

Citizenship Discrimination

As a condition for employment, can NDSU require U.S. citizenship/permanent residency? With some extremely limited exceptions, the answer is no!

The following laws directly or indirectly make such citizenship/permanent residency requirements illegal:

- Title VII, Civil Rights Act of 1964, and Executive Order 11246 which prohibit discrimination based on national origin. The EEOC Guidelines provide that national origin means denial of employment because of an individual's (or his/her ancestor's) place (country) of origin or because s/he have the characteristics of that group. 29 C.F.R. § 1606.1.

Even though a citizenship requirement is not, per se, unlawful discrimination under Title VII, such discrimination is unlawful if the effect of the citizenship requirement discriminates based on national origin. 29 C.F.R. § 1606.5.

Espinoza v. Farah Mfg. Co., 414 US 86 (1973). There will be a discriminatory effect if the citizenship requirement disproportionately disqualifies individuals where not justified by business necessity.

- The Immigration Reform and Control Act of 1986 ("IRCA") also prohibits citizenship discrimination against non-citizens who are authorized to work in this country. 8 U.S.C. § 1324b(a). IRCA protects lawful aliens, e.g., permanent or temporary residents and refugees.

- North Dakota State law, N.D.C.C. § 14-02.4-03, prohibits discrimination in employment based on national origin, similar to Title VII.

- The Equal Protection Clause of the 14th Amendment to the United States Constitution prohibits denying a "person" the equal protection of the laws. Citizenship creates a suspect class category under the 14th Amendment subjecting any such requirement to strict scrutiny by the courts. See Nyquist v. Mauclet, 432 US 1 (1977).

Thus, the appropriate question for applicants, unless an exception to the above rules applies, should be simply "are you or can you be eligible to work in this position?" The question should, of course, be asked consistently of all applicants. A candidate would not have to be hired if they were in an unlawful status or were unable to get work authorization.

There are a few very limited exceptions where preference for citizenship/permanent residency is allowed.

- Nonimmigrants (individuals from abroad who are here on temporary visas such as J-1, F-1, B-1, H1-B, etc.) are precluded from most federal civil service positions by EO 11935 (5 C.F.R. § 7.3).
- It is not unlawful under Title VII to deny employment to someone who doesn't fulfill national security requirements. 29 C.F.R. § 1606.3. Certain Department of Defense research grants may have such a restriction, for example.

- In some extremely limited cases there might be a bona fide occupational qualification ("BFOQ") under Section 703(e) of Title VII. However, it would be extremely difficult to find a situation where citizenship/permanent residency would be a BFOQ at NDSU unless mandated by law.
- Lastly, under IRCA there is an "equally qualified" exception. 8 U.S.C. § 1324b(a)(4). That is, it is not an unfair employment practice to prefer a U.S. citizen/permanent resident if the nonimmigrant and U.S. citizen/permanent resident are equally qualified.

All of these exceptions, however, will typically be construed very strictly against the employer. Therefore, absent an exception that clearly applies, requiring U.S. citizenship/permanent residency for employment at NDSU is almost certainly going to be an illegal employment practice subjecting the University to potential liability.

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