Language Requirements: Navigating Legal Minefields in Today's Multicultural Workplaces

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As the modern workplace becomes increasingly culturally diverse, a byproduct of diversity is that many employees in the workplace may be more comfortable speaking in languages other than English. In addition to this natural growth in language diversity among employees, language diversity also 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.

While many employers are now familiar with the basics of equal employment opportunity laws, a less familiar topic concerns what rules apply when managing a workforce that communicates in languages other than English.

This blog 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.

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 when it is based on a legitimate business purpose, particularly in circumstances where safety or efficiency concerns require clear communication between employees.

In Rosario v. Cacace, 337 N.J. Super. 578, 585-86 (App. Div. 2001), the New Jersey Appellate Division found 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 Equal Employment Opportunity Commission under 29 C.F.R. § 1606.7, provides that it views English-only policies as presumptively discriminatory of national origin. 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.

In short, although "English Only" rules may be permissible in New Jersey, employers must carefully evaluate the legitimate business need for a policy, and make determinations as to whether there are alternatives to applying such rules, 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 is necessary for 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 were 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 situation 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 capably speak 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 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. No. 14-C-663 (E.D. Wis. May 5, 2016), the Court, in denying a motion to dismiss a lawsuit filed by terminated non-English speaking employees, explained that "[i]n some cases the lack of English language proficiency might not be a legitimate, non-discriminatory reason for termination, but that is essentially a question of fact that will turn on the particular circumstances of every case."

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. In Wisconsin Plastics, the employer in terminating the employees, attempted to justify the decision based on their inability to proficiently speak English. 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 case 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 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.

If you encounter any of these issues in your business, contact Einhorn Barbarito to speak to an attorney to assist you in taking the best course of action in your unique situation.