JONES WALKER

E*ZINES
June 2006 Vol. 35

Labor & Employment
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TWENTY-TWO JONES WALKER ATTORNEYS RECEIVE TOP RANKINGS IN *CHAMBERS USA: AMERICA'S LEADING BUSINESS LAWYERS*. EIGHT PRACTICES ALSO RECOGNIZED

Jones Walker announces that 22 of their attorneys were included in *Chambers USA: America's Leading Business Lawyers* for the state of Louisiana, while eight Jones Walker practice areas received top rankings. Using 40 full-time independent researchers who spent eight months conducting over 7,000 interviews of clients and peers in the U.S. marketplace to arrive at consensus opinions to support its rankings, Chambers & Partners Publishing identified leading business lawyers and ranked practice areas. Jones Walker ranked number one in Louisiana in **Banking & Finance, Corporate/M&A, Employment: Mainly Defendant, Energy & Natural Resources, Environment, Gaming & Licensing,** and **Litigation: General Commercial,** and ranked number two in **Real Estate**. The 22 attorneys selected were **F. Rivers Lelong, Jr., J. Marshall Page, III** and **Thomas Y. Roberson, Jr.** (Banking & Finance); **Douglas N. Currault II, Curtis R. Hearn, William B. Masters, L. Richards McMillan, II, Dionne M. Rousseau, R. Patrick Vance and Richard P. Wolfe** (Corporate/M&A); **H. Mark Adams, Cornelius R. Heusel, Clyde H. Jacob, III** and **Sidney F. Lewis, V** (Employment: Mainly Defendant); **John J. Broders** and **Carl D. Rosenblum** (Energy & Natural Resources); **Michael A. Chernekoff** and **Thomas M. Nosewicz** (Environment); **J. Kelly Duncan** (Gaming & Licensing); **Pauline F. Hardin, Harry S. Hardin, III** and **R. Patrick Vance** (Litigation: General Commercial); and **Charles A. Landry** (Real Estate). To access the Chambers USA online directory, go to www.chambersandpartners.com/usa.

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ENGLISH-ONLY RULES AND OTHER FOREIGN WORKER ISSUES

¿Usted no habla inglès: problema o ningún problema?

Are you surprised when you call the local pizzeria for take-out and can't understand the employee who answers the phone because she speaks another language? What about the guy fixing your roof who yells, "¡cuidado!", as you narrowly avoid being hit on the head by his nail gun as it falls from your roof? Will the next step be the teller at your local bank who asks if you want your cash in pesos, yen, or some other currency? The last U.S. Census report (which didn't include all the currently-illegal-and-perhaps-soon-to-be-legal aliens) indicated there are nearly 50 million **Americans** who speak a language other than English at home. Nearly half that number "speak English less than 'very well.'" And, in case you haven't paid attention to newspapers and TV, from your local paper to the *New York Times* and CNN to Univision, the combination of Congress overhauling our immigration laws and controversy over foreign-language versions of the National Anthem are forcing language barrier issues to the forefront. So it's no wonder more and more employers are considering whether to require "English-only" at work and even whether to refuse hiring individuals who can't speak English.

At first blush, you may think that you can just refuse to hire individuals who can't speak English. Title VII of the Civil Rights Act of 1964 (Title VII), however, prohibits you from refusing to hire an individual based on national origin, and the inability to speak English often becomes intertwined with national origin considerations. Issues of race, color and religion also can come into play. The Immigration and Nationality Act also prohibits discrimination based on citizenship status unless the individual is an unauthorized alien. So where does this leave employers? Things may be confusing, but there is no need to create an interpreter position yet.

Say what?

Title VII permits employers to refuse to hire individuals where the ability to communicate effectively in English is an integral job requirement. To establish a *prima facie* refusal to hire case, an employee must show that: 1) he is a member of a protected class; 2) he was qualified for, and applied for, a job; 3) the employer (you) rejected him; and 4) another equally, or less qualified, applicant who is not a member of the same protected class was hired for the job. Even when the other elements are proven, courts generally reject discrimination claims by employees who can't speak English when speaking English is a necessary job qualification.

When is it necessary to speak English? A U.S. hotel, for example, may require that all successful applicants for a front desk position be fluent in English because of the constant interaction with the general public (presumably who speak English), but the hotel may not be able to require the same proficiency from a chambermaid where interaction is minimal. At least one court, however, has found that the public contact need not be that significant in allowing an English speaking requirement. That court found that a garbage collector position required English-speaking skills to instruct the public as to the procedures for dumping trash at garbage transfer stations. Consequently, the court concluded the employer was justified in refusing to hire a Haitian woman who didn't speak English.

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Where the ability to communicate effectively in English is an integral job requirement, an English-only policy or practice may be the logical answer. Such policies or practices can provide a legitimate basis for refusing to hire individuals who neither *hablas* nor *parlez vous Anglais*. However, Title VII requires a "business necessity" to support an English-only policy.

The EEOC agrees that the ability to communicate in English is a business necessity for postal workers who regularly deal with customers and other employees who speak only English. The courts also have upheld English-only policies that require sales personnel to use English when dealing with customers unless the customer speaks another language. Other reasons considered to be a business necessity include when English is needed for a business to operate safely or efficiently such as communicating with customers, co-workers, or supervisors who speak only English. Employees whose job duties require communication with co-workers or customers also may be required to speak English so a supervisor who speaks only English can supervise those employees effectively. The ability to speak English also may be a business necessity in emergencies when a common language is required and most employees and customers speak English. Nevertheless, English-only policies recently have come under scrutiny because of Title VII's prohibition of national origin discrimination. For this reason, employers may be required to show there is no reasonable alternative to the practice or policy of requiring "English-only."

Papeles, por favor.

EEOC guidelines distinguish between English-only polices that apply under certain circumstances and those that apply at all times. 29 C.F.R. § 1606.7. Policies that are always in effect are presumed to violate Title VII and receive the closest scrutiny. Those that apply only at certain times, however, though technically permissible when justified by business necessity, recently have drawn more attention. For example, in *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006), several Hispanic employees (who spoke both English and Spanish) sued a town in Oklahoma claiming its English-only policy, which applied to all work-related and business communications except situations when using a foreign language was necessary, discriminated against them on the basis of race and national origin in violation of Title VII. The employer defended itself on the ground that the policy was necessary to prevent communications, safety, and morale problems. Although the court agreed that the employer's justification for the policy was reasonable, it found little evidence of any actual problems and, therefore, denied the employer's motion to dismiss.

Whatcha talkin' 'bout?

The ability to speak English **clearly** may be a valid underlying job requirement in addition to the ability to speak English. In other words, employers may require an ability to speak English **clearly** in certain positions that require constant contact with the general public. Thus, a thick accent that hampers the general public's understanding of an employee's spoken English also may provide the basis for a refusal to hire. But an accent that may be difficult to understand may not be the basis for demotion when the employee's position requires little contact with the public and minimal supervision by interaction with other employees who speak only English.

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The Equal Employment Opportunity Commission ("EEOC") recommends that employers carefully distinguish between accents that are "merely discernable" and those that interfere with the skills necessary to communicate effectively in a given job. The EEOC provides examples of positions that may require clear oral English communication such as teaching, customer service, and telemarketing. Still, the EEOC has determined that an employer's termination of an Iranian employee with language deficiencies from a librarian position was a cover for discrimination.

Conclusiòn

Employers with English-only policies or requirements should have the necessary documentation to support the stated business necessity behind their policies. Such documentation should include a written record of any and all problems resulting from communication breakdowns including employee and customer complaints as well as security and safety problems. In addition, the English-only policy/practice should be narrowly tailored to encompass instances supported by the documentation. By implementing an effective workplace communications policy, you can better prepare yourself to defend against potential discrimination claims by employees who speak little or no English.

THE CAP RUNNETH OVER

Be it a special set of skills, particularized knowledge, or a willingness to perform jobs American workers traditionally have not wanted, foreign workers can add a lot of value to your company. Thus, more and more American employers are looking to hire foreign workers to fit their needs.

As you've probably heard, the government caps at 65,000 the number of H-1B visas for "professionals in a specialty occupation." The U.S. Citizenship and Immigration Services (USCIS) announced on June 1, 2006, that it already had received enough H-1B petitions to fulfill the fiscal 2007 quota as of May 26, 2006, the earliest that the H-1B quota has ever been reached, less than two months after the agency started accepting petitions on April 1, 2006, and more than four months before the next fiscal year even begins on October 1, 2006. Clearly, the need for qualified foreign workers is great and the current cap is insufficient to meet the demands of U.S. employers. There's no such thing as a "last minute" hire under the H-1B visa, you need to plan your H-1B hires nearly eighteen months in advance.

Maybe it's the bottle that needs to be changed

The only thing on which everyone can agree is that the current "cap" and other employment aspects of our immigration policy aren't working—for employers or employees. On May 25, the Senate passed a comprehensive immigration reform bill (S.2611) that would legalize 8-10 million undocumented persons, establish a guest worker program, toughen immigration enforcement, raise the annual H-1B cap from 65,000 to 115,000, and get rid of the family and employment-based backlogs for those waiting in the long line to become permanent residents. The Senate bill also includes a "path to citizenship" that will allow undocumented immigrants who have been in the U.S. five years or more to apply for citizenship by paying fines and back taxes and immigrants who have been here for 2-5 years to apply for citizenship at border checkpoints. An amendment would mandate English as "common and unifying language" of the United States.

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The Senate bill is dramatically different from the House bill (H.R. 4437) passed in December, which dealt more with enforcement issues and order security. Unlike the Senate bill, the House bill contains no "path to citizenship" or any increase in the number of H-1B visas.

The House and Senate now must see whether any compromises can be worked out.

But Don't Play Spin the Bottle with Your Records

What do the House and Senate agree on? Employers who knowingly hire or continue to employ undocumented workers will be punished severely. The House bill uses a sliding scale based on the number of offenses and contains penalties ranging from $15,000-$40,000. The Senate establishes a flat fine of $20,000. Both proposals contain much higher fines than are currently in place.

Don't wait to be audited or investigated to see whether you've been complying with your obligation to verify your employees are authorized to work in the United States. Now is the time to have your counsel conduct I-9 audits.

- Have you implemented a tickler system to ensure proper reverification?
- When is the last time your employees who review I-9 documents were trained on what is/isn't acceptable in the way of forms, how to correct violations, penalties, etc.
- What do your independent contractor or third party vendor contracts provide with respect to immigration compliance?

You and your counsel should review these issues now. Don't wait to be caught off guard and suffer the penalties, not to mention bad publicity. While it's still uncertain what form the legislation will take, what's clear is that the immigration laws will be tougher and the burdens on employers will be more burdensome.

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LABOR & EMPLOYMENT INTERNET RESOURCES

- HRhero.com
- Louisiana Employment Law Letter

"IN THE SPOTLIGHT"—UPCOMING SPEECHES/PRESENTATIONS BY JONES WAKER LABOR & EMPLOYMENT ATTORNEYS

- South Texas College of Law CLE—Employment Law Conference
  When Disaster Strikes: The Legal and Human Resources Response
  H. Mark Adams—Panelist
  July 13-14, 2006, South Texas College of Law, Houston, Texas

- Council on Education in Management
  FMLA Update 2006
  H. Mark Adams—Moderator
  September 14-15, 2006, Baton Rouge, Louisiana

- HRHero.com—11th Annual Advanced Employment Issues Symposium
  Disaster Management
  H. Mark Adams—Speaker
  Workplace Sabotage: Employers Have Rights, Too."
  Jennifer L. Anderson—Speaker
  November 8-10, 2006, Caesars Palace, Las Vegas, Nevada

- Loyola University School of Law—Annual Labor & Employment Law Conference
  The Application of the National Labor Relations Act in Non-Union Workplace
  Sidney F. Lewis, V—Speaker
  November 9-10, 2006, Pan American Life Center, New Orleans, Louisiana

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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