English-Only Rules In Today's Multicultural Workplace

June 22, 2018 | by Alex Lee

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As published in Law360, June 22, 2018

Regulation of languages in an increasingly multicultural workplace remains a sensitive and challenging issue for employers in 2018. As the modern workforce in the United States becomes increasingly culturally diverse, an increasing proportion of employees in the workplace speak in languages other than English. 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 clients, customers and business partners.

However, recent events have highlighted the passionate and sometimes controversial feelings evoked by the use of diverse languages in the American workplace; feelings that often mirror attitudes regarding the delicate balance between cultural diversity versus cultural assimilation in the greater American culture.

Many readers will recall the headlines in May 2018, when New York attorney Aaron Schlossberg was caught in a tirade on viral video bemoaning the use of Spanish language by employees of a New York City café. The subsequent media backlash against Schlossberg was swift, with many commentators taking offense to the racial undertones against the Hispanic employees.

Yet earlier that month on May 3, 2018, under somewhat more muted coverage, the U.S. Equal Employment Opportunity Commission announced a lawsuit against the national retail grocery chain Albertsons Inc. alleging that Albertons subjected various Hispanic employees to discriminatory treatment through the implementation of language rules prohibiting the use of Spanish in the workplace. Albertsons, which employs 280,000 employees for various well-known brands such as Albertsons, Vons, Safeway and Pavillions, has denied the allegations, but litigation remains ongoing.

While the recent #MeToo movement has served as an important checkpoint for employers in refreshing their familiarity with rules regarding sexual harassment and general employment discrimination principles, the above events highlight how many employers, even those as large and sophisticated as Albertsons, may not be as well-acquainted with the nuances of the law regarding English-only rules, despite the high potential for such sensitive issues to create problems in the current environment.

In light of these trends, employers must remember that when managing employees, personal political views must take a backseat to the relevant applicable legal principles, at the risk of substantial liability to the employer. What may seem like common sense to one employer (or controversial to another), may not align with the reality of the current state of the law.

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 employers 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 [1] 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]."

It is easy to see how such rules may be misused for discriminatory purposes, since language and ethnicity/national origin are often so closely interrelated, and might be used by unscrupulous employers in an attempt to legitimize unlawful discrimination. As seen in Rosario, New Jersey courts are very wary about the use of English-only rules misused as a disguised form of discrimination.

Similarly, the EEOC, under 29 C.F.R. § 1606.7, 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 business 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. Furthermore, such rules should not apply to situations where and when the rules are not necessary, including for employees in positions where verbal communication is not an essential part of the job. For example, a position in sales or in customer service might allow such a requirement, while a position as a laborer, or working in a warehouse might not. Similarly, such rules should not be applied during break and lunch hours, or other times when employees are not on duty.

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 many workplaces, the need to communicate effectively in English may be a key requirement in properly fulfilling the duties of a 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 in 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.

In the noteworthy case of EEOC v. Wisconsin Plastics Inc.,[2] a lawsuit filed by terminated non-English speaking employees, the court denied the employer's motion to dismiss the lawsuit explaining that "[i]n some cases the lack of English language proficiency might not be a legitimate, nondiscriminatory reason for termination, but that is essentially a question of fact that will turn on the particular circumstances of every case." In Wisconsin Plastics, the employer in terminating its employees,

attempted to justify the decision based on their inability to proficiently speak English as required for the job responsibilities.

In its decision, the court recognized that all things being equal, an employee who speaks fluent English can be more valuable to an employer than one who does not. However, in finding against the employer, the court recognized the unfortunate reality that although "language ability per se is not the legal equivalent to a protected class like race or national origin, language can sometimes serve as a proxy, or stalking horse, for discrimination against a protected class."

Important to note in this case, was that the employer's position was not helped by the fact that numerous Asian and Hispanic employees were subsequently replaced by a large majority of Caucasian employees. Moreover, the employer in Wisconsin Plastics, conceded that the ability to speak or read English was not a necessary part of the production operator jobs in question, thus raising serious questions about whether the employer's justifications were legitimate.

So what can employers take away from this decision? 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. Such requirements should not be applied to positions that do not require communication as a major part of the job requirements. Employers must also recognize that such considerations may come into play when taking action to terminate or take employment actions with respect to employees based on their language proficiency, and must take these factors into consideration.

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

[2] EEOC v. Wisconsin Plastics Inc., No. 14-C-663 (E.D. Wis. May 5, 2016).

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