

Employers Must Watch For Nat'l Origin Bias Amid Russian War

By **Christopher Nickels and Tyler Roth** (April 28, 2022)

Several months into Russia's invasion of Ukraine, one of your employees reports to human resources that her manager mockingly called her "comrade," and said she needed to dial down her Russian accent when interacting with customers "until this whole Putin thing blows over."

U.S. employers may face challenges in navigating how to respond when employees make inappropriate comments related to the Russia-Ukraine conflict, such as the one in the above hypothetical.

Political acrimony in general can be disruptive to work operations or a company's reputation. Such acrimony can also lead to legal claims, particularly if employees feel stigmatized or subject to knee-jerk assumptions about their political beliefs based on their national origin or ethnic background.

Employers should therefore keep the following legal issues and best practices in mind when considering how to deal with political or divisive speech related to Russia's war in Ukraine.

Legal Issues

Federal and state laws prohibit national origin discrimination.

Title VII of the Civil Rights Act, and many state laws, prohibit discrimination on the basis of national origin in all aspects of employment.

According to the U.S. Equal Employment Opportunity Commission, national origin discrimination involves treating applicants or employees differently in their terms or conditions of employment because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background, even if they are not.

National origin discrimination can also involve treating applicants or employees differently in their terms or conditions of employment because they are married to or associated with a person of a certain national origin.

Discrimination can occur even among individuals of the same national origin.

While Russia may be the aggressor in Ukraine, U.S. employers must ensure their workplaces are free of any prejudice to Russian employees based on their national origin or ethnicity.

Similarly, employees' political beliefs regarding Russian President Vladimir Putin or Russia's actions in Ukraine should not be presumed based on the employees' nationality or ethnic background.

Employers may want to pay attention to concerns that Russian employees are being subjected to disparate treatment or harassed in the workplace, and employers must not



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ignore or fail to respond when they learn of employees who have engaged in offensive comments or behavior related to an employee's national origin.

State or local laws may prohibit discrimination against employees who engage in lawful, off-duty conduct.

In general, the First Amendment's right to freedom of speech does not apply to private sector employees, and thus does not protect them from discipline by their employers if they engage in inappropriate comments, including those made off-duty — on social media, for example.

The one exception is Connecticut, which has extended the First Amendment's freedom of speech protections to private employees.

However, a minority of states and localities specifically prohibit discrimination in employment based on an employee's off-duty, lawful conduct or activities — for example, California, Colorado and New York.

Still other states protect employees who participate in legitimate, peaceful political protests, including Louisiana; Missouri; Nevada; North Dakota; Washington, D.C.; and Madison, Wisconsin.

Thus, employees who engage in support, protest or other action relating to Russia's war in Ukraine, whether in person or on social media, may be protected if their employer is subject to these types of lawful conduct laws.

For example, if an employee links to an upcoming protest and publicly comments, "Stand with Ukraine, and down with all Russians," the employee may have engaged in protected conduct, depending on the state or location's applicable law.

But what if the employee is friends on social media with co-workers or customers who saw the social media post and reported to the employer that they found it offensive?

In such a situation, the employer would need to assess both its obligations under the state or local law protecting lawful, off-duty conduct, and its obligation to provide a work environment that is free from unlawful harassment or discrimination. Therefore, the employer may need to conduct an investigation to know more before immediately choosing to discipline, or not discipline, the employee.

Given the complexities that can arise from disciplining an employee for off-duty conduct, employers need to carefully assess the applicable legal landscape, and the potential ramifications of taking adverse action or terminating an employee due to off-duty conduct.

The Immigration and Nationality Act prohibits national origin discrimination in the hiring and recruiting process.

The Immigration and Nationality Act prohibits discrimination in the hiring and recruiting process based on a person's national origin or citizenship.[1]

Specifically, the INA prohibits national origin and citizenship discrimination related to recruitment, hiring decisions, termination decisions, retaliation and I-9 employment verification documentary practices.

The U.S. Department of Justice's Immigrant and Employee Rights Section has broad authority to investigate claims of national origin and citizenship discrimination under the INA.

Employers with more than three employees may not recruit or hire applicants of only a certain national origin or citizenship, e.g., only hiring Ukrainian foreign nationals. Additionally, such employers may not prohibit applicants of certain national origins or citizenships.

Lastly, employers should review their I-9 employment verification practices to ensure that they comply with all relevant rules and regulations in light of the anticipated influx of persons who have been granted refugee status, asylum status and temporary protected status — including, for example, Russian and Ukrainian nationals.

Best Practices

Employers better protect themselves from national origin discrimination claims by clearly stating in their equal employment opportunity and anti-harassment policies that they prohibit discrimination and harassment on the basis of national origin.

Similarly, employees, and particularly supervisors, should receive routine training that addresses not only discrimination and harassment based on more well-known protected statuses such as race or sex, but also national origin.

Such training should educate employees on the type of behavior that is prohibited and reinforce the employer's policies for reporting potential violations.

Having a general sense of current events may also help employers to better understand why certain politically charged issues may be creeping into the workplace in ways that certain employees may feel they are at a higher risk of discriminatory conduct.

While criticism of Russia's war in Ukraine is certainly not discriminatory in itself, overgeneralizations about Russians, Ukrainians, or employees based on their Russian or Ukrainian ethnicity may be offensive or perceived as prejudice.

An employer that receives or hears of a workplace concern involving potentially offensive comments or other behavior related to an individual's national origin, such as that in the opening hypothetical, should promptly initiate an investigation to determine what occurred, and whether the conduct violates the company's equal employment opportunity or anti-harassment policies. If it does, the employer should take appropriate action.

Employees who engage in policy violations should be counseled, and — if appropriate, based on the conduct or prior issues — given written discipline or even separated from their employment if the circumstances warrant such action.

Likewise, the employer should notify the appropriate employees of the investigation's determination, and whether or not the employer is taking remedial action based on its investigation.

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[1] 8 U.S.C. § 1324b(a)(1); 28 C.F.R. § 40.200(a)(1)(i).