

MIAMI-DADE COUNTY EQUAL OPPORTUNITY BOARD

GUIDELINES FOR LANGUAGE REQUIREMENTS IN THE WORK PLACE

**Approved by:
Board of County Commissioners
Resolution No. 471-91 (May 7, 1991)**

Language requirements or policies may, in certain circumstances, constitute unlawful employment discrimination under Chapter 11A of the Miami-Dade County Code, as amended (Chapter 11A). These guidelines are for the purpose of providing guidance beyond that currently available from the U.S. Equal Employment Opportunity Commission (EEOC), for use in the analysis of

charges of employment discrimination involving language requirements.

EEOC defines national origin discrimination broadly as including, but not limited to, the denial of equal opportunity because of an individual's, or his or her ancestor's place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.

The scope of Title VII of the Civil Rights Act of 1964, as amended (Title VII) questions regarding charges of national origin employment discrimination are addressed by the EEOC on the issues of:

1. Adverse impact of speak-English-only rules on protected Title VII groups (*EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. 1606.8.*);
2. Accommodation of employee language needs (*i.e. need to accommodate non-English speaking persons if the English language is not job-related*);
3. Language fluency requirements for employment to determine if requirements are job related (*EEOC Guidelines on Discrimination Because of National Origin, 29 CFR 1606.6 [b] [1]*);
4. Discrimination on the basis of manner of speaking or accent (*EEOC Policy Statement on Discrimination Based on Manner of Speaking or Accent, EEOC Manual – Section 623, p. 159*); and
5. Immigration-related practices, which may violate Title VII (*Immigration Reform and Control Act of 1986*).

To a large degree, the Miami-Dade County Equal Opportunity Board (MDCEOB), which implements Chapter 11A, follows the guidelines of the EEOC in the analysis of charges of employment discrimination. Within Miami-Dade County, the uniqueness of our population suggests the need for

amplification of the existing Federal guidelines on language fluency requirements, be that fluency in English or in any other language. The EEOC states, “Rules requiring employee fluency in English or in any other language may constitute unlawful discrimination under Title VII. In most cases, such requirements operate as employee selection procedures and are justified by employers on the basis that fluency in the language in question is a necessary qualification for the job” (EEOC Manual – Section 623, p. 177).

At issue is whether the requirement of knowledge of a particular language, or of more than one language, is a bona fide occupational qualification (BFOQ), a business necessity, or whether it is an action which adversely impacts the members of a particular race, color or national origin more than another in a discriminatory fashion. It is likely that requiring knowledge of a particular language will have an adverse impact on members of one or another racial or national origin group. (It should be noted that what is being discussed is knowledge of a particular language, as opposed to national origin. While it is most likely that a native of a particular country will speak a specific language, a non-native may have fluency in the language and would therefore fulfill the requirement of knowledge of a particular language). The standard that will be used by the MDCEOB to determine whether the language requirement is unlawful discrimination will be based on the theories of disparate treatment and adverse impact, and will examine whether the language requirement reflects a bona fide occupational qualification or business necessity. The investigation will include review of the following issues:

1. Safe and efficient operation of the business: if the language requirement can be shown to be necessary for the health and safety of employees, the public and/or customers, then it will be allowable under the business necessity exception. Examples of such necessity might

include: hospital switchboard operators, where the hospital administration identifies a service population's need for coverage in a specific language and chooses to provide such coverage on all shifts; security guards, where the employer identifies a need for employees to be able to communicate with residents in the community being patrolled.

2. Essence of the business: if the language requirement can be shown to be necessary to the performance of the essence of the business, then it will be allowable under the business necessity exception. Examples of such necessity might include: teachers of any language, where it is likely to have an adverse impact based on national origin, but the language requirement is clearly a reasonable business necessity; clerical workers who are required to have proficiency in a particular language(s), where the job content includes typing or other communication in the required language, will be considered to be a business necessity.

In both of the above instances, in determining whether there is a business necessity, there will be a review of whether there are alternative means of meeting the language need that would either have no impact or a more limited impact on the affected groups. For instance, if an office has five clerical workers, and approximately five per cent of the total work volume for the office is in a specific language, it is unlikely that knowledge of that language would be accepted as a business necessity for all five of the clerical positions. It would be expected that the employer would use the alternative, which would be to assign all work in that language to one or two employees who are fluent in it, so as to limit the adverse impact on other groups.

There are two bases for requiring fluency in a language that will not generally be accepted as a business necessity for charges alleging discrimination based on

language requirements. One, the preference of co-workers, will not be accepted as a business necessity under any circumstances. The second, customer preference, will be reviewed very carefully in charges alleging disparate impact. In order for customer preference to be considered valid as a business necessity, the employer must be able to show that, while the language requirement does not fulfill the essence of the business, the business will lose trade or money if staff members (i.e., salespersons, bank tellers) are not fluent in a particular language. It will be the employer's burden or responsibility to show that:

1. failure to provide staff fluent in the specific language would result in appreciable loss of business;
2. the proportion of staff required to be fluent in the language reflects the minimum level needed to avoid loss of business; and
3. there is no other reasonable alternative means to meet this business need.

The employer's fluency criteria should be applied equally to all languages. An employer may not require a greater degree of fluency in one language as opposed to another if it cannot be justified by the business necessity argument.

Charges or allegations of discriminatory employment advertising will be analyzed using similar criteria. If a position requires fluency in a particular language, then an employment advertisement may indicate this requirement. However, listing language fluency as a "preference" will, in most cases, be viewed with suspicion. If fluency in a particular language were a job requirement, then it would appear reasonable that someone who does not possess such fluency would not be capable of performing the job. If someone who is not fluent in the language can do the job, then language fluency is not a business necessity.

Charges of discrimination alleging adverse impact based on language fluency will

be analyzed by the MDCEOB on a case-by-case basis within the framework of the guidelines described above.

Nothing in this section shall in any way conflict with coverage to persons with disabilities under Chapter 11A of the Miami-Dade County Code, as amended.