EEOC	*NOTICE*	Number TBD
		Date

SUBJECT: **PROPOSED Enforcement Guidance on National Origin Discrimination**

PURPOSE: This transmittal issues for public input the Commission's proposed guidance on national origin discrimination under EEOC-enforced laws.

This proposed sub-regulatory document would supersede *EEOC Compliance Manual, Volume II, Section 13: National Origin Discrimination*. It is intended to communicate the Commission's position on important legal issues.

APPLICABILITY: EEOC enforcement staff and outside stakeholders

EFFECTIVE DATE: N/A – Proposal for public input

EXPIRATION DATE: This transmittal will remain available for public input for a period of 30 days after its publication.

ORIGINATOR: Office of Legal Counsel

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PROPOSED EEOC ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION
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I. OVERVIEW

Title VII of the Civil Rights Act of 1964, as amended, protects applicants and employees from employment discrimination based on their race, color, religion, sex, national origin, opposition to practices made unlawful by Title VII, or participation in Title VII proceedings.[1] Title VII's protection against national origin discrimination extends to all employees and applicants for employment[2] in the United States.[3] In enacting this protection, Congress recognized that whether an individual (or her ancestors) is from China, Russia, or Nigeria, or belongs to an ethnic group, such as Hispanic or Arab,[4] she is entitled to be free from employment discrimination on that basis.

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[1] 42 U.S.C. § 2000e *et seq*. Title VII, which the EEOC enforces, covers private sector and state and local government entities that have 15 or more employees, federal government employers, employment agencies, and labor organizations. In this document, the term "employer" is used to generically reference all of these covered entities.

[2] Individuals are covered under Title VII regardless of immigration status or authorization to work. *See* 42 U.S.C. §§ 2000e(f), 2000e-2; *Espinoza v. Farah Mfg. Co*., 414 U.S. 86, 95 (1973) ("Tit[le] VII protects all individuals from unlawful discrimination, whether or not they are citizens of the United States."); *EEOC v. Tortilleria "La Mejor,"* 758 F. Supp. 585, 593-94 (E.D. Cal. 1991) ("Congress did not intend that the [Immigration Reform and Control Act (IRCA)] amend or repeal any of the previously legislated protections of the federal labor and employment laws accorded to aliens, documented or undocumented, including the protections of Title VII"). In presenting IRCA, a congressional committee confirmed that "[T]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the . . . Equal Employment Opportunity Commission. . . to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies." H.R.Rep. No. 99–682(II), at 8–9 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5757, 5758. Where a worker is undocumented, issues may arise regarding the availability of remedies, but those issues are case-specific. *See EEOC v. Maritime Autowash, Inc*., No. 15-1947, 2016 WL 1622290, at *5 (4th Cir. Apr. 25, 2016) (noting that questions related to relief in cases involving undocumented workers are "nuanced" and "less categorical" than defendant suggested and discussing, inter alia, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), where the Court reversed the NLRB's award of backpay to an undocumented worker while also affirming "the Board's authority to impose other sanctions against the employer").

[3] Employment in the United States includes employment in any territory or possession of the United States, including Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands. *See* EEOC, *Compliance Manual Section 2: Threshold Issues*, § 2-III A.4 n.82, http://www.eeoc.gov/policy/docs/threshold.html (last modified August 6, 2009) [hereinafter *EEOC Threshold Issues Compliance Manual*]. References to the "United States" in this document also include United States territories.

[4] Title VII's protection against national origin discrimination covers a broad definition of "national origin" and therefore is not limited to discrimination based on races or ethnicities reported on the Employer Information Report. *See* 29 C.F.R. § 1606.1 ("The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."). *See also* EEOC, *Questions and Answers for Employers: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be Muslim or Middle Eastern*, http://www.eeoc.gov/eeoc/publications/muslim_middle_eastern_employers.cfm (last visited May 20,

The United States' workforce is ethnically diverse, reflecting both immigration and the ongoing assimilation of first- and second- generation Americans.[5] The largest percentages of immigrants to the United States are now from Asia and Latin America,[6] which extends a recent trend.[7] Immigration from Africa and the Caribbean countries also continues to enhance diversity among Black Americans.[8] Moreover, in the last decade, the immigrant population in 13 states with historically smaller established immigrant communities grew more than twice the national average.[9]

Immigrant workers are present in every occupation in the United States but are over-represented in many of the fastest-growing occupations, including healthcare (e.g., nursing aide

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2016); EEOC, *Questions and Answers for Employees: Workplace Rights of Employees Who Are, or Are Perceived to Be, Muslim or Middle Eastern*, http://www.eeoc.gov/eeoc/publications/muslim_middle_eastern_employees.cfm (last visited May 20, 2016).

[5] *See* Steven A. Camorata, Ctr. for Immigration Studies, *Immigrants in the United States: A Profile of America's Foreign-Born Population*, 10, Figure 1: Immigrants in the United States, Number and Percent, 1900-2010 (Aug. 2012), http://www.cis.org/sites/cis.org/files/articles/2012/immigrants-in-the-united-states-2012.pdf.

[6] *See* U.S. Census Bureau, *The Newly Arrived Foreign-Born Population of the United States: 2010*, 2, Figure 1: Foreign-Born Population by Period of Entry and World Region of Birth: 2010 (Nov. 2011), http://www.census.gov/prod/2011pubs/acsbr10-16.pdf (reporting that of the foreign-born population that arrived in the United States starting in 2008, 40.3% were from Asia and 31.3% were from Central and South America).

[7] *See* U.S. Census Bureau, *The Foreign-Born from Asia: 2011*, *American Community Survey Briefs*, 1 (Oct. 2012), http://www.census.gov/prod/2012pubs/acsbr11-06.pdf ("The foreign-born population from Asia increased from 8.2 million in 2000 to 11.6 million in 2011."); Press Release, U.S. Census Bureau, Asians Fastest-Growing Race or Ethnic Group in 2012, Census Bureau Reports (June 13, 2013), http://www.census.gov/newsroom/press-releases/2013/cb13-112.html?cssp=SERP ("Asians were the nation's fastest-growing race or ethnic group in 2012 . . . More than 60 percent of this growth in the Asian population came from international migration."); U.S. Census Bureau, *The Hispanic Population: 2010*, 2 (May 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf ("The Hispanic population increased by 15.2 million between 2000 and 2010, accounting for over half of the 27.3 million increase in the total population of the United States.").

[8] *See* U.S. Census Bureau, *Race and Hispanic Origin of the Foreign-Born Population in the United States: 2007*, *American Community Survey Reports*, 7 (Jan. 2010), http://www.census.gov/prod/2010pubs/acs-11.pdf (reporting that foreign-born Blacks accounted for 8 percent of the total Black population in 2007; of this 8 percent, 54 percent were born in countries in the Caribbean, such as Jamaica (19%), Haiti (17%), and Trinidad and Tobago (6%), while 34 percent were born in countries in Africa, for example, Nigeria (6%), Ethiopia (4%), and Ghana (3%)).

[9] Thirteen states have seen their immigrant populations grow more than twice the national average of 28 percent over the last decade, for example, Alabama (92 percent) and South Carolina (88 percent). *See* Camorata, *supra* note 5, at 13-15. Nonetheless, 65 percent of the nation's foreign-born population still resides in California, Florida, Illinois, New Jersey, New York, and Texas. *Id.*

positions), home health and personal care, food preparation and food service, materials moving, childcare, and cashier jobs.[10] Twenty-five percent of foreign-born workers aged 16 and older work in service occupations.[11] In the near future, second- and third-generation descendants of at least one foreign-born parent are expected to enter the workforce in increasing numbers.[12]

This guidance sets forth the agency's interpretation of the law of national origin discrimination.[13] In crafting this guidance, the Commission analyzed how courts have interpreted and applied the law to specific facts. Regarding many issues, the lower courts are uniform in their interpretations of the relevant statutes. This guidance explains the law on such issues with concrete examples, where the Commission agrees with those interpretations. Where the lower courts have not consistently applied the law or the EEOC has a different view of the correct interpretation of the law, this guidance sets forth the EEOC's considered position and explains its analysis.

This Enforcement Guidance serves as a reference for Commission staff investigating charges alleging national origin discrimination under Title VII, for EEOC staff conducting outreach, for EEOC lawyers bringing litigation, for employers, employees, and practitioners seeking detailed information about the EEOC's position on national origin discrimination and for employers seeking "promising practices."[14] The positions explained below represent the Commission's well-considered guidance on its interpretation of the law it enforces and the principles with which it will investigate charges and consider litigation. This Enforcement Guidance would supersede EEOC Compliance Manual, Vol. II, Section 13: National Origin Discrimination.

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[10] Audrey Singer, *Immigrant Workers in the U.S. Labor Force*¸ The Brookings Inst., 18 (Mar. 15, 2012), http://www.brookings.edu/~/media/research/files/papers/2012/3/15%20immigrant%20workers%20singer/0315_immigrant_workers_singer.pdf.

[11] *See* U.S. Census Bureau, *The Foreign-Born Population in the United States: 2010, American Community Survey Reports*, 18 (May 2012), http://www.census.gov/prod/2012pubs/acs-19.pdf. In 2015, there were 25.3 million immigrant workers in the U.S. labor force, accounting for 16.7 percent of all U.S. workers. Bureau of Labor Statistics, U.S. Dep't of Labor, *News Release, Foreign-Born Workers: Labor Force Characteristics – 2015*, 1 (May 19, 2016), http://www.bls.gov/news.release/forbrn.nr0.htm.

[12] For example, while one in six Americans is of Hispanic or Latino origin, one in five children under the age of 18 is of Hispanic or Latino origin. *See* U.S. Census Bureau, *The Hispanic Population: 2010, 2010 Census Briefs*, 2 (May 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf; Richard Fry & Jeffrey S. Passel, *Latino Children: A Majority Are U.S.-Born Offspring of Immigrants*, Pew Research Ctr., 1 (May 28, 2009), http://www.pewhispanic.org/2009/05/28/latino-children-a-majority-are-us-born-offspring-of-immigrants/.

[13] In FY 2015, 9,438 employment discrimination charges were filed with the Commission alleging national origin discrimination by private or state and local employers, representing 10.6% of charges filed with the EEOC in FY 2015.

[14] "Promising practices" are actions or programs that can potentially minimize the likelihood of Title VII violations. Promising practices comply with the law, promote equal employment opportunity, show management commitment and accountability, and have produced positive results.

II. WHAT IS "NATIONAL ORIGIN" DISCRIMINATION?

Generally, national origin discrimination means discrimination because an individual (or his or her ancestors) is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group.[15] Title VII prohibits employer actions that have the purpose or effect of discriminating against persons because of their real or perceived national origin.[16]

A. Employment Discrimination Based on Place of Origin

National origin discrimination includes discrimination "because of an individual's, or his or her ancestor's, place of origin[]."[17] The place of origin may be a country (e.g., Mexico, China, Syria) or a former country (e.g., Yugoslavia).[18] The place of origin may be the United States.[19] Finally, it may be a geographic region, including a region that never was a country but nevertheless is closely associated with a particular national origin group, for example, Kurdistan or Acadia.[20]

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[15] 29 C.F.R. § 1606.1 (defining national origin discrimination "broadly"). National origin discrimination includes discrimination because an individual is "non-American" or "foreign born." *See generally Zuckerstein v. Argonne Nat'l Lab.*, 663 F. Supp. 569, 576-77 (N.D. Ill. 1987) (finding that Title VII permits claim of discrimination against "foreign born" employees where charging parties were of Chinese and "German-Jewish-Czechoslovakian" origin).

[16] 42 U.S.C. § 2000e-2; 29 C.F.R. § 1606.2.

[17] 29 C.F.R. § 1606.1. *See also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) (stating that "[t]he term 'national origin' [in Title VII] on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came").

[18] *See, e.g., Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 673 (9th Cir. 1988) (with reference to Serbia and Yugoslavia in 1988, stating that "Title VII cannot be read to limit 'countries' to those with modern boundaries, or to require their existence for a certain time length before it will prohibit discrimination").

[19] National origin discrimination includes discrimination against American workers in favor of foreign workers. *See, e.g., Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991) (stating that Title VII protects Americans from discrimination in favor of foreign workers); *Fulford v. Alligator River Farms, LLC*, 858 F. Supp. 2d 550, 557-60 (E.D.N.C. 2012) (finding that the plaintiffs adequately alleged disparate treatment and hostile work environment claims based on their national origin, American, where the defendant treated them differently, and less favorably, than workers from Mexico); *Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669, 674 (N.D. Ill. 1984) (holding that "a plaintiff discriminated against because of birth in the United States has a Title VII cause of action"). In *EEOC v. Hamilton Growers, Inc.*, No. 7:11-cv-00134-HL (M.D. Ga. filed Oct. 4, 2011), the EEOC alleged that African American workers were regularly subjected to different and less favorable terms and conditions of employment as compared to workers from Mexico. In December 2012, Hamilton Growers, Inc. agreed to pay $500,000 to the workers to settle the case. *See* Press Release, EEOC, Hamilton Growers to Pay $500,000 to Settle EEOC Race/National Origin Discrimination Lawsuit, (Dec. 13, 2012), http://www.eeoc.gov/eeoc/newsroom/release/12-13-12.cfm.

[20] *Roach v. Dresser Indus. Valve & Instrument Div.*, 494 F. Supp. 215, 216-18 (W.D. La. 1980) (recognizing that Title VII prohibits an employer from discriminating against an individual because he is Acadian or Cajun even though Acadia "is not and never was an independent nation" but was a former

B. Employment Discrimination Based on National Origin Group or Ethnicity

Title VII also prohibits employment discrimination against individuals because of their national origin group. A "national origin group," or an "ethnic group," is a group of people sharing a common language, culture, ancestry, race, and/or other social characteristics.[21] Hispanics, Arabs, and Roma are ethnic or national origin groups.[22]

Employment discrimination against members of a national origin group includes discrimination based on:

French colony in North America; in the late 1700s, many Acadians moved from Nova Scotia to Louisiana). *Cf. Vitalis v. Sun Constructors, Inc.*, 481 F. App'x 718, 721 (3d Cir. 2012) (citation omitted) (finding that, although "courts have been willing to expand the concept of 'national origin' to include claims from persons . . . based upon the unique historical, political and/or social circumstances of a given region," plaintiff failed to present sufficient evidence that all of the "local residents" of St. Croix share a unique historical, political, and/or social circumstance).

[21] *See, e.g.*, 29 C.F.R. § 1606.1 ("The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity . . . because an individual has the physical, cultural or linguistic characteristics of a national origin group."); *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J., concurring) (stating "that the line between discrimination based on 'ancestry or ethnic characteristics,' . . . and discrimination based on 'place or nation of . . . origin,' . . . is not a bright one" because "[o]ften . . . the two are identical as a factual matter"; thus, "national origin claims have been treated as ancestry or ethnicity claims in some circumstances" (citing 29 C.F.R. § 1606.1)); *Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936, 940 (7th Cir. 2012) (stating that "national origin discrimination as defined in Title VII encompasses discrimination based on one's ancestry"); *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 173 (3d Cir. 1991) (stating that birth in a foreign country where another culture predominates, immersion in that country's way of life, and speaking the country's native language in one's home, support the conclusion that an individual is part of a national origin group); *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1284 (N.D. Okla. 2006) (concluding in a case filed by EEOC and workers recruited from India, that the workers established disparate treatment discrimination claims based on race and national origin where the defendants "made numerous discriminatory comments about their ancestry, ethnic background, culture, and country"); *Kanaji v. Children's Hosp. of Phila.*, 276 F. Supp. 2d 399, 401-02 (E.D. Pa. 2003) (stating that the term "national origin . . . is better understood by reference to certain traits or characteristics that can be linked to one's place of origin, as opposed to a specific country or nation"); *see also* Anne-Sophie Deprez-Sims & Scott B. Morris, *Accents in the Workplace: Their Effects During a Job Interview*, 45 Int'l J. of Psychol. 417, 418 (2010) ("Ethnicity and country of origin are overlapping but distinct concepts. A country refers to a geographic region . . . [while] [e]thnicity refers to a social group with a shared heritage or culture. While some countries have a strong ethnic identity, others comprise multiple ethnic groups.").

[22] *See, e.g., Salas v. Wis. Dep't of Corr.*, 493 F.3d 913, 923 (7th Cir. 2007) (finding that Hispanics would qualify as a national origin group); *EEOC v. WC&M Enters.*, 496 F.3d 393, 401-02 (5th Cir. 2007) (post-September 11 national origin harassment of a Muslim car salesman from India included taunting about being an "Arab"); *Janko v. Ill. State Toll Highway Auth.*, 704 F. Supp. 1531, 1532 (N.D. Ill. 1989) (finding that discrimination based on an employee's status as a Roma constitutes national origin discrimination under Title VII, which prohibits discrimination based on "ethnic distinctions commonly recognized at the time of the discrimination").

- **Ethnicity**: Employment discrimination because of a person's ethnicity as defined above, for example, discrimination against someone because he is Hispanic.[23] National origin discrimination also includes discrimination against a person because she does *not* belong to a particular ethnic group, such as less favorable treatment of employees who are *not* Hispanic.

- **Physical, linguistic, or cultural traits**: Employment discrimination against an individual because she has discrete physical, linguistic, and/or cultural characteristics closely associated with a national origin group.[24] For example, discrimination based on an individual's African-sounding accent or traditional African style of dress would constitute discrimination based on African origin.[25]

Employment discrimination based on place of origin *or* national origin (ethnic) group includes discrimination involving:

- **Perception**: Employment discrimination based on the belief that an individual (or her ancestors) is from one or more particular countries, or belongs to one or more particular national origin groups. For example, Title VII prohibits employment discrimination based on the perception that someone is from Middle Eastern countries or is of Arab ethnicity, regardless of how she identifies herself or whether she is, in fact, from one or more Middle Eastern countries or ethnically Arab.[26]

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[23] The following terms are used interchangeably in this document due to their frequent and accepted vernacular usage: "Black" and "African American"; "Asian" and "Asian American"; and "Latino" and "Hispanic."

[24] If the alleged employment discrimination is based on traits linked to national origin, then the alleged discriminator need not know the particular national origin group to which the charging party belongs. It is enough to show that the victim was discriminated against "because of his or her foreign accent, appearance or physical characteristics." 45 Fed. Reg. 85,632, 85,633 (Dec. 29, 1980) (EEOC's preamble to "Guidelines on Discrimination Because of National Origin"); *see WC&M Enters*., 496 F.3d at 401 (same).

[25] *See Albert-Aluya v. Burlington Coat Factory Warehouse Corp*., 470 F. App'x 847, 851 (11th Cir. 2012) (stating that a reasonable jury could find that the plaintiff was wrongfully terminated based on her national origin; managers told her that she was being fired because of her "thick African accent" and made other comments regarding her accent and ethnicity); *Kanaji*, 276 F. Supp. 2d at 400-04 (finding that employee properly alleged national origin discrimination based on being "of direct African descent" where employer treated him differently from employees who were not of direct African descent and made critical comments about the employee's ethnic African clothing and language skills).

[26] *See, e.g., WC&M Enters.*, 496 F.3d at 401-02 (finding that the EEOC presented sufficient evidence to support its national origin harassment claim where coworkers repeatedly referred to employee of Indian descent as "Taliban" or "Arab" and stated that "[t]his is America . . . not the Islamic country where you came from," even though the harassing comments did not accurately describe his actual country of origin); *Arsham v. Mayor & City Council of Balt.*, No. JKB-14-2158, 2015 WL 590490, at *4-8 (D. Md. Feb. 11, 2015) (finding that employee of Persian descent stated a valid claim of national origin discrimination and harassment even though her employer mistakenly believed her to be Parsee); *Zayadeen v. Abbott Molecular, Inc.*, No. 10 C 4621, 2013 WL 361726, at *8 (N.D. Ill. Jan. 30, 2013) (finding that a reasonable jury could conclude that comments from coworkers making fun of employee's

- **Association**: Employment discrimination against an individual because of his association with someone of a particular national origin. For example, it is unlawful to discriminate against a person because he is married to or has a child by someone of a different national origin or ethnicity.[27]

- **Citizenship status**: Employment discrimination based on citizenship status if it has the purpose or effect of discriminating based on national origin.[28]

Finally, the Commission's position is that employment discrimination because an individual is Native American or a member of a particular tribe also is based on national origin.[29]

Jordanian accent, native language, food, and physical appearance constituted national origin harassment even though the alleged harassers "did not understand or intentionally fuzzed the distinction between Jordan and Kazakhstan when engaging in the harassment").

[27] *See, e.g., Roule v. Petraeus*, No. C 10-04632 CW, 2011 WL 5914025, at *4 (N.D. Cal. Nov. 28, 2011) (denying the employer's motion to dismiss plaintiff's complaint alleging discrimination based on the national origin of his wife (a Taiwanese national of Asian ethnicity); the court noted that the EEOC, and other federal courts, have consistently concluded that an employer who takes adverse action against an employee because of interracial association violates Title VII); *Chacon v. Ochs*, 780 F. Supp. 680, 682 (C.D. Cal. 1991) (denying the employer's motion to dismiss plaintiff's Title VII complaint where she alleged that her coworkers made denigrating remarks about Hispanics, knowing that her husband and children were Hispanic).

[28] *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92 (1973) (stating that Title VII "prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin"). Citizenship status may also have the purpose or effect of discriminating based on other protected bases, including race, color, or religion. Although Title VII applies regardless of immigration status or authorization to work, employers are prohibited from hiring individuals who are not authorized to work. *See* 8 U.S.C. § 1324a. However, the antidiscrimination provisions of the Immigration and Nationality Act (INA), enforced by the Office of Special Counsel (OSC) of the Department of Justice's Civil Rights Division, expressly prohibit employers with four or more employees from discriminating based on citizenship or immigration status with respect to hiring, firing, and recruitment or referral for a fee. *See* 8 U.S.C. § 1324b(a)(1). In cases where there may be overlapping jurisdiction between the EEOC (Title VII) and OSC (INA), EEOC investigators should consult the 1997 *Memorandum of Understanding Between the Equal Employment Opportunity Commission and The Office of Special Counsel for Immigration Related Unfair Employment Practices* http://www.eeoc.gov/policy/docs/oscmou.html (last modified July 6, 2000) [hereinafter *EEOC/OSC Memorandum of Understanding*]. EEOC investigators should direct any questions concerning the *EEOC/OSC Memorandum of Understanding* to the Office of Legal Counsel, Coordination Division. Additional information about employee rights under the laws enforced by the EEOC and OSC is contained in an EEOC/OSC joint publication that is available in 17 languages on the EEOC and OSC websites. *See* EEOC and OSC, *Do you Know Where to Go*, http://www1.eeoc.gov/eeoc/publications/index.cfm (last visited May 20, 2016) and http://www.justice.gov/crt/worker-information (last visited May 20, 2016).

[29] *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998) (finding that "differential employment treatment based on tribal affiliation is actionable as 'national origin' discrimination under Title VII").

C. National Origin Discrimination That Overlaps or Intersects with Other Title VII Protected Bases

1. Multiple Protected Bases

National origin discrimination often overlaps with race, color, or religious discrimination because a national origin group may be associated or perceived to be associated with a particular religion or race.[30] For example, charges filed by Asian Americans may involve allegations of discrimination motivated by both physical traits (race) and ancestry (national origin).[31] Similarly, discrimination against people with origins in the Middle East may be motivated by race, by national origin, or even by the perception that they follow particular religious practices.[32] As a result, the same set of facts may state claims alleging multiple bases of discrimination.

[30] Employment discrimination involving more than one protected basis is a problem particularly in the area of national origin. *See* Written Testimony of Lucila Rosas, EEOC Lead Coordinator, Immigrant Worker Team, Commission Meeting of November 13, 2013, National Origin Discrimination in Today's Workplace, http://www.eeoc.gov/eeoc/meetings/11-13-13/rosas.cfm (last visited May 20, 2016). The EEOC will "examine with particular concern" charges alleging discrimination "grounded in national origin considerations, such as . . . membership in, or association with an organization identified with or seeking to promote the interests of national origin groups," and "attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group." 29 C.F.R. § 1606.1.

[31] *See, e.g., Reyes v. Pharma Chemie, Inc.*, 890 F. Supp. 2d 1147, 1158 (D. Neb. 2012) (stating that "[t]he line dividing the concepts of 'race' and 'national origin' is fuzzy at best, and in some contexts, national origin discrimination is so closely related to racial discrimination as to be indistinguishable").

[32] *See, e.g., EEOC v. WC&M Enters.*, 496 F.3d 393, 400-01 (5th Cir. 2007) (ruling that a jury could reasonably conclude that post-September 11 harassment against an Indian employee because he was perceived to be Arab and was, in fact, Muslim, was severe or pervasive and motivated by his national origin and religion).

An important difference between national origin and religious discrimination involves reasonable accommodation. Title VII requires reasonable accommodation of sincerely held religious practices barring undue hardship, but it does not require accommodation of national origin traditions or practices. *See* 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(b). For a detailed discussion of religious accommodation and undue hardship, refer to 29 C.F.R. § 1605.2; EEOC, *Compliance Manual Section 12: Religious Discrimination* (July 22, 2008), http://www.eeoc.gov/policy/docs/religion.html; and EEOC, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm (last visited May 20, 2016).

Example 1
National Origin and Religious Discrimination

Thomas, who is Egyptian, alleges that he was harassed by his coworkers about his Arab ethnicity.[33] He also has been subjected to derogatory comments about Islam. Thomas' charge should assert national origin, race, and religious discrimination.

2. Intersectional Discrimination

Title VII also prohibits "intersectional" discrimination, which occurs when someone is discriminated against because of the combination of two or more protected bases (e.g. national origin and race). "Some characteristics, such as race, color, and national origin, often fuse inextricably. . . . Title VII prohibits employment discrimination based on any of the named characteristics, whether individually or in combination."[34] Because intersectional discrimination targets a specific subgroup of individuals, Title VII prohibits, for example, discrimination against Asian women even if the employer has not also discriminated against Asian men or non-Asian women.[35]

Example 2
Race, National Origin, and Sex Discrimination

Ava, who is an Asian American woman, was denied a promotion to a team leader position at the company where she successfully worked for 10 years. Ava is qualified for the team leader position but she was rejected three times for the promotion, without explanation. Ava alleges that she was denied the most recent promotion because she is an Asian American woman. She claims that a non-

[33] Individuals of Arab descent have also described this conduct as race-based harassment. *See St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (recognizing claims for racial discrimination under 42 U.S.C. § 1981 for individuals of Arab descent). EEOC investigators should identify this conduct as discrimination based on race and national origin.

[34] *See Jeffers v. Thompson*, 264 F. Supp. 2d 314, 326 (D. Md. 2003); *see also Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 ("[W]here two bases for discrimination exist, they cannot be neatly reduced to distinct components.").

[35] *Lam v. Univ. of Haw.*, 40 F.3d at 1562 ("[Asian women] may be targeted for discrimination 'even in the absence of discrimination against [Asian] men or white women.'" (*quoting Jefferies*, 615 F.2d at 1032)). Courts also have addressed intersectional discrimination against African American women and against African American men. *See, e.g., Shazor*, 744 F.3d at 958 ("If a female African American plaintiff . . . establishes a sufficient foundation of discrimination, a defendant cannot undermine her prima facie case by showing that [W]hite women and African American men received the same treatment."); *Jefferies*, 615 F.2d at 1032-34 ("we hold that when a Title VII plaintiff alleges that an employer discriminates against [B]lack females, the fact that [B]lack males and [W]hite females are not subject to discrimination is irrelevant"); *Kimble*, 690 F. Supp. 2d at 770-71 (concluding that plaintiff established the first element of a prima facie case under Title VII by alleging that he was discriminated against based on a combination of race and gender, i.e., because he is an African American male).

Asian man was selected and that the company has never promoted an Asian American woman to team leader in its 20 year history, even though Asian American women have constituted about 20% of the line staff from whom team leaders are typically drawn. Ava's charge of discrimination should assert race, national origin, and sex discrimination.

Employment discrimination motivated by a stereotype about two or more protected traits would constitute intersectional discrimination. Thus, a stereotype about Hispanic women would apply *only* to Hispanic women;[36] it would not apply to either Hispanic men or non-Hispanic women.

D. Employment Discrimination and Human Trafficking

When force, fraud, or coercion is used to compel labor or exploit workers, traffickers and employers may be violating not only criminal laws,[37] but also Title VII. In particular, Title VII may apply in trafficking cases if an employer's conduct is directed at an individual and/or group of individuals based on a protected category, such as national origin.

Even if employees are legally brought into the United States, discrimination on the basis of national origin may occur through the use of force, fraud, or coercion. In trafficking cases, it is not unusual for employers to subject trafficked workers to harassment, job segregation, unequal pay, or unreasonable paycheck deductions, all of which are discriminatory if motivated by Title VII-protected status.[38] Trafficking cases may involve multiple or intersecting bases of

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[36] *See Lam v. Univ. of Haw.*, 40 F.3d at 1562.

[37] *See, e.g.*, 18 U.S.C. § 1581-90 (criminalizing the holding, transporting, or selling of persons into peonage, slavery, or indentured servitude, as well as obtaining labor by force or physical restraint). The Trafficking Victims Protection Act ("TVPA') defines "human trafficking" or "severe forms of trafficking in persons" as "(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age;" or "(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." 22 U.S.C. § 7102(9). *See also* U.S. Dep't of State, *Trafficking in Persons Report 2015*, 7-9 (July 2015), http://www.state.gov/documents/organization/245365.pdf.

In addition to Title VII remedies, trafficking victims may pursue civil remedies for violations of the TVPA, other federal statutes, and the U.S. Constitution, as well as tort and breach of contract claims. *See, e.g.*, 18 U.S.C. § 1595 (TVPA), 18 U.S.C. §§ 1960-68 (RICO), 29 U.S.C. § 201 *et seq* (Fair Labor Standards Act), 29 U.S.C. 1801 *et seq* (Migrant & Seasonal Agricultural Protection Act), 42 U.S.C. § 1981, § 1985(3) (Civil Rights Statutes).

[38] *See, e.g. EEOC v. Global Horizons, Inc.*, 7 F. Supp. 3d 1053 (D. Haw. 2014) (Title VII case finding contractor liable where Thai nationals brought to the U.S. under the H-2A visa program were required to pay high recruitment fees, paid less than non-Thai workers, made to work less desirable jobs, forced to live in deplorable living conditions, and subjected to abuses on the farms, including physical violence, humiliation, heavy surveillance, and threats of being shot, deported, or arrested); *see also infra* note 47; Press Release, EEOC, EEOC Resolves Slavery and Human Trafficking Suit Against Trans Bay Steel For An Estimated $1 Million, (Dec. 8, 2006), http://www.eeoc.gov/eeoc/newsroom/release/archive/12-8-

discrimination, such as national origin and sex. They often also involve retaliation for protected activity.[39]

Example 3
Human Trafficking and
National Origin Discrimination

An oil industry parts manufacturer ("Manufacturer") recruits East Indian workers to work in its U.S. factory as high-tech welders, fitters, electricians, and engineers. Manufacturer promises the East Indian recruits that they will be well-compensated and that they will work under conditions similar to those of American workers. However, once the East Indian recruits arrive in the U.S., Manufacturer confiscates their passports, visas, and I-9 Forms and restricts their movement, communications, privacy, worship, and access to health care, while placing no similar restrictions on Manufacturer's non-Indian employees. The East Indian recruits are subjected to racial and ethnic harassment, paid less than minimum wage, placed in substandard housing, and forced to do "undesirable" work unrelated to the skills for which they were hired, including janitorial work. Manufacturer does not subject Caucasian, U.S.-born workers to similar mistreatment or working conditions. Based on these facts, the EEOC finds reasonable cause to believe that the East Indian recruits were subjected to race and national origin discrimination.[40]

III. EMPLOYMENT DECISIONS

Employment decisions that are challenged as discriminatory based on national origin are subject to disparate treatment and disparate impact analysis. Disparate treatment discrimination occurs when national origin (or another protected trait) is a motivating factor in an employment action.[41] Disparate impact discrimination occurs when a policy or practice has a significant negative impact on members of a Title VII-protected group but is not job related and consistent with business necessity.[42]

06.html (describing a Title VII case where Thai workers trafficked to California for welding jobs were, among other things, forced to work for long hours without pay in restaurants and held against their will).

[39] For more information on human trafficking, refer to *Human Trafficking*, EEOC, http://www.eeoc.gov/eeoc/interagency/trafficking.cfm (last visited May 20, 2016).

[40] This example is based on the facts in *Chellen v. John Pickle Co., Inc.*, 446 F. Supp. 2d 1247 (N.D. Okla. 2006) (awarding $1.29 million to 52 male victims of national origin discrimination and human trafficking who were recruited from India as skilled laborers and then subjected to widespread abuse, intimidation, and exploitation).

[41] *See* 42 U.S.C. § 2000e-2(a).

[42] *See* 42 U.S.C. § 2000e-2(k). If the employer demonstrates that the policy or practice is job related and consistent with business necessity, the employer will nevertheless be liable if the charging party demonstrates that the employer has refused to adopt a less discriminatory alternative. *Id.* For more detailed discussion of disparate treatment and disparate impact analysis, *see* EEOC, *Compliance Manual*

Title VII applies to all employment decisions, including those involving:

- Recruitment
- Hiring
- Promotion
- Work assignments
- Segregation and classification
- Transfer
- Wages and benefits
- Leave
- Training and apprenticeship programs
- Discipline
- Layoff and termination
- Other terms and conditions of employment

The following subsections discuss the application of Title VII's bar on national origin discrimination to various types of employment decisions.

A. Recruitment

Title VII prohibits employers from engaging in recruitment practices that have the purpose of discriminating based on national origin, as well as practices that disproportionately limit employment opportunities based on national origin and are not job related and consistent with business necessity. Thus, Title VII prohibits an employer from using certain recruitment practices, such as relying on word-of mouth advertising or sending job postings only to ethnically or racially homogenous areas or audiences, if the practices have the purpose or unjustified effect of excluding people based on national origin.[43] Practices aimed at increasing

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Section 15: Race and Color Discrimination, § 15-V (Apr. 19, 2006), http://www.eeoc.gov/policy/docs/race-color.html#V.

[43] If current staff is ethnically or racially homogenous, relying largely on word-of-mouth recruitment may operate to exclude applicants of other races or ethnicities and therefore be a prohibited practice. *See, e.g.*, *EEOC v. Metal Serv. Co.*, 892 F.2d 341, 350 (3d Cir. 1990) (finding that EEOC presented sufficient evidence of discrimination when, inter alia, it showed that Black applicants were required to undergo a burdensome application process but White applicants were simply referred by their relatives, friends, or neighbors who currently were part of the all-White workforce); Press Release, EEOC, Lawler Foods to Pay over $1 Million to Settle EEOC Race and National Origin Discrimination Suit, (Apr. 26, 2016), https://www.eeoc.gov/eeoc/newsroom/release/4-26-16.cfm (resolving lawsuit alleging that a bakery engaged in a pattern or practice of intentionally failing to hire African American applicants for jobs and by using hiring practices, including word-of-mouth recruiting and advertising a Spanish language preference that had an adverse impact on non-Hispanic applicants without any business justification); *see also Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 529 (6th Cir. 2001) ("[W]ord-of-mouth hiring and similar types of recruiting practices, such as posting job openings in the municipal buildings of a non-diverse city, have a 'tendency to perpetuate the all-[W]hite composition of a work force.'"); *United States v. City of Warren*, 138 F.3d 1083, 1094 (6th Cir. 1998) (finding that the city's recruitment practices for municipal positions, including only advertising vacant positions within a predominantly White local area and maintaining a pre-application residency requirement, resulted in a disparate impact based on race

the overall diversity of the applicant pool that do not exclude any particular national origin groups would not implicate Title VII's bar on national origin discrimination.

Example 4
Job Requirement that May Improperly
Screen Out Individuals Based on National Origin

> Machines, Inc. has an apprenticeship program that trains participants in the skills needed to become a journeyman machine mechanic. The company, which started as a family-owned business, limits the program to individuals who are sponsored by its current machine mechanics. When negotiating a new collective bargaining agreement with the local union, Machines, Inc. and the union note that the number of applicants to the program has declined steadily for the last 10 years and that, while there has been a significant increase in Korean and Hispanic workers in the local labor force, no one in the apprenticeship program is from these national origin groups. Machines, Inc. realizes that the personal sponsorship requirement may create a disparate impact by screening out people on the basis of national origin. Since the requirement is not job related or necessary for the mechanic position, Machines, Inc. and the union agree to implement outreach practices intended to attract a more diverse group of applicants.

Employers may not request that an employment agency refer only applicants and/or employees who are of a particular national origin group. Similarly, because Title VII directly prohibits discrimination by employment agencies, they may not comply with discriminatory recruitment or referral requests from employers.[44] For example, a placement agency may not honor a client request to recruit only Latino workers.

Staffing firms, including temporary agencies and long-term contract firms, also may be covered as employers by Title VII if they have the right to control the means and manner of staff's work performance, regardless of whether they actually exercise that right, and have the statutory minimum number of employees.[45] If both a staffing firm and its client employer have

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in violation of Title VII); *Thomas v. Wash. Cty. Sch. Bd.*, 915 F.2d 922, 924-26 (4th Cir. 1990) (finding that the school board violated Title VII's prohibition on race discrimination through a combination of nepotism, word-of-mouth recruiting, and "the general practice of posting notice of vacancies only in the schools," where minority candidates were unlikely to see them).

[44] *See* 42 U.S.C. § 2000e-2(b); 42 U.S.C. § 2000e(c) (defining "employment agency").

[45] EEOC, *Enforcement Guidance on Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, Questions 1-2, (Dec. 3, 1997) http://www.eeoc.gov/policy/docs/conting.html [hereinafter, *EEOC Enforcement Guidance on Contingent Workers*]; *see also EEOC Threshold Issues Compliance Manual*, *supra* note 3, at § 2-III B.1.a.iii(b), https://www.eeoc.gov/policy/docs/threshold.html#2-III-B-1-a-iii-(b). *See also Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB 186 (2015); No. 32-RC-109684, 2015 WL 5047768, where the NLRB revised its joint-employer standard by holding that the Board would consider an entity's reserved authority to control, as well as its indirect control, over employees' terms and conditions of employment. The EEOC's brief in *Browning-Ferris* urged the NLRB to adopt the EEOC's joint-employer standard, which the Commission argued was more flexible than the Board's current standard to address the range of

the right to control the worker's employment and have the statutory minimum number of employees, then they may be covered as "joint employers." Thus, if a temporary agency learns that one of its employees was involuntarily transferred by a client employer from a position that involves public contact to a lower-paying position without public contact because of perceptions about her national origin, the agency may insist that the client return the employee to the former position. If the client refuses, the agency may offer to assign the worker to another client at the same rate of pay, and decline to assign other employees to the same worksite unless the client changes its discriminatory practices.[46]

Example 5
Staffing Firm and Client Jointly Liable for National Origin Discrimination

A farm labor contract firm (Contract Firm) recruits Thai nationals to work on farms in the U.S., promising steady, high-paying agricultural jobs and temporary worker visas that would allow the individuals to work in the U.S. legally. However, Contract Firm charges the Thai workers extremely high recruitment fees and confiscates their passports when they enter the U.S., threatening deportation if they complain. Once in the U.S., the Thai workers are trained by Contract Firm and assigned to work for a client, "Farm A," to harvest a variety of fruits and vegetables. The Thai workers at Farm A are paid unequal wages when compared to non-Thai workers; forced to live in substandard housing without adequate food or kitchen facilities; forbidden from leaving the premises; isolated from non-Thai workers, who appear to be working under more tolerable working conditions; and threatened and physically abused by Contract Firm supervisors. Farm A is aware of the Thai workers' mistreatment, but did nothing to prevent or intervene. Based on these facts, the EEOC finds reasonable cause to determine that the Thai workers were subjected to unlawful national origin discrimination, harassment, and retaliation, and that Contract Firm and Farm A are liable as joint employers.[47]

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evolving workplace relationships and realities. *See* Brief of the EEOC as Amicus Curiae, in *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB 186 (June 15, 2014) (Case 32-RC-109684), http://apps.nlrb.gov/link/document.aspx/09031d4581786359.

[46] *EEOC Enforcement Guidance on Contingent Workers*, Question 8, https://www.eeoc.gov/policy/docs/conting.html.

[47] This example is based on facts similar to those in *EEOC v. Global Horizons, Inc.*, 7 F. Supp. 3d 1053 (D. Haw. 2014) (finding contractor liable for pattern or practice of harassing, discriminating, and retaliating against hundreds of Thai workers in the U.S., in violation of federal anti-discrimination laws). Global Horizons was subsequently ordered to pay $8.7 million in damages to 82 victims. *EEOC v. Global Horizons, Inc.*, No. 11–00257 LEK–RLP, 2014 WL 7338725, at *31-32 (D. Haw. Dec. 19, 2014). Five major farms that used Global Horizons' services agreed to pay $3.6 million to over 500 victims of discrimination and to make extensive policy changes to safeguard the rights of future migrant workers. *See* Press Release, EEOC, Judge Approves $2.4 Million EEOC Settlement with Four Hawaii Farms for over 500 Thai Farmworkers (Sept. 5, 2014), http://www.eeoc.gov/eeoc/newsroom/release/9-5-14.cfm; Press Release, EEOC, Del Monte Fresh Produce Agrees to Settle EEOC Farmworker National Origin Lawsuit, (Nov. 18, 2013), http://www.eeoc.gov/eeoc/newsroom/release/11-18-13a.cfm.

Example 6
Unlawful Hiring and Job Segregation
Based on National Origin

ABC Corp. owns and operates a resort in Hawaii. It relies exclusively on Recruiter Inc. to provide entry-level and supervisory landscapers at its resort. Recruiter Inc. regularly fills entry-level landscaper positions with Micronesian, Samoan, and Native Hawaiian applicants and fills the landscape supervisory positions with White, Japanese, and Chinese applicants. Kaimana, who is Native Hawaiian, contacts ABC Corp. directly to apply for an advertised landscape supervisor position. ABC Corp. refers Kaimana to Recruiter, explaining that its landscaping work is performed by Recruiter's contract employees. Although Kaimana possesses all the qualifications for the landscape supervisor job, Recruiter offers him a position as an entry-level landscaper. Recruiter instead hires Louis, a White applicant, for the vacant supervisory position even though Louis is less qualified and possesses fewer years of relevant supervisory experience than Kaimana.

Kaimana files a charge of discrimination with the EEOC alleging that ABC and Recruiter discriminated against him based on his Native Hawaiian national origin. ABC Corp. responds to the charge by stating that the landscapers and landscape supervisors are Recruiter's, not ABC's, employees, and therefore ABC is not responsible for Recruiter's actions. The investigation reveals that the landscapers and supervisors are on Recruiter's payroll, that Recruiter pays them based on hours worked as reported by ABC, and that Recruiter evaluates them based on ABC's feedback. ABC schedules their work hours and provides all their landscaping tools and equipment. Based on these facts, the investigator concludes that Recruiter Inc. and ABC Corp. are joint employers because they both have the right to exercise control over the landscaper's and landscape supervisor's employment. Even though Recruiter made all of the hiring decisions, the investigator also concludes based on these facts that there is reasonable cause to believe that both entities discriminated against Kaimana based on national origin.[48]

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[48] *See, e.g., Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 415 (4th Cir. 2015) (holding that the employment agency and contracting company were joint employers, and both entities were liable under Title VII where the temporary employment agency "disbursed [the employee's] paychecks, officially terminated her, and handled employee discipline," and the contracting company "ha[d] a substantial degree of control over the circumstances of the [employee's] employment").

B. Hiring, Promotion, and Assignment

Title VII prohibits hiring discrimination based on national origin.[49] Employers must not treat candidates differently during the hiring process based on their national origin. Employers also must not use selection criteria that have a significant discriminatory effect without being able to prove that the criteria are job related and consistent with business necessity.

Example 7
Unlawful Hiring Decision

> Anu is a woman of Bangladeshi ancestry who wears a sari. She is offered a cashier position at Bakery after a phone interview. When she reports for the first day of work, she is quickly told by the manager who interviewed her by phone that Bakery changed its mind and that it has found someone "better suited" for the position. Anu suspects that Bakery's manager changed his mind after seeing that she wears a sari and is South Asian. Anu files a Title VII charge alleging discrimination based on national origin. The EEOC investigation reveals that Bakery hired a Hispanic woman for the position one week after turning Anu away and that Anu and the selectee possessed comparable qualifications. Under the circumstances, the evidence establishes reasonable cause to believe that the employer provided a false reason for its action as a pretext for unlawful national origin discrimination.

Additionally, employers may not limit assignments and promotional opportunities based on national origin.[50]

[49] *See, e.g., Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1195 (9th Cir. 2003) (holding that a reasonable fact finder could find that the school district improperly denied plaintiff of Lebanese descent a permanent teaching position because of her national origin). *See generally* EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, § IV "Disparate Treatment Discrimination and Criminal Records" (Apr. 25, 2012), http://eeoc.gov/laws/guidance/arrest_conviction.cfm (discussing Title VII's prohibition on disparate treatment discrimination based on national origin when using criminal records to make hiring decisions).

[50] *See, e.g., In re: Rodriguez*, 487 F.3d 1001, 1009-10 (6th Cir. 2007) (vacating summary judgment for employer on plaintiff's failure-to-promote claim because manager's disparaging remarks regarding plaintiff's accent and ethnicity constituted direct evidence of national origin discrimination in violation of Michigan's Elliott-Larsen Civil Rights Act); *Hasham v. Cal. State Bd. of Equalization*, 200 F.3d 1035, 1045-48 (7th Cir. 2000) (upholding jury's finding that a Pakistani American auditor was improperly denied a promotion to a supervisory position based on his national origin); *Beckford v. Astrue*, No. L-08-2730, 2010 WL 2253654, at *3-4 (D. Md. June 1, 2010) (denying motion to dismiss plaintiff's claim that she was not promoted to a management assistant position due to her national origin because of evidence that employer made remarks concerning her Jamaican accent in relation to her non-selection).

Example 8
Unlawful Failure to Promote

Joseph, who is Latino, has worked successfully for a transportation company for over five years. In annual evaluations, his supervisors noted his superior technical and organizational skills. Joseph applies for a promotion to a position in which he would supervise about 25 people performing work similar to his own. Joseph is qualified for the job, but the selecting official rejects him because he believes that some employees will not want to "take orders from a Latino." Based on these facts, the EEOC finds reasonable cause to determine that this decision was unlawful based on Joseph's national origin.

1. Discriminatory Customer Preference

Employers may not rely on the discriminatory preferences of coworkers, customers, or clients as the basis for discriminatory employment actions in violation of Title VII.[51] An employment decision based on the discriminatory preferences of others is itself discriminatory. For example, a specific "corporate look" or "image" policy may serve as a proxy for discriminatory customer preference or prejudice, and, accordingly, would not justify hiring, assignment, or promotion decisions that discriminate against individuals based on their national origin.[52]

[51] *See, e.g., Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) ("It is now widely accepted that a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently . . . ."); *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 799 (8th Cir. 1993) (holding that customer preference for clean-shaven deliverymen did not establish business necessity for strict no-beard policy); *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) (holding that customer preference for slim female flight attendants did not justify discriminatory policy when weight was unrelated to job performance).

[52] *See, e.g., EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 3:04-cv-04731-SI (N.D. Cal. consent decree filed Nov. 10, 2004). In this case, the EEOC alleged that the retailer violated Title VII by maintaining recruiting and hiring practices that excluded minorities and women, adopting a restrictive marketing image, and other policies, which limited minority and female employment. Abercrombie & Fitch agreed to settle the matter by paying $50 million, developing and implementing nondiscriminatory hiring and recruiting procedures, and ensuring that minorities and women would be promoted into manager-in-training and manger positions without discrimination. Press Release, EEOC Agrees to Landmark Resolution of Discrimination Case Against Abercrombie & Fitch (Nov. 18, 2004), http://www.eeoc.gov/eeoc/newsroom/release/archive/11-18-04.html. Title VII is also violated where an employer's interpretation of its corporate "look policy" results in religious discrimination. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033-34 (2015) (holding that Title VII is violated when an employer's motive for not hiring an applicant is to avoid providing a religious accommodation).

Example 9
Unlawful Hiring Decision Based on Customer Preference

Alex, a Chinese-American college student, applies to work as a salesperson at Suburban Clothing Store. Alex is qualified for the job because he has worked successfully in retail sales before. The manager who conducts the job interview asks Alex where he was born, states that he looks "foreign," and notes that he is concerned that Alex's physical appearance would not fit the company's "all-American image." Alex is not hired. If there is evidence that Suburban based this decision on its belief that customers would have negative perceptions about Alex's national origin or race, the EEOC would have reasonable cause to find that Suburban subjected Alex to unlawful national origin or race discrimination.

2. Job Segregation

Title VII prohibits employers from assigning or refusing to assign individuals to certain positions, facilities, or geographic areas; denying promotions; physically isolating employees; or otherwise segregating workers into jobs based on their national origin.[53] For example, a retailer may not require all Filipino employees to work in lower-paying stocking jobs away from public contact because of an actual or assumed customer preference for non-Filipino sales representatives.[54]

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[53] 42 U.S.C. § 2000e–2(a)(2). *See, e.g., Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1284 (N.D. Okla. 2006) (finding in a case filed by EEOC and workers recruited from India, that defendants subjected the workers to "greater testing requirements, lower job classifications, and less desirable job assignments" due to their race and national origin); *Colindres v. Quietflex Mfg.*, No. Civ. A. H-01-4319, H-01-4323, 2004 WL 3690215, at *10-12 (S.D. Tex. Jan. 4, 2006) (denying defendants' summary judgment motion because Latino employees raised disputed fact issues material to determining whether they were eligible for transfer to a higher paying department, which was largely comprised of workers of Vietnamese national origin, and whether they were deterred from applying "because of the [employer's] English language fluency requirement, the segregated workforce, or both"); *Ewing v. Coca Cola Bottling Co. of N.Y., Inc.*, No. 00 CIV. 7020(CM), 2001 WL 767070, at *5-6 (S.D. N.Y. June 25, 2001) (denying defendant's motion to dismiss claim that Black and Hispanic production workers were assigned to work in less desirable jobs than similarly situated White workers, in part, because "the allegations of significant segregation of the production workforce . . . is a sure sign of discrimination"); *cf. Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 743-44 (7th Cir. 1999) (finding that a reasonable jury could infer from the evidence that the employer terminated a former employee, in part, to maintain a racially segregated workforce); *Bridgeport Guardians, Inc. v. Delmonte*, 553 F. Supp. 601, 610-13 (D. Conn. 1982) (finding that defendants intentionally discriminated against Black and Hispanic police officers by only assigning the officers to specific geographical areas of the city in violation of Title VII). For further discussion of this issue, refer to EEOC, *Compliance Manual Vol. 2, Section 618: Segregating, Limiting and Classifying Employees*, (BNA) http://laborandemploymentlaw.bna.com/lerc/2447/split_display.adp?fedfid=6398577&vname=leeeofed&fcn=1&wsn=500448000&fn=6398577&split=0 (last visited May 20, 2016).

[54] *See, e.g., Chaney*, 612 F.3d at 912-15 (reversing grant of summary judgment for health care center because a reasonable person would find that the center's policy of honoring the racial preferences of its residents in assigning health-care providers created a racially hostile work environment); *Simple v. Walgreen Co.*, 511 F.3d 668, 671 (7th Cir. 2007) (holding that a reasonable jury could find that an African American plaintiff was denied a promotion to manage a store in a predominantly White

Example 10
Unlawful Assignment
Based on National Origin

Fine Dining Establishment opens a restaurant in an upscale urban neighborhood. It runs an advertisement in local newspapers recruiting people to work in food preparation, serving, and cleaning. Don, a Hispanic man with three years of experience as a server at a high-end restaurant, applies for a position as a server with Fine Dining Establishment. Believing that he would be better suited for a position with limited public contact at this location due to his Spanish accent, the hiring manager offers Don a position in cleaning or food preparation. Don is as qualified for a server position as non-Hispanic applicants who are hired as servers, and his accent would not materially interfere with his ability to do the job. Based on these facts, the EEOC finds reasonable cause to determine that Fine Dining Establishment has unlawfully assigned Don to a position based on his national origin.

Example 11
Unlawful Denial of Promotion
Based on National Origin

Farm B hires both indigenous Mexican immigrant workers who speak Triqui and non-indigenous Mexican immigrant workers, who typically speak Spanish, to pick fruit on its farms in California. Several qualified indigenous workers apply for a promotion to sorter positions, which entail greater responsibility and are higher paid. Even though proficiency in Spanish is not necessary for successful performance of the sorter position, Farm B's Spanish-speaking Mexican supervisors decide that they prefer to have only Spanish-speaking sorters and therefore promote only non-indigenous, Spanish-speaking workers. Based on these facts, the EEOC finds reasonable cause to believe that Farm B has discriminated against the indigenous Mexican workers based on national origin.

3. Security Requirements and Screening

In limited circumstances, employers may justify their employment selection decisions with reference to national security requirements. Indeed, Title VII provides employers with a defense against a complaint or charge of discrimination for refusal to hire, refusal to refer, or termination where an individual does not meet job requirements that are "imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under" any federal statute or Executive Order.[55] Additionally, the Commission

neighborhood because the district manager wanted to "steer" plaintiff to a store in a predominantly Black neighborhood).

[55] 42 U.S.C. § 2000e-2(g); *see also Toy v. Holder*, 714 F.3d 881, 886-87 (5th Cir. 2013) (holding that a federal regulation adopted under an Executive Order dealing with access to a secure area provides a Title VII defense under this provision); *Ryan v. Reno*, 168 F.3d 520, 524-25 n.3 (D.C. Cir. 1999) (noting that Title VII expressly exempts employment actions "based on security clearance possession").

may not review the substance of an Executive Branch security clearance determination or the federally imposed security clearance requirement itself, even if it is allegedly based on national origin or another characteristic protected under equal employment opportunity (EEO) law.[56]

Nonetheless, Commission review of claims involving national security clearances may be appropriate where the Commission can resolve the matter without considering the merits of a security clearance decision. For instance, the Commission may review whether the grant, denial, or revocation of a security clearance was conducted in a discriminatory manner,[57] and whether procedural requirements for making security clearance determinations were followed without regard to an individual's protected status.[58]

4. Social Security Numbers

Employers are required to verify the employment eligibility of every person they hire.[59] Some employers may use Social Security account numbers of new hires to search the federal E-Verify system[60] to verify identity and employment eligibility.[61] A social security card is one of

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[56] *See Dep't of Navy v. Egan*, 484 U.S. 518, 527-30 (1988) (holding that the Merit Systems Protection Board does not have authority to review the substance of the Navy's security clearance determination in the course of reviewing an adverse action); *Bennett v. Chertoff*, 425 F.3d 999, 1003 (D.C. Cir. 2005) (holding that the court cannot adjudicate the credibility of plaintiff's pretext argument in a Title VII case where doing so would require the court to evaluate the validity of defendant's security clearance determination); *Ryan*, 168 F.3d at 523-24 (holding that an adverse employment action based on the denial or revocation of a security clearance is not actionable under Title VII).

[57] *See Fonda-Wall v. Dep't of Justice*, EEOC Appeal No. 0720060035, 2009 WL 3017634, at *6 (July 28, 2009) ("[t]he Commission retains authority to review whether the grant, denial, or revocation of a security clearance was carried out in a discriminatory manner"). Courts have also found claims involving the discriminatory application of security clearance requirements reviewable, provided that the courts are not required to review the merits of an agency's clearance determination. *See e.g. Zeinali v. Raytheon Co.*, 636 F.3d 544, 554-55 (9th Cir. 2011) (deciding that the court may consider plaintiff's claim that employer terminated him for failure to obtain a security clearance while retaining similarly situated employees who lacked security clearances in violation of the California Fair Employment and Housing Act).

[58] *See Romero v. Dep't of Def.*, 527 F.3d 1324, 1329 (Fed. Cir. 2008) ("[f]ederal employees may challenge an agency's compliance with its regulations governing revocation of security clearances"); *Tenenbaum v. Caldera*, 45 F. App'x 416, 418 (6th Cir. 2002) (deciding that courts may review cases in which an agency violates its own regulations in making a security clearance determination, but they may not review the substance of the clearance determination).

[59] *See* 8 U.S.C. § 1324a(a)(1) (providing that entities or persons must not employ unauthorized aliens in the United States knowing that they are unauthorized to work with respect to such employment).

[60] E-Verify is an Internet-based system that compares information from an employee's Form I-9, Employment Eligibility Verification, to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility. *See* U.S. Dep't. of Homeland Security, U.S. Citizenship and Immigration Serv., *What is E-Verify*, http://www.uscis.gov/e-verify/what-e-verify (last visited May 20, 2016).

several documents that an employer may use to verify work authorization.[62] Social Security account numbers are also used by employers to report federal wages and taxes to the Social Security Administration (SSA).[63] However, according to both the U.S. Citizenship and Immigration Services and the SSA, newly hired employees should be allowed to work if they have applied for but not yet received a Social Security number.[64]

A policy or practice of screening out new hires or candidates who lack a Social Security number implicates Title VII if it disproportionately screens out work-authorized but newly arrived immigrants and new lawful permanent residents of a certain ethnicity or national origin, and thus has a disparate impact based on national origin. If a new hire or applicant shows that such a policy or practice has a disparate impact based on her national origin, its use is unlawful under Title VII unless the employer establishes that the policy or practice is job related and consistent with business necessity.[65]

C. Discipline, Demotion, and Discharge

As with other employment decisions, a decision to discipline, demote, or discharge an employee may not be based on his or her national origin.[66] Rules and policies regarding discipline, demotion, and discharge also must be nondiscriminatory and enforced without regard to national origin.

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[61] *See* 8 U.S.C. § 1324a(b)(1)(C)(i) (a "social security account number card" is one of several documents that provides evidence of employment authorization and, in combination with proof of identity, permits an employee to be hired under the Immigration and Nationality Act).

[62] *Id*.

[63] *See* Social Security Administration, Checklist for W-2/W-3 Online Filing, https://www.socialsecurity.gov/employer/W2checklist.htm, (last visited May 20, 2016).

[64] *See* U.S. Dep't. of Homeland Security, U.S. Citizenship and Immigration Serv., *U.S. Citizenship and Immigration Services E-Verify Questions and Answers*, http://www.uscis.gov/e-verify/questions-and-answers/my-employee-applied-social-security-number-ssn-has-not-yet-received-it-what-should-i-do (last visited May 20, 2016) (explaining that an employer must allow a newly hired employee to continue to work if she has applied for but has not yet received his or her SSN). *See also* Social Security Administration, Employer Responsibilities When Hiring Foreign Workers, https://www.socialsecurity.gov/employer/hiring.htm (last visited May 20, 2016).

[65] *Cf. Guerrero v. Ca. Dep't. of Corr. & Rehab.*, et al., No. C 13-05671 WHA, 2015 WL 4463537, at *8-9 (Jul. 21, 2015, N.D. Cal.) (finding that the California Department of Corrections' policy of screening out certain corrections officer candidates in whole or in part due to their past use of an invalid Social Security number had a disparate impact based on Latino national origin).

[66] *See Albert-Aluya v. Burlington Coat Factory Warehouse Corp*., 470 F. App'x 847, 850 (11th Cir. 2012) (finding that "Title VII makes it unlawful to fire an employee or to otherwise discriminate against an employee based on the employee's national origin.").

Example 12
Unlawful Enforcement of Tardiness Policy Based on National Origin

Grocery Store has a written tardiness policy that allows a 10 minute grace period after the scheduled start time for late arrival, after which the employee is marked tardy. An employee who repeatedly violates the tardiness policy is issued a written reprimand. Da'uud, a Somali employee, is given a written reprimand for tardiness after arriving to work at least 15 minutes late on three occasions. Although other Somali workers also have been reprimanded for tardiness, Hmong workers at Grocery Store either are permitted to make up the time or are just reminded to be on time in the same circumstances. Because Grocery Store treats Somali employees who violate its tardiness policy more severely than Hmong employees who violate it, the EEOC finds reasonable cause to believe that the company has discriminated against Da'uud, and the other Somali employees, based on their national origin.

Employer decisions to discipline or discharge employees must be based on nondiscriminatory reasons, such as their quality or quantity of work, rather than national origin, race, or other prohibited factors.[67]

Example 13
Unlawful Termination Based on National Origin and Race

Veggie Farms hires 75 African American and 145 Mexican seasonal farmworkers for the growing season. Veggie's management officials consistently make negative comments directed towards the African American farmworkers, calling them "lazy" and "slow," and telling them that "American workers are worthless compared to the Mexicans." Supervisors refuse to adequately train the African Americans and assign them to pick vegetables in fields that already have been picked by Mexican workers, resulting in lower pay. After a few weeks, Veggie's management summarily fires most of the African American workers, but does not fire any of the workers from Mexico, saying "[a]ll you lazy Americans can leave, just go to the office and pick up your check." Because the workers' treatment and

[67] *See, e.g., Darchak v. City of Chi. Bd. of Educ.*, 580 F.3d 622, 630-33 (7th Cir. 2009) (reversing dismissal of national origin discrimination claim because plaintiff, a teacher of Polish descent, presented evidence that the school principal's animosity toward Polish people motivated her recommendation not to renew the teacher's contract); *Avila v. Jostens, Inc.*, 316 F. App'x 826, 832-34 (10th Cir. 2009) (holding that a reasonable jury could conclude that the employer's reasons for terminating the Hispanic plaintiff were a pretext for national origin discrimination based on evidence that plaintiff's supervisor disciplined him more frequently and severely than non-Hispanic employees, made derogatory comments about his national origin, terminated him for poor work quality one month after he received a positive performance evaluation, and issued disciplinary warnings in a manner that was inconsistent with the employer's policies and practices).

discharge are based on their national origin (American) and their race (Black), the workers can pursue claims against Veggie for national origin and race discrimination.[68]

Customer or client ethnic prejudices or preferences do not justify discriminatory discipline, demotion, or discharge decisions.

Example 14
Unlawful Discharge Based on National Origin

Yusuf, who is of Iraqi national origin, was discharged from his position as a bus driver. According to the bus company, some customers complained that they were wary of riding with a driver who appeared to be Arab in light of allegations of terrorist activities against Americans in the Middle East. Yusuf's performance was satisfactory and he did not have any driving or safety violations during his employment with the bus company or, before that, with a shuttle bus company. By acting on the basis of customer prejudices rather than Yusuf's performance and driving record, the bus company unlawfully discriminated against him based on national origin.

D. Mixed Motives in Employment Decisions

Employment decisions that are motivated by both national origin discrimination and nondiscriminatory reasons violate Title VII.[69] However, remedies in such "mixed motives" cases are limited if the employer shows that it would have taken the same action even if it had not relied on national origin.[70] Once the plaintiff demonstrates that national origin played a role in the challenged action, the employer then demonstrates that its action was also motivated by some other factor; a mere assertion to this effect is not enough. If the employer makes this showing, the charging party may receive declaratory

[68] The facts in this example are similar to the facts alleged in *EEOC v. Hamilton Growers, Inc.*, No. 7:11-cv-00134-HL (M.D. Ga. filed Oct. 4, 2011), which was settled in December 2012. For more background information about the case, *see* Press Release, EEOC, Hamilton Growers to Pay $500,000 to Settle EEOC Race/National Origin Discrimination Lawsuit (Dec. 13, 2012), http://www.eeoc.gov/eeoc/newsroom/release/12-13-12.cfm.

[69] 42 U.S.C. § 2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrates that . . . national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"); *see Perez v. N.J. Transit Corp.*, 341 F. App'x 757, 761-62 (3d Cir. 2009) (holding that district court erred by failing to apply a mixed motive analysis to national origin discrimination claim; a reasonable jury could conclude that Hispanic transit police officer's national origin was a motivating factor for his termination in light of discriminatory comments made by the decision maker).

[70] *See* 42 U.S.C. § 2000e-5(g)(2)(B).

and injunctive relief, attorney's fees and costs, but is not entitled to reinstatement, back pay, or compensatory or punitive damages.[71]

Example 15
Mixed Motives: Limitations on Remedies

Amil, who is Indian American, is employed as a security guard for an accounting company. Amil's co-workers repeatedly complain to the company's president that Amil is abusing his position as a security guard by issuing unauthorized warning tickets for parked cars, conducting unauthorized office searches, and intimidating and threatening employees. The company president reprimands and later suspends Amil for his actions, but he continues this behavior. Amil is subsequently terminated. During this time period, Amil and several of his colleagues hear the company president state that he feels the company has hired "too many" South Asian employees and that he fears they may be affiliated with extremist terrorist organizations. Amil files an EEOC charge alleging national origin discrimination.

The EEOC investigation confirms that the president did, in fact, make the reported statements about South Asians. The investigation also reveals that the president terminated Amil after confirming Amil's misconduct, warning him, and seeing Amil continue the same conduct. This comported with the company's progressive discipline policy and its treatment of other employees who engaged in similar misconduct. The EEOC finds reasonable cause to believe that the company would have made the same termination decision even absent discrimination. If Amil were to prevail in court by establishing that national origin discrimination was a motivating factor in his termination, he would be entitled to injunctive relief and attorney's fees and costs, but not to reinstatement, back pay, compensatory or punitive damages.

IV. HARASSMENT

In fiscal year 2015, approximately 37 percent of all charges of discrimination filed alleging national origin discrimination in the private and state/local government sectors, included a harassment claim.[72] The subsections below summarize Title VII's prohibition against national origin harassment.

[71] *Id.*; *see Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (finding that "available remedies [under § 2000e-5(g)(2)(B)] include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs"); *Darchak*, 580 F.3d at 633 (same).

[72] In FY 2015, 3,535 national origin charges included a harassment claim, representing about 37% of the 9,438 national origin charges filed that year.

A. Title VII's Prohibition Against a Hostile Work Environment Based on National Origin

Title VII prohibits national origin harassment when it is so severe or pervasive that it "alter[s] the conditions of the individual's employment" by creating a hostile or abusive work environment.[73] The harassment is unlawful if the individual subjectively perceives the work environment as hostile, and a reasonable person would find it to be hostile or abusive.[74]

A hostile work environment based on national origin can take different forms, including ethnic slurs, ridicule, intimidation, workplace graffiti, physical violence, or other offensive conduct directed toward an individual because of his birthplace, ethnicity, culture, language, dress, or foreign accent.[75] A hostile work environment may be created by the actions of supervisors, employees, or non-employees, such as customers or business partners.[76]

Whether an individual was subjected to a hostile work environment depends on the totality of the circumstances. Relevant questions in evaluating whether national origin

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[73] *See Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (holding that Title VII is violated "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'" (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-67 (1986))); *EEOC v. WC&M Enters.*, 496 F.3d 393, 400 (5th Cir. 2007) (finding that the EEOC presented sufficient evidence to create an issue of fact as to whether the employee was subjected to national origin harassment that was "so severe or pervasive as to alter a condition of his employment").

[74] *Harris*, 510 U.S. 17 at 21 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview."); *WC&M Enters.*, 496 F.3d at 399 (stating that "the [harassing] conduct complained of must be both objectively and subjectively offensive . . .[;] not only must the victim perceive the environment as hostile, the conduct must also be such that a reasonable person would find it to be hostile or abusive" (citing *Harris*, 510 U.S. at 21-22)).

[75] *See WC&M Enters.*, 496 F.3d at 400-02 (finding that evidence that a Muslim car salesperson of Indian descent was repeatedly called "Taliban" and referred to as an "Arab" by his coworkers, told that he should "just go back where [he] came from," and informed by a manager that "[t]his is America . . . not the Islamic country where you come from," supported claim that he was subjected to a hostile work environment based on his national origin and religion); *Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1045-46 (7th Cir. 2002) (finding that a reasonable person would perceive offensive "graffiti, remarks, and other harassing conduct" to be based upon Hispanic employee's race and ethnicity); *Zayadeen v. Abbott Molecular, Inc.*, No. 10 C 4621, 2013 WL 361726, at *8 (N.D. Ill. Jan. 30, 2013) (holding that derogatory comments by coworkers about the plaintiff's physical appearance, his Jordanian accent, his native language (Arabic), and the Jordanian food he ate could constitute national origin harassment).

[76] *See, e.g., Hernandez v. Valley View Hosp. Ass'n*, 684 F.3d 950, 958-60 (10th Cir. 2012) (reversing grant of summary judgment for employer because employee of Mexican origin presented evidence that her supervisors subjected her to a hostile work environment by repeatedly making offensive jokes and comments about Latinos); *Galdamez v. Potter*, 415 F.3d 1015, 1023-24 (9th Cir. 2005) (holding that a reasonable jury could conclude that customers subjected postmaster of Honduran origin to a hostile work environment based on her national origin; harassment included offensive remarks about her accent and foreign birth, "racially charged" references to potential mob violence, and direct and indirect threats to her physical safety).

harassment rises to the level of creating a hostile work environment may include any of the following:

- Whether the conduct was hostile and/or offensive;
- Whether the conduct was physically threatening or intimidating;
- How frequently the conduct was repeated; or
- The context in which the harassment occurred.

The following examples illustrate the distinction between an unlawful hostile work environment and offensive conduct that is not sufficiently severe or pervasive to violate Title VII:

Example 16
Hostile Work Environment
Based on National Origin

Muhammad, who is of Pakistani descent, works for Motors, a large automobile dealership. His coworkers regularly call him "camel jockey," "the local terrorist," and "the ayatollah," and intentionally embarrass him in front of customers by claiming that he is incompetent. The EEOC finds reasonable cause to believe that the constant ridicule has made it difficult for Muhammad to do his job and has created a hostile work environment in violation of Title VII.[77]

Example 17
Conduct That Does Not Create a
Hostile Work Environment Based on National Origin

George, an immigrant of Haitian descent, was hired by Shipping Company as a dockworker. On his first day, George dropped a carton, prompting Bill, the foreman, to yell at him. The same day, George overheard Bill telling a coworker that foreigners are stealing jobs from Americans. Two months later, Bill confronted George after he argued with a coworker about assignments. Bill called George "lazy" and mocked his accent. Although Bill's conduct was based on national origin, standing alone, these incidents were not sufficiently severe or pervasive to create a hostile work environment in violation of Title VII.

Language restrictive policies (including English-only rules, *see infra* section V.C.) may contribute to a hostile work environment, particularly if they are broad, and/or there is no apparent justification for the language restriction.[78]

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[77] The facts in this example are similar to those in *Amirmokri v. Baltimore Gas & Electric Co.*, 60 F.3d 1126, 1131 (4th Cir. 1995) (finding that Iranian emigrant employed as an engineer at a nuclear power plant established a prima facie case of national origin harassment).

[78] *See, e.g., Maldonado v. City of Altus*, 433 F.3d 1294, 1304-06 (10th Cir. 2006) (finding that English-only language restrictive policy itself, and not just its effect in evoking hostility by coworkers, can contribute to a hostile work environment, at least where there is no apparent reason for the restriction;

Example 18
Hostile Work Environment and
Unlawful Language Restrictive Policy

Filipino hospital workers were called to a meeting with the CEO of Hospital, who said that a prominent member of the local community complained that two Filipino employees on the Medical/Surgical floor spoke loudly in a Filipino language outside of his wife's hospital room and that this was disrespectful. The CEO told the Filipino workers that this would not be tolerated in the Hospital and that staff were now required to speak English at work. The CEO warned that supervisors and Hospital Security officers had been instructed to report on anyone who spoke a language other than English. Subsequently, a variety of Hospital employees shadowed the Filipino workers, mocked their accents, and loudly reminded them to "only speak English."

Three Filipino workers contacted Hospital's EEO office to complain about the harassment and the Hospital's language restrictive policy, but management did not address the conduct or change the policy. These three employees then filed EEOC charges of discrimination challenging the policy and alleging a hostile work environment based on national origin.

The EEOC found reasonable cause to believe that Hospital's implementation of the language restrictive policy was unlawful[79] and also that the three employees were subjected to an unlawful hostile work environment based on the policy and the harassment that was associated with it.[80]

B. Employer Liability for Unlawful Harassment

Employers and employees each play an essential role in preventing national origin harassment. When employers and employees both take appropriate steps to prevent and

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"[t]he less the apparent justification for mandating English, the more reasonable it is to infer hostility toward employees whose ethnic group or nationality favors another language"), *abrogated in part on other grounds, Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66-69 (2006); *Garcia v. Garland Indep. Sch. Dist*., No. 3:11-CV-502-N-BK, 2013 WL 5299264, at *4-6 (N.D. Tex. Sept. 20, 2013) (denying employer's motion for summary judgment, in part, because Hispanic cook presented evidence to create a reasonable inference that she was subjected to a hostile work environment based on her national origin when her supervisor prohibited employees from speaking Spanish in the kitchen at any time, joked about the cook's mispronunciation of English words, and ridiculed her on a daily basis).

[79] For a discussion of whether an English-only rule, or other language restrictive policy, is unlawful, refer to section V.C.

[80] This example is based on the facts alleged in *EEOC* v. *Cent. Cal. Found. for Health d/b/a Delano Reg'l Med. Ctr*, Case No. 10-CV-01492-LJO-JLT (E.D. Cal. filed Aug. 19, 2010). In August 2012, the hospital agreed to pay $975,000 and provide other relief to settle the case. *See* Press Release, EEOC, Delano Regional Medical Center to Pay nearly $1 Million in EEOC National Origin Discrimination Suit (Sept. 17, 2012), http://www.eeoc.gov/eeoc/newsroom/release/9-17-12a.cfm.

correct offensive conduct, it is much less likely to escalate to the point of violating Title VII. The standard for employer liability for harassment depends on the role of the harasser in the employer's organization.[81]

1. Employer Liability for Unlawful Harassment by Supervisors

When a supervisor[82] engages in harassment that includes a tangible employment action imposing "a significant change in employment status," such as discharge, demotion, or refusal to promote, the employer is liable and does not have a defense.[83] The Supreme Court explained that "[w]hen a supervisor makes a tangible employment decision, there is assurance that the injury could not have been inflicted absent the agency relation" with the employer.[84] For example, if a supervisor created a hostile work environment for an Arab employee by repeatedly accusing her of being a "terrorist," and then terminated her employment because of her race and ethnicity, the employer would be liable for unlawful harassment as well as discriminatory discharge.[85]

When national origin harassment by a supervisor creates a hostile work environment but *does not* result in a tangible employment action, the employer will be liable for the supervisor's conduct *unless* it can show the following:

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[81] The standard for employer liability for harassment by supervisors was established by the Supreme Court in two leading decisions addressing sexual harassment: *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The same standard applies to national origin harassment by a supervisor. *Gotfryd v. Book Covers, Inc.*, No. 97 C 7696, 1999 WL 20925, at *5-7 (N.D. Ill. Jan. 7, 1999) (applying *Ellerth* and *Faragher* standards to national origin discrimination).

[82] *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).

[83] *Ellerth*, 524 U.S. at 762-63 (explaining that the harasser is "aided in accomplishing" the harassment by his relationship to the employer [or, "aided in the agency relationship"] when a supervisor "takes a tangible employment action against a subordinate"); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1303 (11th Cir. 2007) (stating that the affirmative defense is not available where "discrimination the employee suffered included a tangible employment action"); *Ferraro v. Kellwood Co.*, 440 F.3d 96, 101, 102 (2d Cir. 2006) (stating that the affirmative defense is not available if a tangible employment action was taken against an employee as part of a supervisor's discriminatory harassment; harassment culminates in a tangible employment action if the action is "linked" to the harassment). *But see Hall v. City of Chicago*, 713 F.3d 325, 335 (7th Cir. 2013) (concluding that work reassignment could not preclude affirmative defense because it occurred at the beginning of the assignment to the Division and therefore could not have been the "culmination" of anything).

[84] *Ellerth*, 524 U.S. at 761-62.

[85] An employer will also be liable for unlawful harassment if the harasser is of a sufficiently high rank to fall "within that class . . . who may be treated as the organization's proxy." *Faragher*, 524 U.S. at 789. In such circumstances, the harasser's unlawful harassment is automatically imputed to the employer. *See also Ellerth*, 524 U.S. at 758 (finding that under agency principles an employer is indirectly liable for the agent's conduct "where the agent's high rank in the company makes him or her the employer's alter ego").

- The employer exercised reasonable care to prevent and correct promptly any harassing behavior, *and*
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[86]

Example 19
Employer Not Liable
for Hostile Work Environment Created by Supervisor

Natalie, a retail worker who emigrated from Russia to the United States as a child, claims that her supervisor at Luxury Store regularly made offensive comments to her about her Russian national origin. Natalie attends Luxury Store's annual training on harassment, which directs employees to report harassment to Human Resources, assures them that complaints are confidential, and reiterates Luxury Store's "zero tolerance" for retaliation of any kind. There is no evidence that Luxury Store either has failed in the past to respond appropriately to workers' harassment complaints, or has retaliated against employees who made such complaints. Natalie decides, however, that she cannot go to Human Resources about her supervisor's offensive comments.

Several months later, Natalie confides to a colleague about the supervisor's behavior. The colleague reports it to the employer, which immediately conducts an investigation and determines that the supervisor is harassing Natalie based on national origin. The employer disciplines the supervisor and transfers him to another store. If Natalie files a complaint alleging a hostile work environment based on national origin, the company would not be liable because Natalie unreasonably failed to complain and the company took reasonable and corrective measures when it learned about the offensive conduct.

[86] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. A determination as to whether an employee unreasonably failed to take advantage of preventive or corrective opportunities will depend on the particular circumstances and information available to the employee *at that time*. *Faragher*, 524 U.S. at 805-07. In evaluating the effectiveness of the employer's complaint mechanism, the Commission will consider whether it was accessible to all employees, including whether it was accessible in the native languages spoken by the employees if the employer knew or should have known of the employees' limited language capabilities. *See, e.g.*, *EEOC v. Spud Seller, Inc.*, 899 F. Supp. 2d 1081, 1095 (D. Colo. 2012) (concluding that there was a genuine factual dispute as to whether the employer took "reasonable care" to prevent sexual harassment of its Spanish speaking employees, where the policy was only in English "and there [was] no evidence that its provisions were translated into Spanish or that written translations were supplied to Spanish speaking employees"); *EEOC v. Sunfire Glass, Inc.*, No. CV-08-1784-PHX-LOA, 2009 WL 976495, at *14 (D. Ariz. Apr. 10, 2009) (ordering the defendant to post a notice on its sexual harassment policy in English and Spanish and offer trainings on unlawful sex discrimination and sexual harassment in English and Spanish).

2. Employer Liability for Unlawful Harassment by Employees or Non-Employees

An employer is liable when non-supervisory employees or non-employees create a hostile work environment if the employer knew or should have known about the harassment and failed to take immediate and appropriate corrective action.[87]

Example 20
Employer Liable When Non-Employee Creates a Hostile Work Environment

Charles is a frequent visitor on Senior Community's "neighborhood days," when Senior Community allows neighbors to visit its residents. During his visits, Charles often yells derogatory comments about South Asians at Asha, a nurse of Sri Lankan origin, and has pushed and tripped her on a few occasions. Asha complains about the conduct to a manager but is told that Senior Community cannot take any action against Charles because he is not a resident or employee. Charles continues to yell ethnic slurs at Asha on subsequent visits. Asha files an EEOC charge of discrimination. The EEOC finds reasonable cause to believe that Asha was subjected to a hostile work environment based on national origin, and that Senior Community is responsible for the actions of Charles, a non-employee, because it had the power to control Charles's access to the premises, was aware of Charles's offensive conduct, and did not take corrective action.

C. Human Trafficking

Cases involving human trafficking often include employer conduct that constitutes unlawful harassment, such as sexual, national origin, or racial harassment.[88] Given the nature of

[87] 29 C.F.R. § 1606.8(d)-(e); *see Vance*, 133 S. Ct. at 2453 (stating that a plaintiff can prove unlawful harassment "by showing that his or her employer was negligent in failing to prevent harassment from taking place"); *Galdamez v. Potter*, 415 F.3d 1015, 1024 (9th Cir. 2005) (citation omitted) (holding that once the employer knew or reasonably should have known that non-employees were harassing the plaintiff based on her national origin, it was required to "undertak[e] remedial measures 'reasonably calculated to end the harassment'"); *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 801 (8th Cir. 2003) ("Because those who engaged in the [national origin] harassment did not have supervisory power over [the plaintiff], she was required to show that [the employer] knew or should have known about the harassment and failed to respond in a prompt and effective manner."). "In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." 29 C.F.R. § 1606.8(e).

[88] Victims of certain crimes who are willing to assist in the investigation or prosecution of those crimes may submit an application for a U nonimmigrant visa (U-visa) to the Department of Homeland Security, U.S. Citizenship and Immigration Services. The U-visa provides temporary immigration benefits, including automatic grant of work authorization and eligibility to adjust status to lawful permanent resident after three years. Among other application requirements, a U-visa petitioner must ask a federal law enforcement agency or official to complete a certification form confirming that the victim was helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of criminal activity. The EEOC is one of several government authorities that may certify that the individual was a victim of qualifying criminal activity pursuant to the Victims of Trafficking and Violence Prevention Act of 2000, 8 U.S.C. §§ 1101(a)(l5)(U), 1184(p), and the interim final rule of the Department of Homeland Security,

compelled labor, the work environment may reasonably and necessarily be perceived as hostile. The egregious employer conduct in human trafficking cases usually will also easily satisfy the requirements for employer liability for unlawful harassment. However, the specific conduct at issue in a particular human trafficking case will be relevant to determining appropriate relief.

Example 21
Hostile Work Environment
And Human Trafficking

Anna is smuggled from Mexico to the United States under false pretenses about the work she will do. Upon arrival in the United States, she is taken to work at Poultry Plant. She receives $5 a day for her work, is forced to live in a cramped and unsanitary dormitory on Poultry Plant's property, is prohibited from leaving without supervision, and is under threat of deportation. Anna is taunted by coworkers with ethnic slurs such as "wetback" and "Mexican dog." One evening when Anna's shift ends, a supervisor pulls her into a cleaning closet and rapes her; he rapes her regularly after that. Although the employer has a complaint procedure, Anna reasonably fears that she will be subjected to deportation, so she instead contacts a church group and eventually files an EEOC charge. The EEOC finds reasonable cause to believe that Anna was subjected to unlawful harassment based on national origin and sex.

V. LANGUAGE ISSUES

As the U.S. labor force has grown more ethnically diverse, the number of workers who are not native English speakers has increased. Between 2010 and 2014, an average of 20.9 percent of the population spoke a language other than English at home.[89] This represents an increase from 17.9 percent in 2000 and 13.8 percent in 1990.[90]

Employers may have legitimate business reasons for basing employment decisions on linguistic characteristics. However, because linguistic characteristics are closely associated with national origin, it is important to carefully scrutinize employment decisions that are based on language to ensure that they do not violate Title VII.[91] The subsections below provide guidance

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U.S. Citizenship and Immigration Services (DHS/USCIS), 72 Fed. Reg. 53014 (Sept. 17, 2007), 8 C.F.R. § 214.14. *See* EEOC, *Procedures: Requesting EEOC Certification for U Nonimmigrant Classification (U Visa) Petitions in EEOC Cases*, http://www.eeoc.gov/eeoc/foia/u_visa.cfm (last visited May 20, 2016).

[89] *See* U.S. Census Bureau, *USA QuickFacts*, http://www.census.gov/quickfacts/table/PST045215/00 (last visited May 20, 2016).

[90] *See* U.S. Census Bureau, *Language Use and English-Speaking Ability: 2000*, *Census 2000 Brief*, 1 (Oct. 2003), http://www.census.gov/prod/2003pubs/c2kbr-29.pdf; U.S. Census Bureau, *Table 1: Language Use and English Ability, Persons 5 Years and Over, by State: 1990 Census*, http://www.census.gov/hhes/socdemo/language/data/census/table1.txt (last visited May 20, 2016).

[91] *See* 29 C.F.R. § 1606.1; *Fragante v. City & Cty. of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989).

on how Title VII applies to employment decisions that are based on accent, English fluency, and restrictive workplace language policies.

A. Accent Discrimination

An accent can reflect whether a person lived in a different country or grew up speaking a language other than English.[92] National origin and accent are therefore intertwined,[93] and employment decisions or harassment based on accent may violate Title VII.[94] Due to the link between accent and national origin, courts take a "very searching look" at an employer's reasons for using accent as a basis for an adverse employment decision.[95] Courts require employers to provide evidence – as opposed to unsupported assertions – to explain such actions.

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[92] *See* Anne-Sophie Deprez-Sims & Scott B. Morris, *Accents in the Workplace: Their Effects During a Job Interview*, 45 Int'l J. of Psychol. 417, 418 (2010) (stating that "[a]ccents are likely to serve as indicators for social categories such as ethnicity or country of origin").

[93] *See Fragante*, 888 F.2d at 596 (stating that accent and national origin are "obviously inextricably intertwined," therefore requiring a "very searching look" at employment decisions based on accent); *Albert-Aluya v. Burlington Coat Factory Warehouse Corp*., 470 F. App'x 847, 851 (11th Cir. 2012) (stating that "[c]omments about an accent may indicate discrimination based on one's national origin"); *Tseng v. Fla. A&M Univ.*, 380 F. App'x 908, 909 (11th Cir. 2010) ("Discrimination based on accent can be national origin discrimination.").

National origin discrimination based on accent may stem from bias or prejudice that devalues or stigmatizes certain accents rather than from an inability to comprehend an individual when she speaks. *See* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L.J. 1329, 1383 (1991) ("typically, accent discrimination occurs because of unconscious bias, careless evaluation, false assumptions about speech and intelligibility, mistaken overvaluing of the role of speech on the job, or concessions to customer prejudice"); *see also* Sharon L. Segrest Purkiss, et al., *Implicit Sources of Bias in Employment Interview Judgments and Decisions*, 101 Org. Behavior and Human Decision Processes 152, 155 (2006) ("A combination of ethnic minority cues [e.g., ethnic name and ethnic accent] may be more likely to trigger an unconscious and automatic negative reaction because of the salience of the cues and the ease in which one is more confident about placing someone in a class or category; essentially, stereotyping.").

[94] "The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity . . . because an individual has the . . . linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1; *Fragante*, 888 F.2d at 595-96 ("a plaintiff who proves he has been discriminated against solely because of his accent does establish a prima facie case of national origin discrimination").

[95] *See Fragante*, 888 F.2d at 596 (stating that district courts should conduct "a very searching look" into claims where an adverse employment decision was based on a foreign accent); *Machado v. Real Estate Res., LLC*, No. 12-00544 RLP, 2013 WL 3944511, at *8 (D. Haw. July 30, 2013) (denying employer's motion for summary judgment because the Indonesian former employee produced evidence that she was terminated because of her "strong" accent; "[d]etermining whether Defendant made an 'honest' assessment of Plaintiff's oral communication skills and whether Defendant made a reasonable investigation as to if those skills would 'materially interfere' with Plaintiff's job performance is a fact-intensive inquiry . . . typically ill-suited for summary judgment").

Under Title VII, an employment decision may legitimately be based on an individual's accent if the accent "interferes materially with job performance."[96] To meet this standard, an employer must provide evidence showing that: (1) effective spoken communication in English is required to perform job duties; *and* (2) the individual's accent materially interferes with his or her ability to communicate in spoken English.[97]

Where the evidence shows that an individual has a good command of spoken English or satisfactorily performs his job when speaking accented English, courts have ruled against employers under Title VII.[98]

Example 22
National Origin Discrimination Involving Accent

Chinasa, an experienced retail professional who works for National Retailer, speaks English with a Nigerian accent. National Retailer selects Chinasa for a Regional Loss Prevention Manager position. An executive who will oversee Chinasa's work approaches her immediately after the promotion and comments, "I bet this is a great achievement considering where you came from. As an African, you must be the first to achieve this much success in your family given your accent." The executive tells Chinasa to "try to speak more like an American" and also to be careful about her demeanor because, in his opinion, "Africans are known to be brash and aggressive." The executive repeats these comments on several occasions during Chinasa's first several months on the job. There is no evidence, however, that staff members misinterpret or do not understand Chinasa's spoken English. In fact, the evidence shows that staff members respond promptly to Chinasa's directions without seeking clarification and provide information that is responsive to her requests. Nonetheless, after nine months, the executive terminates Chinasa's employment, telling her that she is a "poor fit" for the Regional Loss Prevention Manager position. When Chinasa requests further explanation, he cites discomfort with her "thick African accent," asserts that some staff members do not understand her, and laments that she did not speak "more like an American." Based on these facts, the EEOC finds

[96] *Fragante*, 888 F.2d at 596.

[97] *See id*. ("An adverse employment decision may be predicated upon an individual's accent when – but only when – it interferes materially with job performance."); *see also Dafiah v. Guardsmark, LLC*, No. 10-cv-03119-RBJ-MJW, 2012 WL 5187762, at *5 (D. Colo. Oct. 19, 2012) (same).

[98] *See Berke v. Ohio Dep't of Pub. Welfare*, 628 F.2d 980, 981 (6th Cir. 1980) (finding that employee with Polish accent whose command of the English language was "well above that of the average adult American" was improperly denied two positions "because of her accent which flowed from her national origin"); *Dafiah*, 2012 WL 5187762, at *5-6 (denying defendant's motion for summary judgment because plaintiffs with Sudanese and Ethiopian accents provided evidence suggesting that they were able to successfully fulfill their security guard duties, including communicating with fellow employees in English).

reasonable cause to believe that National Retailer discriminated against Chinasa because of her national origin.[99]

In assessing whether an individual's accent materially interferes with the ability to perform job duties, the key is to distinguish a merely discernible accent from one that actually interferes with the spoken communication skills necessary for the job.[100] Evidence of an accent materially interfering with job duties may include documented workplace mistakes attributable to difficulty understanding the individual; assessments from several credible sources who are familiar with the individual and the job; or specific substandard job performance that is linked to failures in spoken communication.[101]

Example 23
No National Origin Discrimination Involving Accent:
Accent Materially Interferes with Job Performance

Discount Airline needs to hire a customer service agent at a major metropolitan airport to provide in-person assistance for passengers who have missed their connections or whose flights have been cancelled or delayed. This position requires short but effective spoken communication in a noisy environment with a disgruntled public. Romel, who speaks English with a pronounced Filipino accent, applies for the position and is invited for an interview. The interviewing process includes a job simulation during which the applicant responds to customers in an atmosphere that mimics that of a busy airport. Two experienced

[99] This example is based on the facts of *Albert-Aluya v. Burlington Coat Factory Warehouse Corp*., 470 F. App'x 847 (11th Cir. 2012). *See also In re: Rodriguez*, 487 F.3d 1001, 1008-09 (6th Cir. 2007) (vacating summary judgment on claim that plaintiff was not promoted in violation of Michigan's Elliott-Larsen Civil Rights Act; manager's statements indicating that he would not promote plaintiff to a supervisor position because of his "Hispanic speech patterns and accent," along with other disparaging remarks regarding plaintiff's accent and ethnicity, constituted direct evidence of national origin discrimination); *Akouri v. State of Fla. Dep't. of Transp*., 408 F.3d 1338, 1348 (11th Cir. 2005) (upholding jury's finding of national origin discrimination based on employer's statement to plaintiff that he was passed over for promotion because White employees were "not going to take orders from you, especially if you have an accent . . .").

[100] *Compare Fragante*, 888 F.2d at 597-99 (holding that defendant did not violate Title VII when it refused to hire an individual with a Filipino accent for a position requiring constant communication with the public because his pronounced accent materially interfered with his ability to communicate orally), *with Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (finding that an individual with a noticeable Filipino accent was unlawfully demoted from his position as a supervisor and not considered for a supervisory position in a new facility despite the fact that his accent would not interfere with job duties).

[101] *See generally Surti v. G.D. Searle & Co.*, 935 F. Supp. 980, 987 (N.D. Ill. 1996) (noting that "[a] major complicating factor in applying Title VII to accent cases is the difficulty in sorting out accents that actually impede job performance from accents that are simply different from some preferred norm imposed, whether consciously or subconsciously, by the employer." (quoting Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and A Jurisprudence for the Last Reconstruction*, 100 Yale L.J. 1329, 1352 (1991))).

interviewers who understand the demands of this job are impressed by Romel's calm demeanor and commitment to problem-solving, but they have difficulty understanding Romel's spoken English during the interview process. The interviewers conclude that Romel's pronounced Filipino accent will materially interfere with effective spoken communication in this environment. As a result, Romel is not hired. Romel challenges his rejection as national origin discrimination involving his accent. The EEOC does not find reasonable cause to believe that Romel was subjected to national origin discrimination because effective oral communication is required for this position, and Romel's accent materially interferes with his ability to communicate effectively in the circumstances of this job.

Example 24
National Origin Discrimination Involving Accent:
Accent Does Not Materially Interfere with Job Performance

Mariam, who speaks with a discernible Lebanese accent, is an experienced English-language teacher who earned an American graduate degree in education after moving to the United States with her American husband. Mariam's graduate school professors commended her demonstrated ability to engage high school students. High School hired Mariam as a permanent substitute teacher for humanities courses. Teachers at High School specifically requested her as a substitute teacher because it is clear to them that the students learn the assigned material when she teaches.

Mariam subsequently applies and is rejected for three permanent teaching jobs at High School. The School District's hiring official explains that effective communication in English is required for classroom teachers, and Mariam is not qualified because she speaks with a Lebanese accent. Although effective communication in English is required to teach at High School, Mariam's accent does not materially interfere with her ability to do so, as demonstrated by the statements of other High School teachers and her graduate school professors. Mariam states a claim for national origin discrimination involving her accent.[102]

If an employer takes an employment action in response to the discriminatory preferences of others, the employer itself is discriminating. Employers may not rely on coworker, customer, or client discomfort or preference to justify a discriminatory employment action based on accent.[103]

[102] This example is based on the facts of *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185 (9th Cir. 2003) (reversing grant of summary judgment for employer).

[103] *See* cases cited *supra* note 51 (discussing discriminatory customer preference).

B. Fluency Requirements

1. English Fluency

Generally, a fluency requirement is permissible only if required for the effective performance of the position for which it is imposed.[104] An individual's lack of fluency in English may interfere with job performance in some circumstances, but not in others. For example, an individual may be sufficiently proficient in English to qualify as a research assistant but, at that point in time, may lack the fluency to qualify as a senior scientific writer who must communicate complex scientific information in English.[105]

Because the degree of fluency that may be lawfully required varies from one position to the next, employers are advised to assess the level of fluency required for a job on a case-by-case basis. Applying uniform fluency requirements to a broad range of dissimilar positions or requiring a greater degree of fluency than is necessary for a position may result in a violation of Title VII.

Example 25
No National Origin Discrimination Involving English Fluency

Jorge, a Dominican national, applies for a sales position with XYZ Appliances, a small retailer of home appliances in an overwhelmingly English-speaking, non-bilingual community. Jorge has very limited skill with spoken English. XYZ notifies him that he is not qualified for a sales position because his ability to effectively assist customers who only speak English is limited. However, XYZ offers to consider him for a position in the stock room. Under these circumstances, XYZ's decision to exclude Jorge from the sales position does not violate Title VII.

[104] *See Stephen v. PGA Sheraton Resort, Ltd.*, 873 F.2d 276, 280-81 (11th Cir. 1989) (finding that employer's decision to terminate purchasing clerk was justified by business necessity because his inability to adequately speak and understand English prevented him from performing the duties required of the position); *Mejia v. N.Y. Sheraton Hotel*, 459 F. Supp. 375, 377 (S.D.N.Y. 1978) (holding that a chambermaid was lawfully denied a promotion to a front desk position because she was not qualified for the position due to her inability "to articulate clearly or coherently and to make herself adequately understood in the English language"); *cf. Colindres v. Quietflex Mfg*., No. Civ. A. H-01-4319, H-01-4323, 2004 WL 3690215, at *12 (S.D. Tex. Jan. 4, 2006) (denying defendants' motion for summary judgment on plaintiff's disparate impact claims because issue of material fact existed as to whether employer's English language fluency requirement "reinforced racial barriers between departments" and deterred qualified nonfluent English speakers and Latino workers who did speak English from applying to transfer to a higher paying department).

[105] *Shieh v. Lyng*, 710 F. Supp. 1024, 1032-33 (E.D. Pa. 1989), *aff'd*, 897 F.2d 523 (3d Cir. 1990) (finding that the plaintiff was lawfully demoted because his language abilities were too limited to enable him to produce the complex scientific manuscripts required by his position).

Example 26
National Origin Discrimination Involving English Fluency

Ender, whose first language is Turkish, works at Hotel's Registration and Concierge Desk. Hotel serves a largely English-speaking clientele. At the Concierge Desk, Ender provides local directions to restaurants, museums, theaters, and other destinations and otherwise helps guests plan their visits.

A guest complains that Ender gave him directions to a business appointment "in broken English." The guest, who was late for the appointment, demands that Hotel management remove Ender from the Concierge Desk. Two supervisors observe Ender at work. They conclude that he speaks English quickly, clearly, and precisely, albeit with a Turkish accent. They also find Ender's local directions to be accurate. The supervisors recommend against taking action against Ender. However, upper management decides to terminate Ender's employment and replace him with a native English speaker, because the guest who complained works for a company that is an established client of Hotel.

Under these circumstances, there is reasonable cause to believe that Hotel's decision to terminate Ender was motivated by his national origin and violates Title VII. The Hotel's supervisors specifically found that Ender's accent did not affect his ability to communicate information accurately, and he was terminated to appease the preferences of an unhappy client. Where client preference is based on a protected basis such as national origin, the employment decision violates Title VII.

2. Foreign Language Fluency

With American society growing more diverse, employers have increasingly required some employees to be fluent in languages other than English. As with English fluency requirements, a foreign language fluency requirement is only permissible if it is required for the effective performance of the position for which it is imposed.[106] For example, a business that provides services to numerous Spanish-speaking customers may have a sound business reason for requiring that some of its employees speak Spanish.

A business with a diverse clientele may assign work based on foreign language ability. For example, an employer may assign bilingual Spanish-speaking employees to provide services to customers who speak Spanish, while assigning employees who only speak English to provide

[106] *See Strong v. Progressive Roofing Servs.*, No. 05-1023-PHX-EHC, 2007 WL 2410354, at *4-6 (D. Ariz. Aug. 20, 2007) (finding that plaintiff was not selected for safety coordinator position because he was not fluent in Spanish; requirement of Spanish fluency was job related and consistent with business necessity); *Henderson v. Rice*, 407 F. Supp. 2d 47, 51-52 (D. D.C. 2005) (finding no discrimination where plaintiff was not selected for consular position in Germany because "without German fluency, the plaintiff does not meet the minimum qualifications"). *But cf. Chhim v. Spring Branch Indep. Sch. Dist.*, 396 F. App'x 73, 74 (5th Cir. 2010) (holding that "neither a preference nor a requirement of bilingual ability would constitute discrimination based on race or national origin" against those who do not speak both languages).

services to English-speaking customers. Additionally, employers are not required by Title VII to provide additional compensation for work that is performed in a foreign language, provided the employers do not require employees to work extra hours without compensation.[107]

Example 27
Bilingual Job Requirement Not Discriminatory

Andy, who is only fluent in English, applies for a custodial supervisor position with a school district in Texas. The job description states that a preferred qualification is that candidates speak fluently in Spanish and English in order to communicate effectively with the custodial staff, many of whom speak only English or only Spanish. During Andy's job interview with a school district representative, Andy acknowledges that he does not speak Spanish. The school district does not hire Andy because he is not fluent in Spanish and English. Instead, the school district promotes Anne, a Hispanic woman who was employed as a custodial foreman for the school district, to the custodial supervisor position. Anne is fluent in both English and Spanish. The school district representative suggests to Andy that he should apply for a different custodial position that does not require fluency in Spanish. Under these circumstances, the school district's preference for a bilingual supervisory employee would not support a Title VII discrimination claim based on race or national origin by the non-bilingual applicant.[108]

C. English-Only Rules and Other Restrictive Language Policies

Restrictive language policies or practices requiring the use of the English language at work are commonly known as English-only rules. These policies or practices may also involve languages other than English, for example, Spanish-only policies. Restrictive language policies implicate national origin because an individual's primary language is closely tied to his or her cultural and ethnic identity.[109]

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[107] *See Hernandez v. Muns*, No. 96-40087, 1996 WL 661171, at *4 (5th Cir. Oct. 21, 1996) (finding no national origin discrimination where plaintiff "was asked to do Spanish translations during her normal working hours as part of her job duties," and "her translation responsibilities did not cause her to work extra hours without compensation"); *Cota v. Tucson Police Dep't*, 783 F. Supp. 458, 473-74 (D. Ariz. 1992) (finding that Title VII was not violated because, although Hispanic employees performed more Spanish-related tasks than non-Hispanic employees, there was no evidence that Hispanic workers performed extra or more difficult, rather than merely different, work).

[108] This example is based on the facts of *Chimm v. Spring Branch Indep. Sch. Dist.*, No. H-09-3032, 2009 WL 5170214 at *1-3 (S.D. Tex. Dec. 18, 2009).

[109] Even for bilingual persons who speak English proficiently, their primary language remains closely tied to their national origin. *Gutierrez v. Mun. Court of S.E. Judicial Dist.*, 838 F.2d 1031, 1039 (9th Cir. 1988), *remanded with directions to vacate as moot*, 490 U.S. 1016 (1989), *vacated as moot*, 873 F.2d 1342 (9th Cir. 1989); *see also Garcia v. Spun Steak Co.*, 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc) (observing that even for a bilingual individual, "native language remains an important manifestation of his ethnic identity and a means of affirming links to his original culture").

1. Policies Adopted for Discriminatory Reasons

As with other workplace policies, a restrictive language policy violates Title VII if it is adopted for discriminatory reasons, such as bias against employees of a particular national origin.[110] Thus, it would be unlawful disparate treatment to implement an overly broad English-only rule in order to avoid hearing foreign languages in the workplace, to generate a reason to discipline or terminate people who are not native English speakers, or to create a hostile work environment for certain non-English speaking workers.

Evidence of disparate treatment could include failure to consider whether there are substantial business reasons for the policy. The absence of substantial business reasons does not, by itself, show that the employer acted with discriminatory bias. However, the weaker the business reasons, the more difficult it may be to justify the policy under Title VII.

Example 28
Evidence Establishes That Policy Was Adopted for Discriminatory Reasons

John, a Latino man who is bilingual in Spanish and English, works in a warehouse for Factory, Inc. John works on an assembly line and has job duties that do not require him to speak English. Factory decides to adopt a rule that requires all workplace communications to be conducted in English after a complaint is received objecting to John speaking Spanish during a break. In practice, the English-only rule is applied at all times on company property, even though its text says that it should not be applied during breaks and personal time.

John files a Title VII charge challenging the rule. Based on the evidence, the EEOC finds reasonable cause to believe that John was subjected to unlawful disparate treatment. In particular, the evidence reveals that Factory, Inc. did not provide work-related reasons for the rule, and that a manager expressed concern prior to the rule's adoption that other warehouse employees were likely to taunt Latinos if they knew about the rule. In addition, management adopted the rule without discussing it with a consultant who was under contract during the same time frame to investigate alleged anti-Latino discrimination. Finally, Factory, Inc.'s chief executive referred to the Spanish language as "garbage" in a public interview. The evidence establishes reasonable cause to believe that the English-only rule was adopted because of anti-Latino bias.[111]

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[110] *See Lopez v. Flight Servs. & Sys. Inc*., 881 F. Supp.2d 431, 440 (W.D. N.Y. 2012) (holding that an employer "may not forbid employees from speaking their native tongues if the reason is because of discriminatory animus toward the employee's national origin").

[111] This example is based on facts similar to those in *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006). For a discussion of when a language-restrictive policy may contribute to a broader hostile work environment, such as where workers are subjected to an English-only policy and to ethnic epithets and taunting by coworkers, refer to section IV.

2. Policies Applied in Discriminatory Manner

Regardless of whether a restrictive language policy was adopted for nondiscriminatory reasons, the policy may not be applied differently to employees because of their national origin. For example, if six languages other than English are spoken in a workplace, it would be facially discriminatory to prohibit employees from speaking one of those languages but not the others, e.g., a "no Russian rule," no matter the reason.[112] Title VII also prohibits an employer from enforcing a policy in a discriminatory manner, for example, imposing more severe discipline on Vietnamese employees who violate the policy than on Latino employees with comparable violations. Finally, penalizing employees for minor, inadvertent infractions that do not undermine workplace safety or efficiency may be evidence of intentional discrimination.[113]

3. EEOC Guidelines on English-only Policies

The EEOC's long-standing English-only guidelines, issued in 1980, provide that rules requiring employees to speak English in the workplace at all times will be presumed to violate Title VII.[114]

a. Adverse Effect on National Origin Groups

When an employer imposes an English-only rule, either in limited circumstances or at all times, employees with limited or no English skills and bilingual employees whose primary language is not English may be adversely affected because they are prohibited from communicating at work—including for work-related purposes —in their most effective

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[112] *See Wilkie v. Geisinger Sys. Servs.*, No. 3:12–CV–580, 2014 WL 4672489, at *10 (M.D. Pa. Sept. 18, 2014) ("[I]f Plaintiff can prove that she alone was prohibited from speaking another language, then such a restriction would be indicative of [national origin] discrimination."); *cf. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) ("Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.").

[113] *See generally Garcia v. Spun Steak Co*., 998 F.2d 1480, 1489 (9th Cir. 1993) ("Likewise, we can envision a case in which such rules are enforced in such a draconian manner that the enforcement itself amounts to harassment. In evaluating such a claim, however, a court must look to the totality of the circumstances in the particular factual context in which the claim arises.").

[114] 29 C.F.R. § 1606.7 ("A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it."). The Commission first published the Guidelines on Discrimination Because of National Origin at 45 Fed. Reg. 85,632, 85,636 (Dec. 29, 1980).

language.[115] An English-only rule may also adversely impact these employees by subjecting them to discipline and termination for speaking their most effective language while imposing no comparable risk for native English-speaking employees.[116] Finally, an English-only rule "is likely in itself to 'create an atmosphere of inferiority, isolation, and intimidation' that constitutes a 'discriminatory working environment.'"[117]

b. Policies That Apply at All Times

A restrictive language policy is applied "at all times" when employees are prohibited from speaking their primary language any time they are on duty or in the workplace, including during lunch, breaks, and other personal time while on the employer's premises.

Because language-restrictive policies may be applied only to those specific employment situations for which they are needed to promote safe and efficient job performance or business operations, blanket rules requiring employees to speak English (or another language) at all times are presumptively unlawful.[118]

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[115] *See Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000) (stating that English-only rules "disproportionately burden national origin minorities because they preclude many members of these groups from speaking" their most effective language but "rarely, if ever, hav[e] that effect on non-minorit[ies]").

[116] *See id.* at 1070 (noting that Hispanic employees "were faced with the very real risk of being reprimanded or even losing their jobs if they violated the English-only rule, even if such non-compliance was inadvertent. There was no comparable risk posed by the policy for Defendant's non-Hispanic employees."); Lisa L. Behm, Comment, *Protecting Linguistic Minorities Under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 Marq. L. Rev. 569, 596-97 (1998) (noting that bilingual individuals whose preferred language is not English may be subject to adverse employment decisions for violating their employer's English-only policy while the same policy would "have almost no impact on native English-speaking employees").

[117] *Maldonado v. City of Altus*, 433 F.3d 1294, 1306 (10th Cir. 2006) (quoting 29 C.F.R. § 1606.7(a) as persuasive authority); *Garcia v. Spun Steak Co.*, 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc) (agreeing with EEOC that "being forbidden under penalty of discharge to speak one's native tongue generally has a pernicious effect"); *see also EEOC v. Synchro-Start Prods., Inc.*, 29 F. Supp. 2d 911, 914 (N.D. Ill. 1999) (stating that EEOC English-only guidelines take the "modest step" of creating an inference that English-only rules disadvantage workers on the basis of national origin (citing 29 C.F.R. § 1606.7(a))).

As discussed in section IV.A, a language-restrictive policy also may contribute to a broader hostile work environment, such as where workers are subjected to an English-only policy and to ethnic epithets and taunting by coworkers.

[118] *See* 29 C.F.R. § 1606.7(a). As discussed in section V.C.1 ("Policies Adopted for Discriminatory Reasons"), the adoption of an overly broad language-restrictive policy may indicate that an employer was motivated by national origin discrimination. Thus, such policies may result in both unlawful disparate treatment as well as disparate impact discrimination.

c. Policies That Apply in Limited Circumstances

The lawfulness of a limited language-restrictive policy— one that does not apply at all times or to all jobs, workplace situations, or locations— depends on whether the evidence shows that the policy is job related and consistent with business necessity.[119] An employer may satisfy this standard by providing detailed, fact-specific, and credible evidence demonstrating that the business purpose of requiring employees to speak a common language is sufficiently necessary to safe and efficient job performance or safe and efficient business operations to override its adverse impact; that the policy has proven effective in promoting such a business purpose; and that it is narrowly tailored to minimize any discriminatory impact based on national origin.[120]

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[119] 29 C.F.R. § 1606.7. The difficulty of demonstrating the discriminatory effect of an English-only rule "may well have been one of the reasons for the promulgation of [§ 1606.7]. On the other hand, it should not be difficult for an employer to give specific reasons for the [English-only] policy, such as the safety reasons advanced in this case." *Synchro-Start*, 29 F. Supp. 2d at 914 (quoting *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993) (Boochever, J., dissenting)); *Gutierrez*, 838 F.2d at 1040 (agreeing with EEOC guidelines "that English-only rules generally have an adverse impact on protected groups"). *But see EEOC v. Beauty Enters., Inc.*, No. 3:01CV378 (AHN), 2005 WL 2764822, at *9-10 (D. Conn. Oct. 25, 2005) (criticizing EEOC guidelines for imposing a "blanket rule" that "ignores the reality" that the burden imposed by English-only rules varies and disagreeing that evidence of impact would necessarily consist of "conclusory self-serving statements"); *see also Reyes v. Pharma Chemie, Inc.*, 890 F. Supp. 2d 1147, 1164 (D. Neb. 2012) (concluding that EEOC guidelines "contravene" Title VII).

The Commission disagrees with the Ninth Circuit's rejection of the EEOC guidelines' position as "presuming that an English-only policy has a disparate impact in the absence of proof." *See Spun Steak*, 998 F.2d at 1490. While the EEOC agrees with the court that non-English speakers may be adversely impacted by an English-only rule because these employees could not "enjoy the privilege of conversing on the job if conversation is limited to a language they cannot speak," *id.* at 1488, the EEOC disagrees with the court's statement that an English-only rule does not have a disparate impact on fully bilingual employees, who "can readily comply with the English-only rule and still enjoy the privilege of speaking on the job." *Id.* at 1487. *See Spun Steak*, 13 F.3d at 298 (Reinhardt, J., dissenting from denial of rehearing en banc) ("Whether or not the employees can readily comply with a discriminatory rule is by no means the measure of whether they suffer significant adverse consequences."). As scholars and courts have recognized, bilingual speakers have varying levels of English proficiency and may often inadvertently move from one language to another, which is referred to as "code switching." *See Premier Operator Servs.*, 113 F. Supp. 2d at 1069-70 (citing report and testimony of professor of linguistics and Hispanic language and culture that "adhering to an English-only requirement is not simply a matter of preference for Hispanics, or other persons who are bilingual speakers"). English-only rules also can adversely impact bilingual speakers by subjecting them to discipline for violating such rules while imposing no comparable risk for English-speaking employees. *Id.*

[120] *See, e.g., Hamer v. City of Atlanta*, 872 F.2d 1521, 1533 (11th Cir. 1989) ("The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 245 (5th Cir. 1974))); *EEOC v. Rath Packing Co.*, 787 F.2d 318, 332-33 (8th Cir. 1986) (finding that policy against employing spouses violated Title VII because it had a disparate impact on women and was not shown to be "essential to safety and efficiency"); EEOC Dec. No. 81-8, 1980 WL 8898 (1980) (stating that the issue is "whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business" (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971))).

d. Job Related and Consistent with Business Necessity

Because of the adverse effects of a restrictive language policy on employees with limited or no English skills, and on bilingual employees whose primary language is not English, such a policy is unlawful unless the employer establishes that the policy is job related and consistent with business necessity; the policy must be necessary to safe and efficient job performance or safe and efficient business operations. It is not sufficient that the policy merely promote business convenience.[121]

To meet the burden of establishing business necessity, the employer must present detailed, fact-specific, and credible evidence[122] showing that the language-restrictive policy is "necessary to safe and efficient job performance"[123] or safe and efficient business operations.[124] This burden cannot be met with conclusory statements or bare assertions about the business need for a language-restrictive policy.[125] It is necessary to analyze the specific circumstances that are

[121] *See, e.g.*, *El v. S.E. Pa. Trans. Auth.*, 479 F.3d 232, 242 (3d Cir. 2007) (noting that the Supreme Court has rejected "criteria that are overbroad or merely general, unsophisticated measures of a legitimate job-related quality" and that Congress enacted a "business necessity" test, not a "business convenience" test); *EEOC v. Allstate Ins.*, 458 F. Supp. 2d 980, 987 (E.D. Mo. 2006) ("[T]he burden of showing business necessity 'is a heavy one,' requiring the Defendant to 'show that their selection plan has a manifest relationship to the employment in question and that there is a compelling need to maintain the practice.'" (quoting *Leftwich v. Harris-Stowe State Coll.*, 702 F.2d 686, 692 (8th Cir.1983))). *But see Pacheco v. N.Y. Presbyterian Hosp.*, 593 F. Supp. 2d 599, 621-22 (S.D. N.Y. 2009) (upholding English-only rule based on employer's evidence of "valid business reason"); *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 736 (E.D. Pa. 1998) (concluding that English-only policy was valid as a matter of law as employer had "valid business justification"). The Commission disagrees with the less stringent manner in which *Pacheco*, *Kania*, and some other courts have applied the business necessity standard established under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and *Dothard v. Rawlinson*, 433 U.S. 321 (1977), and codified by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codifying the burden of proof in disparate impact cases).

[122] *See Premier Operator Servs., Inc.*, 113 F. Supp. 2d at 1070-71 (finding that insufficient "credible evidence" was presented to establish business necessity for an English-only rule because speaking Spanish was a job requirement for the employees affected by the rule; there was no credible evidence of "discord" between employees due to Spanish being spoken in the workplace; there was no evidence that the rule and its enforcement "promoted 'harmony' in the workplace"; and there was insufficient evidence to establish that employees were unable to communicate with their supervisors in carrying out their job duties and responsibilities).

[123] *Dothard*, 433 U.S. at 331 n.14 ("[A] discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."); *see also Griggs*, 401 U.S. at 431-32.

[124] *See Dothard*, 433 U.S. at 331 n.14; *Griggs*, 401 U.S. at 431-32; *see also, Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (1971) ("[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.").

[125] *See El*, 479 F.3d at 240 (noting that the Supreme Court has rejected "bare" or "common-sense"-based assertions of business necessity).

presented in each situation. The following general principles provide guidance when evaluating whether a language-restrictive policy is job related for the position in question and consistent with business necessity.

(1) Restrictive Language Policy Effectively Serves Business Needs

Part of establishing business necessity is demonstrating that the language-restrictive policy actually serves the identified business need.[126] The effectiveness of a language-restrictive policy also may hinge on which language is identified as the common language of those performing the work. Thus, if detailed, fact-specific, and credible evidence shows that successful performance of job duties directly depends on dialogue with supervisors and/or customers, speaking a common language may be necessary. But that common language may depend on the circumstances. Sales representatives with bilingual clientele may generate the most sales by speaking the language in which the customer is most proficient. Similarly, cooperative work assignments may be completed efficiently when employees use the language in which they are most proficient. If safety considerations constitute the demonstrated business need, employers may assess whether their employees with limited English skills are more likely to understand and relay safety instructions or warnings efficiently and effectively in English or in their shared language.[127]

(2) Restrictive Language Policy is Narrowly Tailored

A language-restrictive policy is narrowly tailored when it applies only to those workers, work areas, circumstances, times, and job duties in which it is necessary to effectively promote safe and efficient business operations. This minimizes the adverse impact.

Example 29
Policy Narrowly Tailored to Promote Safe and Efficient Job Performance

> Claudia, a Honduran-born U.S. immigrant who is fluent in Spanish and English, is employed by County hospital as a housekeeper, and she is assigned to clean operating rooms. She files a charge of discrimination alleging that she was subjected to unlawful national origin discrimination when the hospital adopted an English-only rule. The respondent produces evidence showing that the rule applies to all workers, including cleaning staff, but only when they are working in

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[126] *See NAACP v. N. Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 477 (3d Cir. 2011) (noting that the Supreme Court has rejected "rough-cut measures of employment-related qualities" and has instead required employers to tailor criteria "to measure those qualities accurately and directly for each applicant" (quoting *El v. S.E. Pa. Trans. Auth.*, 479 F.3d 232, 240 (3d Cir. 2007))).

[127] *Cf. Strong v. Progressive Roofing Servs.*, No. 05-1023-PHH-EHC, 2007 WL 2410354, at *5 (D. Ariz. Aug. 20, 2007) (holding that Spanish language fluency for a supervisory position was "job related for the position in question" and "consistent with business necessity" because it was in the employer's "interest to communicate safety information in Spanish to employees whose comprehension ability is better in Spanish").

the operating room. The evidence shows that most of the medical staff in the operating room only speak English.

Clear and precise communication between the medical staff and the cleaning staff is essential in the operating room because cleanliness is of paramount importance to patients' health and safety. The rule only applies to job-related discussions in the operating room and does not apply in any other circumstances. Based on this evidence, the EEOC does not find reasonable cause to believe that County Hospital's English-only rule violates Title VII.[128]

Some employers have adopted language-restrictive policies in order to improve interpersonal relationships between employees.[129] If coworkers or customers are concerned about exposure to languages they do not understand, or about gossip in these languages, one approach is to address these concerns on an individualized basis without resorting to language-restrictive policies.[130] A language-restrictive policy that has a disparate impact on a particular group cannot be justified if an employer can effectively promote safe and efficient business operations through a policy that does not disproportionately harm protected national origin groups.

Example 30
English-Only Rule Not Justified

At a management meeting of Athletic Shoe Co., a supervisor proposes that the company adopt an English-only rule to decrease tensions among its ethnically diverse workforce. Two of the employees he supervises, Ann and Vinh, allegedly made derogatory comments in Vietnamese about their coworkers. Managers conclude that this can be addressed effectively under the company's discipline policy and that it would not justify a practice that adversely affects other workers based on their national origin. Therefore, Athletic Shoe decides that the circumstances do not justify adoption of an English-only rule. To reduce the

[128] This example is based on the facts alleged in *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1171 (10th Cir. 2007) (finding that hospital's limited English-only rule requiring housekeepers to speak English when working in operating rooms while performing job duties did not violate Title VII).

[129] *E.g.*, *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 736 (E.D. Pa. 1998) (stating that the "Church adopted its English-only rule to improve interpersonal relations at the Church, and to prevent Polish-speaking employees from alienating other employees, and perhaps church members themselves").

[130] *See* EEOC Dec. Decision No. 81-25, 1981 WL 17720, at *2 (July 6, 1981) (concluding that English-only policy was not justified to address employee communication problems; "[s]pecific problems . . . have specific solutions which do not require an absolute prohibition against speaking any language other than English in the workplace"); Janet Ainsworth, *Language, Power, and Identity in the Workplace: Enforcement of "English-Only" Rules by Employers*, 9 Seattle J. Soc. Just. 233, 247-48 (2010) (noting that workforce conflicts stemming from derogatory comments stated in foreign languages are "better addressed by implementing policies forbidding employees to insult or harass one another regardless of the language used to do so. Restricting communication by bilinguals is hardly calculated to result in the asserted goal of achieving an ethnically harmonious workplace.").

likelihood of future incidents, supervisors are instructed to investigate the allegations and, if necessary, to counsel line employees about appropriate workplace conduct.

4. Notice and Enforcement of Restrictive Language Policy

Employers must provide adequate notice of language-restrictive policies.[131] "Adequate notice" means effectively communicating to employees under what circumstances they will be required to speak a specific or common language and what will happen if they violate the rule.[132] Notice can be provided by any reasonable means under the circumstances, such as explaining the rule at a meeting, providing personal notice, sending e-mail, or posting the rule.[133] In some circumstances, it may be necessary to provide notice in multiple languages. A grace period before the effective date of the policy generally will be important. Because adequate notice is essential to ensure employee compliance with the policy, failure to provide such notice will undermine attempts to establish business necessity.

Managers often benefit from guidance on how to enforce the policy. Employers are strongly discouraged from "draconian"[134] enforcement of language-restrictive policies. By limiting disciplinary measures to willful violations and not penalizing workers for inadvertent violations linked to their protected status,[135] employers will more likely be able to establish business necessity.

VI. CITIZENSHIP ISSUES

A. U.S. Citizenship Requirements

Title VII is violated whenever citizenship discrimination has the "purpose or effect" of discriminating on the basis of national origin.[136] For example, a citizenship requirement would

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[131] 29 C.F.R. § 1606.7(c).

[132] 45 Fed. Reg. 85,632, 85,635 (Dec. 29, 1980) (EEOC's preamble to "Guidelines on Discrimination Because of National Origin").

[133] *See id.*

[134] *Garcia v. Spun Steak Co*., 998 F.2d 1480, 1489 (9th Cir. 1993) (stating that "draconian" enforcement of an English-only rule could amount to harassment).

[135] *See* sources cited *supra* note 119 (discussing how language restrictive policies can adversely impact bilingual employees who may unconsciously alternate from English to another language during informal conversations).

[136] *Espinoza v. Farah Mfg. Co*., 414 U.S. 86, 92 (1973) (stating that Title VII "prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin"); 29 C.F.R. § 1606.5(a); *see also Lixin Liu v. BASF Corp*., 409 F. App'x 988, 991 (8th Cir. 2011) (per curiam) (citation omitted) (finding no Title VII violation where the plaintiff "conflate[d] national origin and alienage. His employment was terminated because of his immigration status, not his Chinese ancestry.").

be unlawful if it is a "pretext" for national origin discrimination, or if it is part of a wider scheme of national origin discrimination.[137] Although Title VII applies regardless of immigration status or authorization to work, employers are prohibited by the immigration laws from hiring individuals who are not authorized to work.[138]

Example 31
Citizenship Requirement as Pretext
for National Origin Discrimination

Juanita, a Guatemalan-born naturalized U.S. citizen, was assigned by Staffing Firm to work as a technician for XYZ, an industrial subcontractor that builds equipment for use at nuclear facilities. Staffing Firm's contract with XYZ includes a clause requiring that anyone working on its projects must be a U.S. citizen. Shortly after beginning her first shift at XYZ, Juanita is told to produce a U.S. birth certificate in order to establish her citizenship. Juanita cannot produce a U.S. birth certificate because she was born in Guatemala, but she does provide her U.S. passport to prove her citizenship. The XYZ manager tells Staffing Firm that Juanita cannot continue working at its plant because she cannot provide proof that she was born in the U.S and terminates her employment. Based on these facts, the EEOC finds reasonable cause to determine that Juanita was subject to unlawful national origin discrimination. Additionally, the EEOC determines that Staffing Firm and XYZ may be liable as joint employers.[139]

Example 32
Citizenship Requirement that is Part of Wider
Scheme of National Origin Discrimination

Luis, a Venezuelan citizen, files a charge with the EEOC alleging that he was not promoted from his unskilled laborer position to a skilled craft position by Petroleum Company because of his Venezuelan national origin. The investigation reveals that Petroleum Company has many Venezuelan citizens employed in

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[137] *See Espinoza*, 414 U.S. at 92. The antidiscrimination provisions of the Immigration and Nationality Act (INA) expressly prohibit employers with four or more employees from discriminating based on citizenship or immigration status with respect to hiring, firing, and recruitment or referral for a fee. *See* 8 U.S.C. § 1324b(a)(1)(B). In cases where there may be overlapping jurisdiction between the EEOC (Title VII) and the Department of Justice's Office of Special Counsel (INA), EEOC investigators should consult the *EEOC/OSC Memorandum of Understanding*, *supra* note 28.

[138] *See* 8 U.S.C. § 1324a(1) (providing that entities or persons must not employ unauthorized aliens in the United States knowing that they are unauthorized to work with respect to such employment).

[139] This example is based on the facts alleged in *EEOC v. Express Servs., Inc.*, No. 6:11-cv-00279-HFF-BHH (D. S.C. filed Feb. 3, 2011). In June 2011, the staffing firm and the subcontractor agreed to pay $42,500 and provide other relief to settle the case. *See* Press Release, EEOC, Temporary Staffing Firm and Client Company To Pay $42,500 to Settle EEOC National Origin Lawsuit (Jun. 6, 2011), http://www.eeoc.gov/eeoc/newsroom/release/6-6-11a.cfm.

unskilled positions and has a policy requiring that all of its higher-paid skilled workers be U.S. citizens. Unless Petroleum Company provides a nondiscriminatory reason for the citizenship requirement, the EEOC would find reasonable cause to conclude that the purpose was to exclude individuals with Venezuelan ancestry from higher paying jobs because of their national origin.

Federal law requires U.S. citizenship for most federal civil service employment.[140] When U.S. citizenship is required by federal law, the failure to hire an individual because he or she is not a U.S. citizen does not constitute national origin discrimination in violation of Title VII**.**

Federal law provides a variety of protections for employees and applicants for employment who are discriminated against based on their citizenship status or national origin. As a result, in addition to national origin claims under Title VII, individuals who are not U.S. citizens may have claims under federal statutes enforced by departments or agencies other than the EEOC:

- **Immigration Reform and Control Act of 1986 (IRCA)**: With IRCA, the Immigration and Nationality Act (INA)[141] was amended to prohibit employers with four or more employees from discriminating because of *citizenship status* against U.S. citizens and certain classes of foreign nationals authorized to work in the United States with respect to hiring, firing, and recruitment or referral for a fee.[142] It also prohibits *national origin discrimination* with respect to hiring, firing, and recruitment or referral for a fee, by employers with between four and 14 employees. The antidiscrimination provisions of the INA are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, at the Department of Justice (OSC).[143]

- **Fair Labor Standards Act (FLSA)**: The FLSA requires, among other things, that covered workers, including those who are not U.S. citizens, be paid no less than the federally designated minimum wage. The FLSA is enforced by the Employment Standards Administration, Wage and Hour Division of the Department of Labor (DOL).[144]

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[140] Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (Sept. 2, 1976).

[141] 8 U.S.C. § 1101 *et seq*. The INA also prohibits unfair documentary practices related to verifying the employment eligibility of employees, such as requesting more or different documents than are required to verify employment eligibility or rejecting reasonably genuine-looking documents with the purpose or intent of discriminating on the basis of citizenship status or national origin. 8 U.S.C. § 1324b(a)(6).

[142] 8 U.S.C. § 1324b(a)(1)(B).

[143] *See generally* U.S. Dep't of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices, http://www.justice.gov/crt/about/osc/ (last visited May 20, 2016).

[144] *See generally* U.S. Dep't of Labor, Wage and Hour Division, http://www.dol.gov/whd/ (last visited May 20, 2016).

- **Special Visa Programs**: Employment of foreign nationals under special visa programs, such as H-1B and H-2A visas, also may be subject to certain requirements related to wages, working conditions, or other aspects of employment.[145]

Example 33
Citizenship Requirement that
May Violate Multiple Statutes

Staffing Company routinely hires U.S. citizens as well as non-U.S. citizens who have work authorizations. It verifies all employees' eligibility for employment through E-Verify,[146] but requires non-citizens to submit additional documentation beyond what is required to establish their work authorization. Staffing company does not require extra documentation from U.S. citizens.

If Staffing Company has more than four employees, it has violated the antidiscrimination provisions of the INA, which prohibit employers from using discriminatory documentary policies, procedures, or requirements based on citizenship or national origin when determining or re-verifying an employee's work authorization. If Staffing Company only requires the specific documentation from individuals of particular national origins who are non-citizens with work authorization, Staffing Company has violated Title VII.[147]

B. Coverage of Foreign Nationals

Title VII prohibits discrimination against individuals in the United States[148] by covered employers, regardless of citizenship or work authorization.[149] A worker's immigration status is not relevant to the underlying merits of a discrimination charge.[150] The Commission takes the

[145] At the time this document was drafted, the Wage and Hour Division of DOL investigates alleged violations of some visa program requirements, including H-1B and H-2A visa requirements. *See id.*

[146] E-Verify is an Internet-based program administered by the U.S. Department of Homeland Security and the Social Security Administration through which employers can verify the employment eligibility of their employees. *See also supra* note 60.

[147] For detailed information on referral procedures for charges that may be within the jurisdiction of the Office of Special Counsel, EEOC investigators should consult the *EEOC/OSC Memorandum of Understanding*, *supra* note 28.

[148] Title VII's prohibition on employment discrimination also protects individuals in United States territories. *See supra* note 3.

[149] *EEOC Threshold Issues Compliance Manual*, *supra* note 3, at § 2-III A.4, https://www.eeoc.gov/policy/docs/threshold.html#2-III-A-4 ("Individuals who are employed in the United States are protected by the EEO statutes regardless of their citizenship or immigration status."). *Cf. Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (holding "Tit[le] VII protects all individuals from unlawful discrimination, whether or not they are citizens of the United States.").

[150] *See supra* note 2.

position that foreign nationals outside the United States are covered by the EEO statutes when they apply for U.S.-based employment.[151] However, if the employment is outside the United States, individuals who are not U.S. citizens are not protected by the EEO statutes.

VII. RELATED ISSUES

The following subsections discuss issues related to Title VII's prohibition on national origin discrimination, including:

- Retaliation for opposing national origin discrimination or otherwise participating in protected activity.
- Title VII's application to foreign employers in the United States and American employers in foreign countries.

A. Retaliation

Title VII prohibits retaliation, or reprisal, against an individual because he or she has opposed unlawful national origin discrimination or participated in the EEO process by filing a charge or complaint, testifying, assisting, or participating in any manner in an employment discrimination investigation, proceeding, or hearing.[152]

There are three essential elements of a retaliation claim:

- **Employee Protected Activity** – opposition to discrimination or participation in any EEO investigation, proceeding, or hearing;

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[151] *See* Brief of the EEOC as Amicus Curiae In Support of the Plaintiff-Appellant, in *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861 (4th Cir. 2001) (No. 00–1963). The Fourth Circuit rejected the Commission's position, 250 F.3d at 866-67, finding that the Age Discrimination in Employment Act of 1967 (ADEA) does not protect foreign nationals who apply for U.S.-based employment from outside the United States. Other courts have agreed with the Commission's position. *See Denty v. SmithKline Beecham Corp*., 109 F.3d 147, 150 n.5 (3d Cir. 1997) (finding that the place where a job is performed constitutes the location of the work site for ADEA coverage purposes); *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, 76 F. Supp. 2d 476, 477-78 (S.D. N.Y. 1999) (holding that a non-U.S. citizen was not protected by the ADEA with respect to employment in Beijing and Hong Kong, even though employment interviews and hiring decisions were made in New York); *Gantchar v. United Airlines, Inc*., No. 93 C 1457, 1995 WL 137053, at *4-6 (N.D. Ill. Mar. 28, 1995) (finding that Title VII jurisdiction is dependent on the location of potential employment).

[152] 42 U.S.C. § 2000e-3(a). *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59-60 (2006) (holding that Title VII's anti-retaliation provision forbids employer actions that "discriminate against" an employee for opposing any practices made unlawful by Title VII). The other statutes enforced by the EEOC also prohibit retaliation. *See* 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203 (ADA); 29 U.S.C. § 215(a)(3) (Equal Pay Act); 42 U.S.C. § 2000ff-6(f) (GINA).

- **Materially Adverse Action** – any adverse treatment by the employer (beyond a petty slight or a trivial annoyance), that might dissuade a reasonable person from participating in protected activity;[153] and
- **Causal Connection** – between the protected activity and the adverse treatment.[154]

The most obvious types of retaliatory adverse actions are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge because the individual engaged in protected activity.[155] Other types of retaliatory adverse actions include threats, warnings, reprimands,[156] transfers,[157] negative or lowered evaluations,[158] or verbal or physical abuse (whether or not it rises to the level of creating a hostile work environment) because an individual engaged in protected activity. Sometimes an employer takes a materially adverse action in reprisal against an employee who engaged in protected activity by harming a third party who is closely related to or associated with the complaining employee.[159]

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[153] *See Burlington N.*, 548 U.S. at 68 (citation omitted) (finding that a retaliation claim is actionable under Title VII if a reasonable person would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination'").

[154] *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013) (holding in a private sector Title VII retaliation case that "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action"). *But see Mabus*, 629 F.3d 198, 205-06 (D.C. Cir. 2010) (holding that the "but-for" standard applicable to non-federal sector ADEA claims does not apply to ADEA claims filed by federal employees).

[155] *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998) (stating that suspensions and terminations "are by their nature adverse").

[156] *Millea v. Metro-N. R.R. Co.*, 658 F.3d 154, 165 (2d Cir. 2011) (applying the Title VII retaliation standard for materially adverse action in an FMLA retaliation claim, the court held that a letter of reprimand is materially adverse even if it "does not directly or immediately result in any loss of wages or benefits, and does not remain in the employment file permanently"); *Ridley v. Costco Wholesale Corp.*, 217 F. App'x 130 (3d Cir. 2007) (upholding jury verdict finding that, although the demotion was not retaliatory, post-demotion transfer to warehouse, counseling notices for minor incidents, and failure to investigate complaints about these actions were unlawful retaliation).

[157] *Kesler v. Westchester Cty. Dep't of Soc. Servs.*, 461 F.3d 199, 209 (2d Cir. 2006) (finding that the transfer of a high level executive without any loss of pay was actionable as retaliation where he was relegated to a non-supervisory role and non-substantive duties).

[158] *See generally Peques v. Mineta*, No. 04-2165 (GK), 2006 WL 2434936 (D.D.C. Aug. 22, 2006) (finding that the lowering of an evaluation to "proficient" after prior assessments of "distinguished" or "meritorious," along with harassing actions at a company meeting and a supervisor's comments that plaintiff's EEO complaint will "come back to haunt you" were sufficient to permit a retaliation claim to proceed to the jury).

[159] *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011); *see also EEOC v. Fred Fuller Oil Co., Inc.*, No. 13-cv-295 PB, 2014 WL 347635 (D.N.H. Jan. 31, 2014) (refusing to dismiss retaliation claim involving a close friend of the individual who had filed an EEOC charge).

Example 34
Retaliation Violates Title VII

Steve and Joseph work for Construction, Inc. Joseph complains to Construction Inc.'s human resources department about harassment based on his Polish national origin. In support of Joseph's allegations, Steve provides a statement describing their supervisor's derogatory comments to Joseph about people from Poland. Steve subsequently is not assigned any overtime, and he learns that he was removed from the overtime list. He files an EEOC charge alleging that the denial of overtime is retaliatory. Construction, Inc. states that Steve was not assigned overtime because there was less work. The investigation reveals no significant change in the amount of extra work or overtime available before and after Steve was removed from the overtime list. Other employees with similar qualifications to Steve have not experienced a change in the amount of overtime they have been assigned. The EEOC finds that these facts establish reasonable cause to believe that Steve has been subjected to retaliation in violation of Title VII for participation in an EEO investigation.

Example 35
Threats to Report Immigration Status as Retaliation

ABC employs farm workers and other laborers in its agricultural and food processing facilities. ABC suspects that many of its employees may be undocumented workers, but, in order to meet its production demands, ABC does not request documentation to verify the employees' work status. Several ABC employees who are undocumented complain to a supervisor about sexual harassment by male co-workers, including physical assaults and persistent unwelcome sexual remarks and advances. The ABC supervisor does nothing to address the employees' complaints, orders them to return to work, and threatens to expose their immigration status if they continue to complain about the harassment. Threatening to report to government authorities that the workers are undocumented because they have opposed unlawful harassment, or actually making such a report about workers because they engaged in protected activity, is likely to deter them from engaging in protected activity and therefore is materially adverse and actionable as retaliation under Title VII. If an EEOC charge is filed, ABC can be found liable for retaliation. The workers' undocumented status is not a defense.[160]

[160] *See* sources cited *supra* note 2 (discussing Title VII's protection of employees and applicants for employment in the U.S.); *see also EEOC v. DeCoster Farms*, No. 3:02-cv-03077-MWB (N.D. Iowa, consent decree entered September 2002) (EEOC alleged that supervisors sexually harassed and raped female workers, especially those of Mexican and other Hispanic national origin - some of whom were undocumented at the time - and threatened to deport and terminate any of the victims who cooperated with EEOC; settlement provided $3.5 million; undocumented victims were granted deferred status and visas); *EEOC v. Quality Art*, No. 2:00-cv-01171-SMM (D. Ariz.) (stipulated judgment entered August 2001) (case involved sexual and national origin harassment; employer threatened to report employees to the INS and subsequently contacted INS in an attempt to secure arrest and/or deportation; settlement provided $3.5 million to victims).

B. Foreign Employers in the United States and American Employers in Foreign Countries

The following sections discuss how Title VII applies to foreign employers in the United States and American employers in foreign countries. With a few exceptions, foreign employers doing business in the United States are covered by Title VII to the same extent as American employers.[161] Similarly, American employers in foreign countries are generally covered by Title VII in the same manner as American employers located in the United States with respect to employees who are U.S. citizens.[162]

1. Foreign Employers

Title VII applies to a foreign employer doing business in the United States to the same extent as an American employer,[163] unless the foreign employer is exempted from coverage by a treaty or international agreement. When permitted by treaty, a foreign employer may discriminate in favor of its own citizens.[164] Title VII does not apply to a foreign employer's actions in a foreign country, provided that the foreign employer is not controlled by an American employer.[165]

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[161] Foreign employers doing business in the United States are also generally covered by the ADEA, Title I of the Americans with Disabilities Act of 1990 (ADA), the Equal Pay Act of 1963 (EPA), and Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). For a detailed discussion of the coverage requirements for employers, refer to *EEOC Threshold Issues Compliance Manual*, *supra* note 3, at § 2-III B, https://www.eeoc.gov/policy/docs/threshold.html#2-III-B.

[162] American employers in foreign countries are also generally covered under the ADEA, the ADA, and GINA with respect to U.S. citizens, but the Equal Pay Act does not apply in foreign countries. For further discussion of these issues, refer to EEOC, *Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States* (Oct. 20, 1993), http://www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html; EEOC, *Policy Guidance on Application of the Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Pay Act of 1963 (EPA) to American firms overseas, their overseas subsidiaries, and foreign firms*, (Mar. 3, 1989), http://www1.eeoc.gov/policy/docs/extraterritorial-adea-epa.html.

[163] *See, e.g., Ward v. W & H Voortman, Ltd.*, 685 F. Supp. 231, 233 (M.D. Ala. 1988) ("any company, foreign or domestic, that elects to do business in this country falls within Title VII's reach"); *see also Morelli v. Cedel*, 141 F.3d 39, 44 (2d Cir. 1998) (noting that American laws prohibiting employment discrimination would apply to a foreign employer's operations in the United States).

[164] *See, e.g., Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1401 (7th Cir. 1997) (finding that the Treaty of Friendship, Commerce and Navigation between the United States and Japan entitles companies of either nation to discriminate in favor of their own citizens even if the other nation prohibits such discrimination); *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1147 (3d Cir. 1988) (finding that treaty a between the United States and Korea permitting each to have businesses in the other country managed by their own citizens did not conflict with Title VII's prohibition against intentional national origin discrimination).

[165] 42 U.S.C. § 2000e-1(c)(2).

2. American Employers in Foreign Countries

Title VII prohibits discrimination against U.S. citizens by American employers operating in foreign countries,[166] unless compliance with Title VII would cause an employer to violate the laws of the foreign country in which the workplace is located.[167] An employer operating in another country that is incorporated in the United States will generally have sufficient ties to the United States to be deemed an American employer.[168] If an employer is not incorporated in the United States or is not incorporated at all (e.g., it is a partnership), various factors will be considered to determine whether the employer has sufficient connections to the United States to make it an American employer. These factors include the employer's principal place of business, the nationality of dominant shareholders and/or those holding voting control, and the nationality and location of management.[169]

Title VII also prohibits discrimination against U.S. citizens abroad by a foreign employer that is controlled by an American employer.[170] The determination of whether an American employer controls a foreign employer is based on the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control of the American employer and the foreign employer.[171]

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[166] *See* 42 U.S.C. §§ 2000e(f), 2000e-1(c). Title VII's protections do not extend to non-citizens working in foreign countries. 42 U.S.C. § 2000e-1(a); *see Shekoyan v. Sibley Int'l Corp*., 217 F. Supp. 2d 59, 65 (D. D.C. 2002) ("Congress has provided that Title VII will only have an extraterritorial application when: (1) the employee is a United States citizen and (2) the employee's company is controlled by an American employer."), *aff'd*, 409 F.3d 414, 421-22 (D.C. Cir. 2005); *Iwata v. Stryker Corp*., 59 F. Supp. 2d 600, 604 (N.D. Tex. 1999) (same).

[167] 42 U.S.C § 2000e-1(b).

[168] *See generally* Restatement (Third) of Foreign Relations Law § 213 (1987) ("For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.").

[169] *See* Restatement (Third) of Foreign Relations Law § 213 cmt. d (1987).

[170] 42 U.S.C. § 2000e-1(c)(1); *see Watson v. CSA, Ltd*., 376 F. Supp. 2d 588, 593 (D. Md. 2005) ("if an American 'employer' is deemed to 'control' the foreign company, any Title VII violation by the foreign company is presumed to constitute a violation by the American employer").

[171] 42 U.S.C. § 2000e-1(c)(3); *Watson*, 376 F. Supp. 2d at 594-99 (denying foreign corporation's motion to dismiss former employee's Title VII discrimination claim because the evidence established that the foreign corporation was controlled by an American employer). This is the same test used by courts in determining whether two or more employers constitute an "integrated enterprise." *See Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 815-16 (9th Cir. 2002) (finding that a U.S.-based company and its parent company in Tijuana, Mexico were an "integrated enterprise" for purposes of Title VII coverage).

VIII. PROMISING PRACTICES

Highlighted below are some promising practices[172] that employers may wish to adopt to promote equality of opportunity and reduce the risk of Title VII violations based on national origin discrimination. Although each workplace is different, and the practices below are not comprehensive, well designed policies, training, and organizational structures play an important role in fostering equality of opportunity.

Promising practices are not themselves legal requirements, but rather are proactive measures that may help reduce the risk of violations and foster more diverse and inclusive workplaces. Carefully designed policies and practices that are implemented well may decrease complaints of unlawful discrimination, cultivate talent, and enhance employee productivity. They also may aid recruitment and retention efforts.

A. Recruitment

Reliance on word-of-mouth recruiting may magnify existing ethnic, racial, or religious homogeneity in a workplace and result in the exclusion of qualified applicants from different national origin groups. As previously noted, word-of-mouth recruiting may result in a Title VII violation where an employer's actions have the purpose or effect of discriminating based on national origin.

To avoid inadvertently excluding some national origin groups, it is a promising practice to use a variety of recruitment methods to attract as diverse a pool of job seekers as possible. Depending on the type of position and the level of skill required, such recruitment tools may include a combination of newspapers of general circulation, as well as those directed at groups underrepresented in the workforce, and online postings; job fairs and open houses; publicly posting job announcements with a variety of community-based organizations as well as widely-distributed sources; conducting outreach through professional associations and search firms; recruiting from internship and scholar programs; and referrals using in-person connections.

An employer may wish to state that it is an "equal opportunity employer" and to draft employment advertisements to notify prospective applicants of all qualifications, including any qualifications related to language ability.

B. Hiring, Promotion, and Assignment

Employers can reduce the risk of discriminatory employment decisions, including hiring, promotion, and assignment decisions, by establishing written objective criteria for evaluating candidates for hire, promotion, or assignment; communicating the criteria to prospective candidates; and applying those criteria consistently to all candidates. If an employer has clearly defined criteria for employment decisions, managers can be more confident that they are selecting the most qualified candidates, and candidates will understand how they will be evaluated. Appropriate objective criteria for employment decisions will be tied to business needs, and help ensure that all individuals are given an equal opportunity when being considered

[172] *See supra* note 14.

for open positions, assignments, and promotions. An employer's decision to apply criteria that are not related to the performance of the job, such as real or perceived coworker or customer preferences may improperly screen out individuals based on their national origin. When conducting job interviews, employers can promote nondiscriminatory treatment by asking similar questions of all applicants and by limiting their inquiries to matters related to the position in question. Employers are encouraged to discuss the selection process with officials tasked with making hiring decisions and hold officials accountable to ensure non-discrimination in hiring.

C. Discipline, Demotion, and Discharge

Employers can reduce the risk of discriminatory employment decisions by developing objective, job-related criteria for identifying the unsatisfactory performance or conduct that can result in discipline, demotion, or discharge.[173] One common approach for addressing misconduct is to implement a progressive discipline policy directed at correcting employee misconduct. Such a policy would clearly communicate conduct standards and performance expectations to employees and provide employees with the opportunity to improve their performance before progressive discipline or discharge occurs.

When languages other than English are spoken in the workplace, employers are advised to take proactive measures to ensure that their policies are communicated effectively to all their employees. Such measures may include translating the policies into, and offering training in, the languages spoken by employees.

Employers also will benefit from carefully recording the business reasons for disciplinary or performance-related actions and sharing these reasons with the affected employees. Because any policy related to discipline or poor work performance will require some exercise of managerial discretion, employers are advised to monitor the actions of inexperienced managers and encourage them to consult with more experienced managers when addressing difficult performance issues.

D. Harassment

The most important step for an employer in preventing a hostile work environment is clearly communicating to employees through policies and actions that harassment will not be tolerated and that employees who violate the prohibition against harassment will be disciplined. Harassment and other policies should be shared with all employees, including temporary and contract workers. In addition, effective and clearly communicated procedures for addressing complaints of national origin harassment are important. An employer's policies and procedures will not be effective if its employees are unable to understand[174] or utilize the complaint

[173] *See, e.g., Woodsford v. Friendly Ford,* No. 2:10-cv-01996-MMD-VCF, 2012 WL 2521041, at *12 (D. Nev. June 27, 2012) (concluding that "lack of [a clear employment policy defining insubordination] could lead a reasonable juror to believe that Defendant's proffered non-retaliatory business reason was a post-hoc rationalization for terminating [the plaintiff]").

[174] *See EEOC v. V & J Foods, Inc.*, 507 F.3d 575, 578 (7th Cir. 2007) ("If [victims of harassment] cannot speak English, explaining the complaint procedure to them only in English would not be reasonable."); *EEOC v. Spud Seller, Inc.*, 899 F. Supp. 2d 1081, 1095 (D. Colo. 2012) (questioning whether the

process.[175] Therefore, employers are advised to consider translating their policies into the languages spoken by employees with limited English skills, conducting trainings on the policies in these languages, and providing interpreters or other language assistance to ensure that employees can report harassment confidentially.[176] Employers also may train managers on how to identify and respond effectively to harassment.[177]

Employees who are harassed are encouraged to act at an early stage to prevent the continuation of the objectionable conduct. This may include notifying the official designated by the employer's complaint or harassment procedures or another appropriate individual who is not specifically designated by the employer to accept complaints about the conduct.

IX. CONCLUSION

The increased cultural diversity of today's workplaces presents new and evolving issues with respect to Title VII's protection against national origin discrimination. Once issued, the Commission's national origin enforcement guidance will assist EEOC staff in their investigation of national origin discrimination charges and provide information for applicants, employees, and employers to understand their respective rights and responsibilities under Title VII.

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employer "adequately informed employees who spoke and read only Spanish about its anti-harassment policy" where the "[t]he Handbook that contained the policy was in English, and there is no evidence that its provisions were translated into Spanish or that written translations were supplied to Spanish speaking employees").

[175] *See, e.g., V & J Foods, Inc.*, 507 F.3d at 579 ("A policy against harassment that includes no assurance that a harassing supervisor can be bypassed in the complaint process is unreasonable as a matter of law.").

[176] Information about the EEOC and the laws it enforces that may be useful to employers when drafting personnel policies is available in Arabic, Chinese, Haitian Creole, Korean, Russian, and Vietnamese on the EEOC's website at: www.eeoc.gov/languages/ (last visited May 20, 2016). A Spanish language version of the EEOC's website can be accessed at: http://www.eeoc.gov/spanish/index.html (last visited May 20, 2016), *Comisión para la Igualdad de Oportunidades en el Empleo*, http://www.eeoc.gov/spanish/index.html (last visited May 20, 2016). Additionally, a fact sheet designed to help small business owners better understand their responsibilities under the federal employment anti-discrimination laws is available in Amharic, Arabic, Bengali, Burmese, Chinese, English, French (Canadian), French (European), German, Greek, Haitian Creole, Hindi, Hmong, Japanese, Karen, Khmer, Korean, Laotian, Marshallese, Nepali, Polish, Punjabi, Russian, Somali, Spanish, Tagalog, Thai, Ukrainian, Urdu, and Vietnamese on the EEOC's website at: http://www.eeoc.gov/eeoc/publications/ (last visited May 20, 2016). Further, under the Americans with Disabilities Act, an individual with a disability may request a reasonable accommodation in his or her preferred primary language and the employer may be required to provide the accommodation absent undue hardship. *See* 42 U.S.C. § 12112(b)(5).

[177] Typically, employer policies related to national origin harassment can be part of broader policies addressing all prohibited forms of harassment, including harassment based on race, color, sex, religion, age, disability, or genetic information. For more information on preventive measures related to harassment generally, refer to EEOC, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), http://www.eeoc.gov/policy/docs/harassment.html.