The San Diego Union-Tribune

EEOC says it's going after 'anti-American' employment discrimination

What does this mean for employers?

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UPDATED: March 10, 2025 at 6:01 AM PDT

The acting chair of the U.S. Equal Employment Opportunity Commission (EEOC) — Andrea Lucas — announced in February that she will prioritize investigation of, and enforcement actions against, employment bias against American workers in favor of foreign-born workers during her term.

She warned: "The EEOC is putting employers and other covered entities on notice: if you are part of the pipeline contributing to our immigration crisis or abusing our legal immigration system via illegal preferences against American workers, you must stop."

Is workplace discrimination based on American nationality illegal?

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on national origin, among other categories. In FY 2024, just over 9% of discrimination charges filed with the EEOC claimed discrimination based on national origin.

The EEOC's recent announcement noted, "Although Title VII's national origin nondiscrimination requirement generally means that employers cannot prefer American workers, it equally means that employers cannot prefer non-American workers and disfavor Americans."

Lucas said, "Unlawful bias against American workers, in violation of Title VII, is a large-scale problem in multiple industries nationwide." She asserted many employers have unlawful policies and practices that prefer undocumented immigrants, migrant workers, and visa holders and other legal immigrants over American workers.

While discrimination based on national origin is unlawful under Title VII, discrimination based on citizenship is not. In 1973, the U.S. Supreme Court ruled in Espinoza v. Farah Mfg. Co. that citizenship is not among the categories of discrimination the text of Title VII prohibits. That makes it tricky to assert a claim that an employer distinctly discriminated based on an employee's American national origin.

Limited guidance from courts

Few cases have addressed claims of national origin discrimination for being American. In March 2024, a New York federal court rejected a motion to dismiss a complaint brought against Emirates Airline that claimed the airline had subjected American employees and employees perceived to be American to discrimination in layoffs and access to severance benefits in the shadow of COVID-19's impact on the travel industry. In Farah v. Emirates, the court concluded the former employees' claims, if proven, could establish unlawful national origin discrimination.

The former employees alleged:

- The head of the airline's human resources department in the U.S. had repeatedly said she preferred non-American workers and had said the call center should be closed because it was staffed by American workers who "complained too much and felt entitled."
- The airline paid American workers less than United Arab Emirates nationals and other non-American workers brought from overseas to work in the United States.
- The airline provided only non-American workers with travel benefits for one year or more following termination of employment, and otherwise maintained policies that favored hiring and promoting non-American nationals.

Judge Laura Taylor Swain ruled the plaintiffs had "adequately alleged discriminatory comments attributing negative characteristics to 'Americans' and treatment that" if ultimately believed "plausibly suggest discrimination on the basis of their American origin."

The lawsuit is still pending.

Prior EEOC action against anti-American bias

In the EEOC announcement, Lucas pointed to the EEOC's "track record of investigating and prosecuting unlawful discrimination against American workers."

For example, the EEOC filed a lawsuit claiming Hamilton Growers, a Georgia agricultural firm, fired virtually all American workers while retaining workers from Mexico during at least three growing seasons. The EEOC also alleged the grower assigned American workers to pick vegetables in fields that had already been picked by foreign workers, resulting in Americans earning less than their Mexican counterparts.

The EEOC's lawsuit resulted in a 2012 consent decree in which Hamilton Growers agreed to pay $500,000 to the class of American workers on whose behalf the lawsuit was brought.

Preventing claims of anti-American bias

Employers should avoid words and actions favoring or disfavoring foreign workers over American workers because of national origin, whether because of customer preferences or the biased assumption that foreign workers work harder than American workers. It is legally risky for an employer to favor or disfavor applicants or employees because of their nation of origin or other protected characteristic. And that includes favoring or disfavoring those whose nation of origin is America.

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Originally Published: March 10, 2025 at 6:00 AM PDT