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Four Rules for Tax-Exempt Organizations With Volunteers

Part One of a Two-Part Article

By Ofer Lion

The use of volunteers and interns by nonprofits comes with legal risks, particularly from potentially applicable wage and hour laws and from harms caused by or happened upon the volunteers and interns, risks which may be reduced by following four basic rules. Those nonprofits fortunate enough to have people willing to serve without compensation should consider carefully the possible legal implications. This article discusses both federal and California state law.

Part One herein focuses on wage and hour laws. The forthcoming Part Two focuses on injuries to volunteers, injuries caused by volunteers, and reimbursing the expenses of volunteers.

The Rules

Rule #1 — Do Not Pay Volunteers in Cash or in Kind

Reimburse expenses only according to a written "accountable plan."

Rule #2 — Have Them Sign a Volunteer Agreement

Among other things, it says that you will not pay them. Other potential provisions discussed herein include waivers of liability and the acknowledgment and acceptance of the nonprofit's workplace, data privacy and other applicable policies.

Rule #3 — Get Insurance Going Both Ways

Have appropriate volunteer accident and volunteer liability policies, and consider opting into workers' compensation insurance for volunteers, if available.

Rule #4 — Screen and Supervise

Know who they are, know what they are doing, and provide them with a safe working environment.

Wage and Hour Laws: Characterization As Interns, Volunteers or Employees

The numbers of unpaid interns are skyrocketing, and the federal Labor Department and California, New York, Oregon and other state regulators have begun

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Overreaching English-Only Policies Spell Trouble for Employers

By Delyanne Barros

In May 2011, eight Hispanic employees of the City of Rochester, NY, filed an action against the City, among other defendants, for implementing a sweeping English-only policy that prohibited Spanish from being spoken at all times, including breaks and whether it was within or outside the presence of non-Spanish speaking employees. (*See Rodriguez v. City of Rochester*, No. 6:11-cv-06256-MAT (W.D.N.Y. 2011).) According to the complaint, the employees' manager told them, "if you want to speak Spanish, do it at home and not at the workplace." (*Id.*)

Legal Background

Rochester is a thriving economic metropolitan city, home to heavy-hitting corporations such as Xerox, Kodak, GM, and Bausch & Lomb. According to the 2010 census, it is the third largest city in New York State, with a population of approximately 211,000 people, 16.4% of whom identify themselves as Hispanic. (Racial Demographics of Area Towns, ROCDOCS, http://rocdocs.democratandchronicle.com/database/racial-demographics-area-towns (last visited May 23, 2011).)

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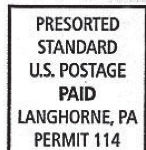

Volunteer Workers

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investigations and levied fines against employers with "interns" that they believe should be treated and paid like employees. Recently, two men who worked among dozens of other interns on the movie "Black Swan" filed suit in federal court claiming that the production company had violated minimum wage and overtime laws.

Some questions you may want to ask and answer include: Do you owe your volunteers or interns the minimum wage for their time? Could you be liable for back pay, interest, penalties and damage awards, unpaid taxes, unemployment contributions and possibly face criminal charges for your executives?

Volunteers and interns may want to file for unemployment compensation benefits when they are "released." They could pursue a wrongful termination suit or seek access to the health and retirement benefits you offer to employees. A volunteer's descendants (*i.e.*, greedy kids) may want to sue for the life insurance benefits you offer to employees.

Volunteers for Nonprofits

To reduce the risk that individuals who volunteer or donate their services to nonprofits become characterized as employees subject to wage and hour laws, federal and California laws appear to require that those individuals serve: 1) freely and not under pressure; 2) without being compensated in cash or in kind (*see* Rule #1); 3) without anticipation of compensation (*see* Rule #2); 4) for public service, religious or humanitarian objectives (*see* Rule #2 again — this is one of the "other things" that a volunteer agreement could set forth); and 5) not in a commercial enterprise. There are special rules, discussed under "Paid employees who also 'volunteer' for their nonprofit employers" below, that address employees who provide volunteer services to their nonprofit employers.

Federal Law: The Fair Labor Standards Act (FLSA)

The FLSA specifically provides that the "term 'employee' does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries." Note that the FLSA would need to apply in the first place. The law generally applies to individuals and enterprises engaged in a business activity connected to interstate commerce. However, its coverage is quite broad and it appears somewhat rare for the law not to apply.

While this exception is quite narrow, the Supreme Court has stated that the FLSA was not intended "to stamp all persons as employees who without any express or implied compensation agreement might work for their own advantage on the premises of another." (*Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).) The U.S. Department of Labor (DOL), in administering the FLSA, has provided that it "follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable or similar non-profit organizations that receive their service."

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One Employer's Strategy Against the DOL's Crackdown On Employee Misclassification

By Annette A. Idalski, Daniel D. Pipitone and Kelly E. Campanella

Imagine that your client, a small business owner, alarmed by a recent visit from the United States Department of Labor (DOL), calls you. The DOL's Wage and Hour investigator has informed your client that he owes the government millions of dollars for violating the Fair Labor Standards Act (FLSA) and misclassifying as independent contractors hundreds of individuals that the investigator believes are employees. Moreover, the investigator states that the client will have to treat his contractors as employees going forward, thus forcing him to change his business practices drastically.

DOL Directive

There is no doubt that a significant number of employers and their counsel will be faced with this very scenario — otherwise known as the "so-called misclassification label." The reason for this is that the Obama Administration has made the enforcement of employee misclassification cases its "Strategic Goal #1 in 2011." U.S. Department of Labor Strategic Plan Fiscal Years 2011-2016. The DOL devoted a whopping $12 million of its FY 2011 budget to pursuing misclassification enforcement actions, alone. U.S. Dep't of Labor, Fyi 2011 Budget In Brief 5 (2010). Another $13 million of that budget has been delegated to competitive misclassification training grants to the States and to the DOL's Solicitor of Labor for the purpose of litigating misclassification cases. U.S. Department of Labor Strategic Plan Fiscal Years 2011-2016. Such training appears to be needed, given the low percentage of misclassification enforcement actions pursued in prior years. As a result of the significant financial resources and high priority that the DOL has placed on these investigations, employers must be ready to defend themselves when the DOL comes knocking. How would you advise your client?

Until recently, employment counsel likely would have informed the employer in the above example that he has two choices: 1) enter into a settlement and pay the back wages, overtime and liquidated damages demand, which would have the effect of completely changing his business practices; or 2) refuse to settle and wait to defend a future "enforcement" action filed by the DOL, all the while accruing additional back wages and liquidated damages as time passes if he is ultimately found wrong.

Employers now may have a third option as a result of one Texas employer's recent victory against the DOL: Refuse to settle and be the "first to file" a lawsuit against the DOL seeking a declaratory judgment that the employer has not violated the FLSA and, thus, does not owe any back wages or liquidated damages. This is precisely what occurred in *Gate Guard Services, L.P. v. Hilda L. Solis*, United States Department of Labor., United Stated District Court for the Southern District of Texas, Victoria Division, Case No. 6:10-CV-91.

The Facts

Gate Guard Services, L.P. (GGS) enters into agreements with oil field operators by supplying them with gate attendants that perform the job of logging in vehicles entering and departing oil field operation sites throughout Texas. GGS treats those gate attendants, many of whom are retirees, as independent contractors and pays them between $100 and $175 per day. Many of the gate attendants are "snow birds" who travel to Texas during the winters only. The gate attendants enter into independent contractor relationships with GGS so they can work for multiple gate attendant companies, supplement their Social Security income, and maintain a flexible schedule. While performing their assignments, the gate attendants live out of their recreational vehicles and are visited only every two weeks by GGS service technicians, who service septic tanks and provide fuel for generators.

In July 2010, a DOL Wage and Hour investigator initiated an investigation, in large part, to determine whether GGS's gate attendants were properly classified as independent contractors. Just a few months later, in early October 2010, the DOL advised GGS of its findings. Specifically, it concluded that the gate attendants were misclassified as independent contractors and that GGS, therefore, must compensate the gate attendants at the federal minimum wage rate, plus overtime, for all hours worked beyond 40 hours per week. In fact, the investigator said that GGS must compensate the gate attendants 24 hours a day, seven days per week. According to the DOL's Summary of Unpaid Wages, GGS allegedly owed its approximately 345 attendants an astounding $6.2 million in minimum wage and overtime. (That back wage amount also includes overtime pay for service technicians who service the septic tanks and provide fuel for the gate attendants' recreational vehicles.) Additionally, the DOL insisted that GGS must treat its gate attendants as employees going forward. In November 2010, GGS again met with DOL representatives, who advised that enforcement litigation against the company would be initiated if it did not comply with the DOL's directive. GGS refused to acquiesce, contending that it had not violated the FLSA.

GGS Files First

Rather than wait for the DOL to file a lawsuit, on Nov. 19, 2010, GGS filed a declaratory judgment action

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Employer vs. DOL

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against the Secretary of the U.S. Department of Labor. Specifically, GGS filed a complaint seeking a declaration from the court that GGS has not misclassified its independent contractors and that it does not owe $6.2 million in back wages. (GGS was represented by the authors.)

GGS saw several advantages to filing the declaratory judgment action. Most importantly, GGS would not need to wait to be sued by the DOL and could more expeditiously obtain a ruling on its decision to classify the gate attendants as independent contractors. Time was clearly of the essence so that GGS's owner could determine if and when his business would be affected. Additionally, from a procedural standpoint, a declaratory judgment action would allow GGS to litigate in the forum that is most convenient: the U.S. District Court for the Southern District of Texas, Victoria Division, where most of its gate attendants are located. Additionally, at trial, GGS would have the advantage of presenting its case first to a jury and the last to rebut the DOL's evidence. Given the significant financial impact on GGS's business, its attorneys felt that GGS had a right to judicial review and should not be at the mercy of the DOL as to the timing of a resolution.

Three months after GGS filed the declaratory judgment action in the Southern District's Victoria Division, the DOL filed a separate lawsuit in the Southern District of Texas's Corpus Christi Division. However, the Corpus Christi court granted GGS's motion to transfer the DOL's lawsuit to the Victoria Division. Once the case was transferred, the DOL moved to dismiss GGS's declaratory judgment action, alleging that the court lacked subject matter jurisdiction because the DOL's decision was not "final." A "final" decision is required in order to waive the DOL's defense of sovereign immunity under the Administrative Procedures Act. The court denied the DOL's motion to dismiss finding that the decision was indeed final. The court further granted GGS's motion to consolidate the two lawsuits in Victoria based on the "first-to-file" rule. The order designated GGS as the named Plaintiff and the DOL was named the Defendant.

Conclusion

This decision is significant because it means that employers who have been admonished by the DOL for alleged violations of the FLSA need not sit and wait for the DOL to file a lawsuit against them. The employer can file a declaratory judgment action seeking a court's determination as to whether the DOL's decision is justified. This case presents a novel strategy for dealing with the DOL's crackdown on employers and provides an offensive remedy for employers who truly believe that they have not violated the FLSA.

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In short, the DOL "recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations." (U.S. Department of Labor, Wage and Hour Division, Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act (April 2010), or the Fact Sheet.) "For example, members of civic organizations may help out in a sheltered workshop; men's or women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or elderly; parents may assist in a school library or cafeteria as a public duty to maintain effective services for their children or they may volunteer to drive a school bus to carry a football team or school band on a trip. Similarly, an individual may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with disabled children or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs." (U.S. Dept. of Labor, elaws Advisors, Fair Labor Standards Act Advisor, Volunteers, available at www.dol.gov/elaws/esa/flsa/docs/volunteers.asp.)

Note that different rules apply to individuals volunteering for public agencies, and for students volunteering to do certain work for the school they attend or participating in certain activities as part of the overall educational program, including activities in connection with student publications, radio stations, athletics, etc.

It is not enough that volunteers consider themselves as such. The U.S. Supreme Court has found that individuals who received food, clothing and shelter (but no money) from the nonprofit they worked for were not volunteers, regardless of their emphatic declarations that they were.

California Law

The California Labor Code defines "volunteer" as "an individual who performs work for civic, charitable, or humanitarian reasons for a public agency or corporation qualified under Section 501(c)(3) of the Internal Revenue Code as a tax-exempt organization, without promise, expectation, or receipt of any compensation for work performed." "An individual shall be considered a volunteer only when his or her services are offered freely and without pressure and coercion, direct or implied, from an employer." "An individual may receive reasonable meals, lodging, transportation, and incidental expenses or nominal nonmonetary awards without losing volunteer status if, in the entire context of the situation, those benefits and payments are not a substitute form of compensation for work performed." *See* Rule #1 and Rule #2.

A letter issued by the Legal Section of the California Division of

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Labor Standards Enforcement (DLSE) indicates that "[i]n determining whether one is a volunteer or an employee, the [DLSE] takes the position that the intent of the parties is the controlling factor. If the person intends to volunteer his or her services for public service, religious, or humanitarian objectives, not as an employee and without contemplation of pay, the individual is not an employee of the religious, charitable, or similar nonprofit corporation which receives the services."

The letter further provides that "when religious, charitable or nonprofit organizations operate commercial enterprises which serve the general public, such as restaurants or thrift stores, or when they contract to provide personal services to businesses … volunteers may not be utilized." "If the person performing the service is an employee, that person must be paid pursuant to the [Industrial Welfare Commission, or IWC] Orders. If the person is truly a volunteer, with no expectation of any pay, and is not performing services of a commercial nature, the person is not covered by the IWC Orders."

INTERNS

To avoid employee status, interns generally must be engaged primarily for educational purposes, rather than to assist the company they are interning for. While the definition of "intern" is quite narrow in a commercial context, unpaid internships (*see* Rule #1) for nonprofit charitable organizations, where the intern volunteers without expectation of compensation (*see* Rule #2), are generally not treated as employees. Nonetheless, to ensure that interns are treated as such, nonprofits should understand the applicable federal and state tests for interns generally, especially if it is at all unclear whether the intern meets the above-mentioned preferential rule for nonprofit charitable organizations.

FEDERAL LAW

With respect to whether interns must be paid the minimum wage and overtime for their services to private sector employers, the FLSA defines the term "employ" very broadly as including to "suffer or permit to work." However, the Fact Sheet provides that "[u]npaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. [The DOL's Wage and Hour Division] is reviewing the need for additional guidance on internships in the public and non-profit sectors." Without such additional guidance, it can be difficult to rely on the preferential rule in certain situations. As a result, nonprofits should understand the applicable tests for interns generally, and may wish to seek to meet the established criteria.

Generally, the DOL requires that all six of the following criteria be satisfied for an individual to be deemed an "intern" and not an employee under the FLSA.

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff (*see* Rule #4);
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship, and the Fact Sheet indicates that the "internship should be of a fixed duration, established prior to the outset of the internship" (*see* Rule #2 — one of the "other things" an internship agreement could cover); and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship (*see* Rule #1 and Rule #2).

CALIFORNIA LAW

In a 2010 Opinion Letter, California's Division of Labor Standards Enforcement, "in view of the similar purposes for the State and Federal minimum wage law generally," found it "reasonable to look to federal interpretations as guidance for purposes of enforcing the State's minimum wage and overtime provisions where there is no inconsistency."

"In the past, DLSE has articulated an '11-factor test' which consisted of the six factors from DOL's criteria interpreting federal law, plus five additional factors … " However, the additional factors "do not appear to be based upon any source statute or regulation from which they derive nor are the additional factors identified with specific case law."

As a result, it appears that California's DLSE now adheres to DOL's six-factor test for determining whether interns must be treated as employees subject to California's wage and hour laws. Nevertheless, it seems prudent for the internship period to be fairly short, such as a maximum of three to six months; interns should not displace employees or substitute for them; and the hiring of interns as employees should not be overdone.

PAID EMPLOYEES WHO ALSO 'VOLUNTEER' FOR THEIR NONPROFIT EMPLOYERS

Federal Rules

According to Labor's Field Operations Handbook, although volunteer services to nonprofits that meet the federal criteria described above "are not considered to create an employment relationship, the organizations for which they are performed will generally also have employees performing compensated service whose employment is subject to the standards of the [FLSA]. Where such an employment relationship exists, the [FLSA] requires payment of not less than the statutory wages for all hours worked in the [workweek]." Generally, those regular employees of a charitable organization must be compensated pursuant to the FLSA and cannot "volunteer" services on an uncompensated basis to handle his or her usual tasks.

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"However, there are certain circumstances where such an employee may donate services as a volunteer, and the time so spent is not considered to be compensable 'work'." One example provided is where an office employee of a hospital volunteers to sit with a patient during off-duty hours as an act of charity. Another example is where an office employee of a church volunteers to perform non-clerical services in the church preschool during off-duty hours as an act of charity.

Pledge drives are one situation where volunteers are often utilized. The Field Operations Handbook warns that "this [exception] does not mean that a regular office employee of a charitable organization can volunteer services on an uncompensated basis to handle correspondence in connection with a special fund drive or to handle other work arising from the exigencies of the operations conducted by the employer."

California Rules

In a 1998 Opinion Letter, with respect to employees of nonprofits who also volunteer for the nonprofit, California's DLSE takes the position that the intent of the parties is the controlling factor:

> In certain circumstances, a regular employee of a religious, charitable, or nonprofit organization may donate services as a volunteer. However, these may not be the usual services of that employee's job.
>
> However, when religious, charitable or nonprofit organizations operate commercial enterprises which serve the general public, such as restaurants or thrift stores, or when they contract to provide personal services to businesses, such enterprises are subject to the Industrial Welfare Commission Orders and volunteers may not be utilized.

If the person performing the service is an employee, that person must be paid pursuant to the IWC Orders. If the person is truly a volunteer, with no expectation of any pay, and is not performing services of a commercial nature, the person is not covered by the IWC Orders.

As you will note, except for the occasional situation where a bona fide employee volunteers services of a humanitarian or religious nature, the term "employee" and "volunteer" are at odds with each other since there is no expectation of payment by a volunteer.

Similar to the federal rules, it appears that the employee may not volunteer to perform his or her usual services, and volunteered services generally must be of a humanitarian or religious nature.

Follow the Four Rules

The use of volunteers and interns by nonprofits comes with legal risks that may be reduced by following the four basic rules stated above.

Part Two of this article focuses on injuries to volunteers, injuries caused by volunteers, and reimbursing the expenses of volunteers. It will provide further background and explanations of these four rules, with the goal of minimizing the legal risks associated with the use of volunteers by nonprofits.

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English-Only Policies

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Therefore, hearing a co-worker speak Spanish in the workplace should be not only commonplace, but expected. Employers should realize that these over-reaching policies are illegal, bad for employee morale, contradictory to diversity initiatives, and bad business overall.

English-only policies have long been criticized and targeted by the Equal Employment Opportunity Commission. In addition to Title VII of the Civil Rights Act of 1964, English-only policies may also violate other statutes such as Sections 1983 and 1981 of 42 U.S.C., as well as state and city laws. (*See Pacheco v. New York Presbyterian Hosp.*, 593 F. Supp. 2d 599, 604 (S.D.N.Y. 2009) (action alleging violations of Title VII, Section 1981, and New York State and City Human Rights Laws).) Although Title VII does not provide that language is a protected category, the EEOC makes the obvious connection of language and national origin, finding that language is an "essential national origin characteristic," and therefore, English-only policies should be closely scrutinized for compliance with Title VII's prohibitions against national origin discrimination. (EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.7 (Speak English Only Rules) (1980).) The Supreme Court has also noted that language "elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn," which "all too often result from or initiate racial hostility." (*Hernandez v. New York*, 500 U.S. 352, 371 (1991).)

Although the EEOC's guidelines provide that a blanket English-only policy per se satisfies the plaintiff's burden to show a *prima facie* case of discrimination, courts in the Second Circuit have not adopted this standard. (*See Pacheco*, 593 F. Supp. 2d at 613.) Rather, courts in this circuit have held that an English-only policy may be a basis for a hostile work environment claim based on national origin discrimination if the employee shows that: 1) the employer's policy had a significant and adverse impact on the employee; and 2) the employer's justified business reason for the policy is pretextual. (*See, e.g., Pacheco*, 593 F. Supp. 2d at 611-612 (granting summary judgment for employer where plaintiff failed to offer any evidence to disprove employer's legitimate, non-discriminatory business reason for English-only practice); *Perez v. New York & Presbyterian Hosp.*, No. 05 CIV5749 LBS, 2009 WL 3634038 (S.D.N.Y. Nov. 3, 2009).)

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A conclusory allegation that an English-only policy has created a hostile work environment is insufficient to establish a hostile work environment claim. (*Pacheco*, 593 F. Supp. 2d at 623.) However, courts will consider an English-only policy that unreasonably restricts an employee's ability to speak his native language as evidence of harassment. (*See Levitant v. City of New York Human Resources Admin.*, 625 F. Supp. 2d 85, 100 (E.D.N.Y. 2008).) Thus, a court will be less likely to grant an employer's motion for summary judgment where a restrictive English-only policy is accompanied by other indicia of discrimination, such as verbal harassment, excessive scrutiny, or a failure to explain the language policy to employees. (*See, e.g., Levitant*, 625 F. Supp. 2d at 100 (employer's excessive monitoring in conjunction with prohibition of employee's native language in private conversations was sufficient to raise genuine issues of material fact); *see also Maldonado v. City of Altus*, 433 F.3d 1294, 1308 (10th Cir. 2006) (employer's adoption of English-only policy without consulting with Hispanic employees is evidence of intent to create a hostile work environment), overruled on other grounds, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).)

English-Only Policy Must Result in an Adverse Employment Action

In order to prevail on a discrimination claim, an employee still must show that an employer's English-only policy resulted in an adverse employment action. As with any other discrimination action brought under Title VII, an "adverse employment action" in an English-only policy claim is a "materially adverse change in the terms and conditions of employment … more disruptive than a mere inconvenience or an alteration of job responsibilities." (*Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (internal citations and quotations omitted).) Where the employee is seeking to prove a hostile work environment claim, the employee must show that the workplace is "permeated with discriminatory intimidation, ridicule, and insult … that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." (*See Levitant*, 625 F. Supp. 2d at 97.)

Disciplinary write-ups may constitute adverse employment actions "if they affect ultimate employment decisions such as promotions, wages or termination." (*Knight v. City of New York*, 303 F. Supp. 2d 485, 497 (S.D.N.Y. 2004) aff'd, 147 F. App'x. 221 (2nd Cir. 2005).) Although threats of disciplinary action and excessive monitoring will not, in and of themselves, constitute adverse employment actions, they could also support an employee's hostile work environment claim if they are "part of a broader campaign of harassment and retaliation." (*See Levitant*, 625 F. Supp. 2d at 98-100 (supervisor threatened to write up employee when he witnessed employee speaking Russian during personal telephone calls).)

English-Only Policies Must Be Supported by a Legitimate Business Justification

An employer must show that the English-only policy is consistent with business necessity and that it is job-related in order to shift the burden back to the employee. An employer "cannot satisfy this burden simply by demonstrating the English-only rule is convenient or beneficial to its business. Instead, [the employer] must show that the asserted business necessity is vital to the business." (*EEOC v. Beauty Enters.*, No. 3:01CV378(AHN), 2005 WL 2764822, at * 3 (D. Conn. Oct. 25, 2005).) Limited English-only policies have been upheld where their purpose was to "facilitate[e] customer relations" or "to promote communication among employees and supervisors." (*Pacheco*, 593 F. Supp. 2d at 614-615 (collecting cases).) The EEOC's Compliance Manual further provides that an English-only policy may be justified by a business necessity such as "communication with customers, coworkers or supervisors" or "to enable a supervisor … to monitor the performance of an employee." (EEOC Compliance Manual § 13-V(C)(1) ("Application of Title VII to English-Only Rules") (Dec. 2002).) Some examples of legitimate business justifications that courts have upheld include "promoting employee cohesion," "improving communication with customers," and "promoting politeness to customers." (*Perez*, 2009 WL 3634038 at *14 (internal citations and quotations omitted).)

Selective Enforcement of an English-only Policy

If the employer provides a legitimate business reason for the policy, an employee may still prevail if the employee can show that a discriminatory reason motivated the employer or the employer's reason is not credible. Courts will be quick to find an English-only policy to be a pretext for discrimination if an employer does not enforce the policy with an even hand. For example, a New York district court denied an employer's summary judgment motion where an employee alleged that his employer subjected him to a hostile work environment because his supervisor forbade him to speak Russian during personal phone calls while allowing other employees to speak Spanish during working hours. (*Levitant*, 625 F. Supp. 2d 85 (denying employer's summary judgment motion to dismiss plaintiff's hostile work environment claim).)

The court found that if such a policy existed that "specifically targeted plaintiff and his native language with respect to personal conversations, such evidence could be used to support the existence of a hostile work environment based upon his national origin." (*Id.* at 99-100; *see also Velasquez v. Goldwater Mem'l Hosp.*, 88 F. Supp. 2d 257, 263 (S.D.N.Y. 2000) ("if plaintiff were able to present evidence that other employees were permitted to speak in, for example, Chinese or Portuguese, but not Spanish, such evidence could support an inference

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of intentional discrimination on the basis of national origin").)

ENGLISH-ONLY POLICIES SHOULD NOT APPLY TO OFF-DUTY CONDUCT

Courts have upheld English-only policies that required employees to speak only English during business hours and while they were in the presence of customers. (*EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408 (S.D.N.Y. 2005).) However, where a bilingual employee is prohibited from speaking a foreign language at all times, including during personal phone calls and during lunch, a court is more likely to find that such a policy results in national origin discrimination. (*See Levitant*, 625 F. Supp. 2d at 101 (denying employer's summary judgment motion to dismiss plaintiff's hostile work environment claim). Summary judgment for the employer may be avoided by evidence such as affidavits from coworkers supporting the plaintiff's claim that such a policy was applied during off-duty hours. (*Perez*, 2009 WL 3634038 at *1, 13.)

OTHER EVIDENCE OF NATIONAL ORIGIN DISCRIMINATION

Other evidence of national origin discrimination can be helpful to prove that an employer's proffered reason for an English-only policy is a pretext for discrimination. In *Maldonado v. City of Altus*, the plaintiffs alleged that an English-only policy created a hostile work environment for Hispanic workers. (433 F.3d 1294, 1301 (10th Cir. 2006).) In reversing the District Court's grant of summary judgment for the defendant, the Tenth Circuit Court of Appeals noted the extensive allegations of taunting, harassment, and racial jokes that resulted from the policy. (*Id.*) Likewise in *Levitant v. City of New York Human Resources*, the court denied an employer's summary judgment motion on a hostile work environment claim where a restrictive and selectively enforced English-only policy was accompanied by insults and excessive monitoring by the employer. The court noted that "[t]hough the alleged excessive monitoring and the alleged insults referring to plaintiff's racial and/or national origin (if credited) might not be sufficiently pervasive or severe to constitute a hostile work environment if viewed in isolation, there is also evidence that the plaintiff was given a directive forbidding him from speaking his native language in personal conversations while others were permitted to do so." Just as other evidence of national origin discrimination may be very helpful in showing that the employer's proffered justification was pretext, the absence of any such evidence may be a problem to a plaintiff trying to avoid summary judgment. (*Perez*, 2009 WL 3634038 at *14) ("Circumstantial evidence of discriminatory intent is lacking. Plaintiff's evidence of racial slurs and jokes is based solely on his own allegations and has not been substantiated by a third party's affidavit; nor do his allegations even indicate that jokes and slurs were common occurrences … ")

COURTS CONSIDER WHETHER THE EMPLOYEE IS BILINGUAL AND HIRED TO SPEAK THE FOREIGN LANGUAGE FOR BUSINESS PURPOSES

Courts have been more accepting of English-only policies where the affected employees are bilingual and have little trouble communicating without violating the policy. (*Pacheco*, 593 F. Supp. 2d at 613; *Perez*, 2009 WL 3634038 at *14.) Where an English-only policy is enforced against employees who are monolingual in their native tongue or who have difficulty communicating in English, a court is more likely to conclude that the employer's justification for the policy is pretextual. One court noted that "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth." (*Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980).) However, where the employee has little difficulty communicating in English, this factor will tend to negate a finding of pretext.

Courts are hesitant to find pretext where the employee is required, as part of his job duties, to speak the foreign language at issue to customers. Where the employer has a hiring preference for bilingual employees or where "an employee has been asked or required to speak Spanish on the job" may weigh against an inference of discrimination when evaluating a limited English-only policy. *Id*. (Citing *Long v. First Union Corp. of Virginia*, 894 F. Supp. 933, 942 (E.D. Va. 1995) aff'd, 86 F.3d 1151 (4th Cir. 1996).)

CONCLUSION

Ultimately, there is no bright line rule to determine whether an English-only policy violates anti-discrimination laws. Rather, courts balance a variety of factors when evaluating these types of claims. These factors range from the purpose of the policy to its application and effects in the workplace. Employers should be wary of applying over-reaching policies that may cause hostility and tension among its workforce. The Supreme Court noted the powerful influence of language when it stated that "just as shared language can serve to foster community, language differences can be a source of division." (*Hernandez v. New York*, 500 U.S. 352, 371 (1991); *see also Pacheco*, 593 F. Supp. 2d at 612 (citing *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (noting that "[l]anguage may be used as a covert basis for national origin discrimination").)

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