



## Limited English Proficient Individuals: The Value of Translation

*Potential sources of discrimination against limited English proficient members of your workforce, and how to steer clear.*

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The U.S. Office of Civil Rights defines “limited English proficient [LEP] individuals” as “individuals who do not speak English as their primary language and who have a limited ability to read, write, speak or understand English.”<sup>1</sup> Federal and state laws, rules, and regulations prohibit discrimination against LEP individuals, which discrimination can take many forms, including failure to provide access to information and services.

### What Are the Issues?

If your company has an LEP member in its workforce and you aren’t offering training programs in non-English languages, your company may be exposed. Because language is an integral characteristic of someone’s nationality, discrimination based on language constitutes national origin discrimination under both Title VI and Title VII of the Civil Rights Act of 1964. The Immigration Reform and Control Act of 1986 and Section 274B of the Immigration and Nationality Act of 1986 also prohibit national origin discrimination.

LEP discrimination can take many forms. For example, on May 3, 2018, the Equal Employment Opportunity Commission (EEOC) announced it had filed suit against the national retail grocery chain, Albertsons, Inc., alleging that Albertsons subjected certain employees to a hostile work environment and harassment under

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<sup>1</sup> <https://www.hhs.gov/civil-rights/for-providers/laws-regulations-guidance/guidance-federal-financial-assistance-title-vi/index.html>

Title VII as a result of, among other things, implementation of an English only policy, which prohibited Spanish-speaking employees from speaking Spanish around non-Spanish speaking employees and customers.<sup>2</sup> In addition, the EEOC alleges that Albertsons publicly reprimanded policy violators and failed to take action when affected employees complained.<sup>3</sup>

### What do you need to do for your Employees?

**Access to Information:** Most sophisticated employers know that having clear policies in place, and implementing them consistently, can be the best defense to employment-related harassment or discrimination claims, as it allows the employer to demonstrate a “good faith effort” and “reasonable care” to prevent the discriminating or harassing conduct.<sup>4</sup> However, for LEP persons, demonstrating receipt of the policy and training in English may not be enough. Though federal law does not require employers to provide LEP members of the workforce with direct translations of employment policies (including anti-discrimination policies), it may be in an employer’s best interest to do so in order to demonstrate that the applicable LEP person actually received access to the policy information. Further, providing training in the LEP’s native language may also be beneficial to demonstrate a good faith effort. In at least one case, failure to both provide translated policies and training in Spanish factored into a court’s determination that an employer had not exercised reasonable care.<sup>5</sup>

**Access to Relief:** An employer must also provide a way for LEP employees to exercise their rights under the policy—in their spoken language. Hiring bilingual managers isn’t a requirement (and if limited to a single bilingual manager, may not be enough—as in *Albertsons*, he/she may him/herself be the subject of the complaint), but making translation services available is essential. If your employees cannot complain in the language that they speak, then your policy cannot be effective.

**A Note About English-Only Policies:** If your company needs an English-only policy (EOP), drafting and implementation should be handled with great care. While the EEOC recognizes that an employer must be able to communicate with its employees, it will presume that an EOP that applies at all times and in all places in the workplace violates Title VII.<sup>6</sup> However, an English-only policy may be

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<sup>2</sup> <https://www.eeoc.gov/eeoc/newsroom/release/5-3-18b.cfm>; *EEOC v. Albertsons Co.*, 2018 WL 2126927 (S.D. Cal).

<sup>3</sup> *Id.*

<sup>4</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

<sup>5</sup> *See., e.g., EEOC v. The Spud Seller, Inc.* (D.Colo 2012) No. 10-cv-02381-MSK-KLM (in which a video summarizing an employer’s policy in Spanish without an exactly translated policy fell short of the reasonable care standard).

<sup>6</sup> *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993) (stating, “an employee meets the prima facie case in a disparate impact cause of action merely by proving the existence of the English-only policy.”).

compliant with Title VII if it only applies at certain times and is justified by a business necessity.<sup>7</sup> For example, a compliant EOP may require employees to use English in emergency situations, when communicating with English-speaking customers, and with respect to communications about safety in the workplace. However, if hostility toward LEP persons is evident in the workplace, even a less restrictive EOP can be discriminatory. The discomfort of some employees with respect to use of another language in their presence will not justify implementation of an EOP.

**Treatment During the Hiring Process:** It is crucial for an employer not to treat differently any applicant based on his/her birth, country of origin, ancestry, native language, or accent. Having on-boarding processes and policies that apply uniformly to all new or potential hires is essential. For example, in the U.S. Department of Justice's recent settlement with the University of California, San Diego, the DOJ concluded that it is discriminatory to have in place different on-boarding procedures for noncitizens and to require more frequent reverification of work authorization.<sup>8</sup> It is similarly discriminatory to require LEP persons to produce more (or different) documents than English-fluent persons are required to produce, complete, or update.

### Upcoming Webinar

These are just some of the many examples of the *Do's* and *Don'ts* for effectively training and preventing discrimination against LEP's. To learn more, make plans to join [GableGotwals'](#) free webinar on June 29, 2018, from 10:30-11:30 a.m.

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<sup>7</sup> EEOC Enforcement Guidance on National Origin Discrimination §V(C)(4) ("Notice and Enforcement of Restrictive Language Policy") (Nov. 18, 2016).

<sup>8</sup> Press Release, Department of Justice, Office of Public Affairs, Justice Department Settles Immigration-Related Discrimination Claim Against University of California, San Diego (May 10, 2018) (on file with author) available at <https://www.justice.gov/opa/pr/justice-department-settles-immigration-related-discrimination-claim-against-university>.