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Talking The Talk: Can An Employer Require Its Workforce to Speak English?

Discrimination against applicants and employees based on the individual's race or national origin is prohibited by law. The Equal Employment Opportunity Commission (EEOC) has published guidelines indicating that discrimination based on various language requirements may be an unlawful form of national origin and/or race discrimination. Thus, both courts and the EEOC will carefully scrutinize any hiring or retention requirements related to the ability to speak English.

English Proficiency. Proficiency in English may be an acceptable job requirement if the employer can show that the requirement is a "business necessity." In general, proficiency in English is a matter of business necessity if the employee's inability to speak English would materially interfere with his or her ability to perform the duties of the position effectively. For example, courts have upheld the imposition of English proficiency requirements in communication-dependent jobs, such as hospital positions involving the health and safety of patients, teaching jobs, customer service positions requiring regular contact with the public, and telemarketing jobs. Similarly, courts have upheld the terminations of employees whose inability to speak English rendered them incapable of receiving workplace instructions or communicating effectively with coworkers.

English Only. Rules requiring that English be the only language spoken in the workplace often face tougher scrutiny. The EEOC presumes that a complete ban on speaking any language other than English discriminates on the basis of national origin. Some courts, however, have taken a more fact-specific view. One federal appellate court recently refused to find that English-only policies are always improper and required the employee to demonstrate that the rule actually had a discriminatory impact. Similarly, another federal appellate court found the question of whether any particular English-only policy is discriminatory is a fact-specific matter for a jury to decide. The court ruled that, while English-only policies could not be presumed to be discriminatory, they likewise could not be presumed to not be discriminatory.

Regardless of whether the rule is related to English proficiency or English-only, the following best practices should be considered:

- Carefully analyze whether either English proficiency or English-only rules make sense in your workplace. The answer may vary depending on the specific job duties, the work environment, and similar factors.
- Clearly inform employees of the circumstances under which they will be required to speak English and the consequences of not doing so. Doing so will make it more likely that employees will follow the policy, and also will tend to thwart any allegation that the policy was a non-existent "unwritten" rule selectively enforced against any particular individual or group.
- Before implementing an English language requirement, consider whether any current employees will be unable to meet the standard and, if so, what assistance you are willing to provide in order to assist them in complying with the rule.

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In This Issue:

Workers' Compensation Reform Legislation — Substitute Senate Bill No. 7

Substitute Senate Bill No. 7 will become effective on June 30, 2006. Its provisions will restore needed balance to Ohio's workers' compensation law, a balance that had been disturbed by a number of Ohio Supreme Court decisions. The Bill addresses employer concerns about the system without directly reducing benefits. The more important parts of the Bill may be summarized as follows:

Aggravation — At present, an injured worker may receive workers' compensation benefits for the slight or mere aggravation of a pre-existing condition. The Bill requires that there be a "substantial" aggravation of a pre-existing condition, documented by objective clinical or diagnostic findings, in order for an employee to receive benefits for a pre-existing condition.

Longevity of Claims — Claims in Ohio remain alive for ten years from the last payment of compensation or medical bill; *i.e.* an ever-receding horizon. The length of time for claims to remain open will be reduced to five years from the last payment of compensation or medical bill.

Permanent Total Disability — Permanent total disability compensation is paid for the life of the injured worker. The Bill contains the first statutory definition of permanent total disability compensation and provides that, in order to receive such compensation, the impairment from the allowed conditions in a claim must prevent the employee from engaging in employment using present skills or those skills that he might reasonable obtain. Benefits will not be paid when the inability to work is due to non-allowed conditions, the aging process, the injured worker's voluntarily abandonment of employment, or the injured worker's failure to take steps to improve his situation.

Non-Working Wage Loss — Non-working wage loss is paid to an injured worker who cannot find work because of the allowed conditions in his claim, despite a good faith job search. Such benefits may be paid for up to 200 weeks. Non-working wage loss will be restricted to 52 weeks maximum, on the theory that if someone is looking for work and cannot find work for a full year, wage loss compensation is an ineffective form of compensation and the injured worker should be looking toward rehabilitation or other efforts to change his situation. Working wage loss compensation may be paid for up to 226 weeks.

Judicial Relief — An injured worker may delay an employer's court appeal from getting to trial for at least two years through a voluntarily dismissal of his complaint. The Bill prohibits the injured worker from so delaying the employer's appeal.

Employer Fraud and Late Payment — The penalty for the late payment of premiums or assessments and the penalties for employer fraud have been strengthened. Ohio employers who comply with the law will no longer subsidize those who ignore their obligations.

"Mental-Mental" Claims — The Supreme Court created a loophole in the rule requiring there to be physical harm for an injured worker to recover for an emotional condition. The Bill reinforces that there must be physical harm prior to an employee's receiving compensation for a psychological condition.

Group Rating Protection — Currently, a single claim can prevent an employer from enjoying the benefits of participation in a group rating program. The Bill provides that the Administrator may establish a program to minimize the impact that a single claim might have on an employer who is in a group rating program and permits an employer to pay the first $5,000 of medical costs in the claim, without those costs going into the employer's experience.

Surplus Fund Reimbursement — The Bill permits self-insuring employers to opt out of surplus fund reimbursement of subsequently reversed decisions and the employer's assessments will be reduced, much in the same way that employers who opted out of rehabilitation and handicap reimbursement had their assessments reduced.

Effective Date — Certain provisions of the Bill that will likely be applicable to all claims that are pending as of that date. These are remedial measures which deal with the procedure for processing claims. Those provisions of the law that affect the substantive rights of the injured worker or increase liabilities for employers will only apply to claims with a date of injury on or after June 30, 2006.

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