"English Only" Rules In Healthcare Facilities

October 25, 2018 | by Timothy Ford

Regulation of languages in an increasingly multicultural workplace remains a sensitive and challenging issue for healthcare providers in 2018. As the modern workforce in the United States becomes increasingly culturally diverse, an increasing proportion of employees in the healthcare field speak in languages other than English, particularly in senior living residences, such as skilled nursing homes and assisted living facilities. Moreover, language diversity continues to increase due to efforts by employers to seek out bilingual and multilingual employees who can communicate with a broader range of residents and family members.

The ability of employees to speak languages other than English can be an asset, particularly when staff needs to communicate with non-English speaking residents to understand their needs and the status of their health. However, it is often necessary for employees to be able to read and write in English, regardless of the ability of the employee to speak a second language. There are legitimate business reasons for this requirement, as it directly correlates to the health, safety and welfare of the residents/patients the community serves. Simply put, an employee who cannot read or write in English results in potential liability for the facility and may compromise the health of the residents.

This article addresses some of the common circumstances that employers may encounter with respect to what rules may apply to regulating or prohibiting the use of languages in the workplace, and how those rules mesh with the general framework of employment discrimination laws.

Can Employers have English Only Requirements?

A question that healthcare providers often ask is whether they are permitted to have "English Only" rules for their employees, particularly when such rules are based on a legitimate business purpose. This concern is especially relevant in circumstances where safety or efficiency concerns require clear

communication between employees. While individual state legal standards vary on this topic, there are a few overarching principles that employers may keep in mind.

In New Jersey, the Appellate Division found in the case of *Rosario v. Cacace* **[i]** that even though a language requirement by an employer is not *per se* unlawful, a "plaintiff who could prove that an English-only or English-mainly rule was used as a surrogate for discrimination on the basis of national origin, ancestry, or any other prohibited grounds, would qualify for relief under [the New Jersey Law Against Discrimination]." Essentially, you must have a legitimate purpose for the requirement and take steps not to single out any single national origin or language.

Similarly, the EEOC provides that it views English-only policies as presumptively discriminatory of national origin. Notably, the EEOC's standards apply nationwide, and should be considered a baseline for employers. However, the EEOC notes that exceptions to the rule may apply where there is a business necessity for such rules.

Further complicating the issue is that while several federal courts have supported the EEOC's interpretation, others have rejected the EEOC's application of section 1606.7 in Title VII lawsuits involving English-only policies. The U.S. Supreme Court has yet to make a decisive determination on the issue, which leaves no bright line rule for employers in maintaining compliance with federal standards. Without any bright lines, the prudent course of action is for employers to tread carefully when implementing any such policies.

In short, although "English Only" rules may be permissible in New Jersey and other jurisdictions with similar standards, employers must carefully evaluate the legitimate business need for a policy, and make determinations as to whether there are alternatives to applying such rules, as such rules will encounter strong scrutiny if examined by the EEOC or a state/ federal court.

Even if a healthcare facility/provider concludes that such a rule will be necessary for legitimate business purposes, employers must be extremely careful in how they craft and implement such a rule. As a basic consideration, employers must make sure that one specific language is not targeted unfairly (i.e. if Spanish is prohibited, then French, Mandarin Chinese, etc. must also be prohibited) as this may

demonstrate discriminatory intent.

Can Employers Require their Employees to Capably Speak English as a Job Requirement

Another dilemma that employers may face is whether they can require employees to speak English proficiently as a requirement for their positions. In healthcare facilities, the need to communicate effectively in English is often fundamental to the duties of the job.

As a general rule, employers are allowed to make employment determinations based on an employee's ability to speak English, so long as the English language ability is fact a key requirement of the position. Similarly, if a job requires an employee to speak a language other than English proficiently, an employer can lawfully require that an employee speak the other language fluently for that position. However, similar to "English Only" rules, employers must be thoughtful about whether such rules must be implemented, and if so, how they are implemented.

As a practical matter, similar to "English Only" requirements, employers must be extremely careful not to allow English language requirements to be discriminatory in effect. In circumstances where the employee's job duties involve resident care, the requirement that employees speak and write in English can properly be characterized as a legitimate business need. In the vast majority of the circumstances, these requirements in the healthcare setting will be recognized as reasonable. Of course, a carefully crafted policy is recommended and careful consideration must be given to the job posting identifying this requirement.

[i] *Rosario v. Cacace*, 337 N.J. Super. 578, 585-86 (App. Div. 2001)