

Pre-Employment Screening/Recruiting: The Do's and Don'ts



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Three Areas of Federal Law Involved:

- ◆ Immigration and Nationality Act (“INA”)
- ◆ Title VII – National Origin Discrimination
- ◆ Title VII – Religion Discrimination
 - Good Source: www.eeoc.gov

Immigration and Nationality Act (INA)

- ◆ Prohibits “citizen status” discrimination with respect to recruiting, hiring, and termination
- ◆ Enforced by the U.S. Department of Justice (Office of Special Counsel)
- ◆ “Protected individuals” include:
 - U.S. citizens and lawful permanent residents
 - Temporary residents
 - Refugees and asylees
- ◆ Not Protected:
 - Non-Immigrant Visa holders (H1-B,L,J&F)

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Title VII – National Origin

◆ Prohibited Conduct:

- Discrimination in employment (e.g., hiring) on the basis of national origin

◆ Covered Persons:

- All individuals, regardless of their immigration status
- Employer generally not required to hire undocumented workers

Title VII – National Origin

- ◆ What is National Origin Discrimination?
- ◆ Ethnicity: discrimination against members of an ethnic group, e.g., Arabs, Kurds, even Gypsies
- ◆ Physical, linguistic or cultural traits:
 - For example: Traditional African-style dress

Title VII – National Origin

◆ Perception: Act on belief that applicant is a member of a particular national origin group, e.g., based on speech, mannerisms and appearance

■ For example:

- Sikh turban
- Woman wearing hijab
- “Muhammad” name

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Accent Discrimination:

✦ Not unlawful if effective oral communication in English is required

■ For example:

- Teaching
- Customer Service, etc.

– **AND** –

✦ Foreign accent materially interferes with applicant's ability to communicate orally in English

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Not Appropriate to Ask on a Job Application:

- ◆ "Are you a U.S. citizen?"
- ◆ "Where were you born?"
- ◆ "What is your religion?"
- ◆ "Have you been arrested in the past?"

Appropriate Questions on a Job Application:

- ◆ “Are you legally authorized to work in the United States?”
- ◆ “Will you have authorization to work by [start date]?”
- ◆ “An offer of employment is contingent on the applicant’s production of documentation required by the Immigration Reform and Control Act of 1986 (IRCA).”

Appropriate Questions on a Job Application:

- ◆ “Have you been convicted of a felony in the last five years?” (You are not obligated to disclose any criminal history record information which has been ordered expunged, sealed or impounded. Further, answering “yes” does not automatically disqualify you for employment. The nature and timing of any conviction and the relevance to the job being sought will be considered by the employer.)
- ◆ “Our Company is an equal employment opportunity employer.”

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Title VII – National Origin

- ◆ Typical Problem Areas in Recruiting:
 - Word-of-mouth hiring only. Not per se illegal, but...
 - Recruiting exclusively from community-based organization catering to one nationality
 - Nepotism-only hiring
 - Walk-in recruiting only

Title VII – National Origin

◆ English-Only Rules?

- Geno's Steakhouse: "This is America. When ordering, please speak English."
- \$200,000 settlement with EEOC involving Highland Hospital

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Title VII – National Origin

◆ English-Only Rules?

■ Two ways to support English-only rule:

- “A Business Necessity”
- Safety

■ In Illinois, at least, must advise employees in advance

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Title VII – National Origin

◆ Tips on English-Only Rules:

- If English-only **is** required, include that as job qualification in ads, etc.
- If English-only **is not** required, consider translating job application into predominant language (for example, Spanish)

Title VII – Religion Discrimination

◆ Prohibited Conduct:

- Discrimination on the basis of an applicant's or employee's religious beliefs
- Post-9/11 backlash against Muslims
- Once hired, religious and grooming practices may need to be accommodated

◆ Covered Persons:

- All individuals

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Conclusion

◆ Basic Concept:

- Treat all individuals the same with regards to:
 - Taking applications
 - Use same application for all jobs
 - Take applications only in writing
 - All applicants to apply for a specific position
 - Publicize deadline for submission of applications
 - Keep under active consideration for established time period. For example: 90 days

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Conclusion

◆ Basic Concept:

- Job announcements

- Interviews

- Use script and ask same questions of everyone

- Describe work schedule and ask applicant if he or she can meet it

- Train interviewers on EEO and Immigration laws

- Job Offers

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Conclusion

◆ Basic Concept:

- Verifying eligibility to work
 - Get an I-9 from everyone
 - Don't require more documentation of "foreign looking" applicants
- Hiring
- Firing – Use legitimate, non-discriminatory reasons