Equal Employment Opportunity Compliance Program

A comprehensive program designed to help employers comply with anti-discrimination laws and prevent costly employee lawsuits.

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EMPLOYER KNOWLEDGE SERIES

Equal Employment Opportunity Compliance Program

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An EEO Program as outlined herein can only be effective if taken seriously and followed through. Each company is unique. The needs of your company should be examined and implemented into the program in order to make it successful. It is essential that the employer demonstrate at all times their personal concern for their employees and the priority placed on them in your workplace. The policy must be clear. The employer shows its importance through their own actions.

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Introduction to Equal Employment Opportunity (EEO)

Discrimination in any aspect of employment is illegal and employees are protected from such conduct under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA) of 1963 and the Genetic Information Nondiscrimination Act (GINA).

Black's Law Dictionary defines discrimination as "the failure to treat all persons equally where no reasonable distinction can be found between those favored and those who are not favored." In other words, discrimination is the unfair treatment or denial of standard privileges of employment (such as benefits, working hours, pay increases, transfers, or promotions) based on one's race, age, sex, nationality, pregnancy, religion, genetic information, marital or veteran status, or handicap whether physical or mental.

Discrimination is prohibited in all phases of employment including:

hiring and firing;

compensation, assignment, or classification of employees;
transfer, promotion, layoff, or recall;
job advertisements;
recruitment;
testing;
use of company facilities;
training and apprenticeship programs;
fringe benefits;
pay, retirement plans, and disability leave; or
other terms and conditions of employment.

Discriminatory practices under these laws also include:

Harassment on the basis of race, color, religion, sex, national origin, disability, or age;

Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;

Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, genetic information or individuals with disabilities; and

Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, genetic information or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

There are two categories under which most employment discrimination claims fall: disparate treatment and disparate impact. Disparate treatment occurs when an employer commits intentional discrimination such as harassment or refusing to promote or hire an individual because of their color. Disparate impact is generally not intentional; it results from an employment practice that on the surface appears to be neutral in treatment but, actually treats one group of people more negatively than another. Furthermore, these practices are not justified by a business necessity. Examples of disparate impact include establishing a dress code, educational requirements or height and weight requirements.

An employer’s best defense against discrimination is to develop a strong EEO policy that is clearly communicated and accepted by both managers and employees. Training is an important element and making sure to enforce the rules is pertinent. When business decisions need to be implemented, make sure that the decision is well defended and documented. Always explain employment decisions to affected individuals as thoroughly as possible.

Frequently Asked Questions

Q: What is Equal Employment Opportunity (EEO)?
A: Federal and State laws prohibit employment discrimination based on race, color, sex, religion, national origin, age, genetic information, disability, and prohibit retaliation for opposing job discrimination, filing a charge, or participating in proceedings under these laws.

Q: How is discrimination defined?
A: Black's Law Dictionary defines discrimination as "the failure to treat all persons equally where no reasonable distinction can be found between those favored and those who are not favored."

In other words, discrimination is the unfair treatment or denial of standard privileges of employment (such as benefits, working hours, pay increases, transfers, or promotions) based on one's race, age, sex, nationality, pregnancy, religion, marital or veteran status, or handicap whether physical or mental.

Q: What are the laws that govern EEO and to whom do they apply?
A: Title VII of the Civil Rights Act of 1964 (Title VII) prohibits race, color, religion, sex, and national origin discrimination. Title VII applies to employers with fifteen (15) or more employees.

Title I of the Americans with Disabilities Act of 1990 (ADA) prohibits employment discrimination against qualified individuals with disabilities. The ADA applies to employers with fifteen (15) or more employees.

Age Discrimination in Employment Act of 1967 (ADEA) prohibits age discrimination against individuals who are forty (40) years of age or older. The ADEA applies to employers with twenty (20) or more employees.

Equal Pay Act of 1963 (EPA) prohibits wage discrimination between men and women in substantially equal jobs within the same establishment. The EPA applies to most employers with one or more employees.

Lilly Ledbetter Fair Pay Act of 2009 states that with respect to pay discrimination, an unlawful employment practice occurs "each time wages, benefits, or other compensation is paid, resulting in whole or in part from [a pay] decision or other practice."

Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employment discrimination against qualified individuals because of their genetic information. GINA applies to employers with fifteen (15) or more employees.

Q: If a company has less than 15 employees are they exempt from these laws?
A: No. States generally have their own specific statutes addressing discrimination. Federal law requires at least 15 employees on staff to file a discrimination claim while individual state law may allow a discrimination claim with as few as one employee. Therefore, even if a company has less than 15 employees, a discrimination claim can still be filed with either the state's administrative agency, in court or both.

Q: Who enforces these laws?
A: The U.S. Equal Employment Opportunity Commission (EEOC).

Q: How will a company know if a charge of discrimination has been filed against them?
A: The EEOC will notify the employer within 10 days of receiving a charge. Notification normally includes a copy of the charge briefly identifying the charging party, the basis (e.g., race, religion, sex, etc.) and issue(s) (e.g., hiring, promotion, discharge, etc.) of the allegation, and the date(s) of the alleged discrimination. Ordinarily, a plain language explanation of the EEOC charge process will be included, as well as explanations of the employer's obligation to retain records pertaining to the charge and of the non-retaliation provisions of the EEOC laws. An invitation to mediate the charge may also be included in the notification package.

Q: What can be expected to happen in an EEOC investigation?
A: After a charge is filed, an employer may be asked to provide a statement of position responding to the allegations in the charge. They may also be asked to provide documents or information related to the subject of the EEOC's investigation. Additionally, the EEOC may ask to visit the worksite or to interview some employees. Cooperation with EEOC requests for information is helpful to the EEOC in investigating charges. When an employer refuses to provide information, or does not do so in a reasonably timely manner, the EEOC may issue a subpoena. Employers may retain an attorney to represent them during the EEOC's handling of the charge but they are not required to do so.

Q: What remedies are available for unlawful discrimination via EEOC enforcement?
A: Under the EEOC-enforced laws, the remedies for unlawful discrimination include:

an order to eliminate discriminatory practices

hiring, wage adjustments, promotion or reinstatement, depending upon the nature of the action taken against the individual monetary remedies

Monetary remedies available under the laws enforced by the EEOC are as follows:

lost wages and prejudgment interest (all statutes)

liquidated/double damages (ADEA and EPA)

compensatory damages (Title VII and ADA cases involving intentional discrimination)

punitive damages (Title VII and ADA cases in which the employer acts with reckless disregard of the federally protected rights of the individual)

the sum of punitive damages and future compensatory damages may not exceed the following amounts, per person:

$50,000 for employers with 15-100 employees

$100,000 for employers with 101-200 employees

$200,000 for employers with 201-500 employees

$300,000 for employers with more than 500 employees

Q: What are the most prevalent claims filed under discrimination?

A: According to the EEOC, in 2008, the following is the breakdown by percentage of discrimination claims filed with the EEOC*:

Race:	35.6%
Sex:	29.7%
Retaliation (all Statutes):	34.3%
Retaliation (Title VII):	30.1%
Age:	25.8%
Disability:	20.4%
National Origin:	11.1%
Religion:	3.4%
Equal Pay:	1.0%

*Because individuals often file charges claiming multiple types of discrimination, the percentage of total charges for any given fiscal year may exceed 100%

Q: What kinds of notices, posters, policies, and forms should I have implemented in my place of business to help me avoid discrimination lawsuits?
A: To ensure compliance with pertinent labor laws and avoid potential liability in discrimination claims, employers must educate themselves, their supervisors, and managers about the legal issues that affect the workplace and post mandatory notices including the following:

- Federal “Equal Opportunity is the Law” EEOC poster;
- Your state fair employment / human rights poster;
- Clear policies on harassment and discrimination that describes how to report a complaint and how it will be investigated by the company;
- A policy that describes the employer’s commitment to providing equal opportunity to all applicants and employees;
- Employee complaint forms.

Implementation Procedures

1. Read Chapter 2 “Applicable State and Federal Laws” to understand which laws apply to your workplace based upon the number of employees you have on payroll and the state in which you are located.

2. Post the enclosed EEO Policy Poster (Item #FD-EEO) in an area where both employees and job applicants can view it. If you need additional copies of this poster, please contact Personnel Concepts at 800-333-3375.

3. Review Chapters 2-7 to achieve a basic understanding of the various workplace issues that commonly give rise to discrimination claims. Each chapter discusses a specific type of discrimination or issues pertaining to a specific protected class.

4. Review the model policy statements in Chapter 8 to formulate an effective EEO and harassment policy.

5. Designate an individual within the organization who will be primarily responsible for receiving, documenting, and investigating complaints (i.e. HR Manager, Personnel Manager, Office Manager, or Owner/Operator).

6. Designate alternate individuals who can field and investigate any complaints that may arise about the individual named in step 5.

7. Form a grievance committee of executives, managers, and/or supervisors to review and investigate specific complaints. These individuals should be informed that the details of any complaint brought to their attention must be kept confidential to protect the privacy of the accuser and the accused.

8. Use the materials in Chapter 9 to conduct supervisory training at least annually on the various types of employment discrimination and how to avoid exposing the company to a potential claim or complaint.

Applicable State And Federal Laws

Title VII of the Civil Rights Act of 1964

Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin. Employers engaged in an industry affecting commerce that has fifteen or more employees, labor organizations and employment agencies must comply with Title VII. The law (SEC. 2000e-2. *[Section 703]*) states that:

> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The most common violation under Title VII is intentional discrimination, also known as disparate treatment. An employee may feel that they were unfairly fired or passed up for a promotion, but that doesn't mean that they were discriminated against. In order for it to be classified as discrimination, the employee had to be treated differently because of their race, sex, religion, color or national origin.

Disparate treatment is usually proved circumstantially by convincing the court the employer's explanation for their action is unbelievable and it is thereby reasonable to infer the real explanation is discrimination. This is called evidence of pretext because the explanation given by the employer is proven to be a pretext to cover their discriminatory act. Pretext is generally proven through one of the following:

- Employer offers an explanation that they know is false
- Individuals with the same qualifications of a different class were treated differently than the complainant
- Evidence of bias such as knowledge that the employer has an issue with a particular class of people
- Statistical evidence such as the employer failing to have females in management positions despite their availability

Another violation of Title VII occurs when an employer does not intend to exclude a particular group of people but engages in practices that have the effect of doing so. This is known as disparate impact. Typically disparate impact will be determined by comparing the rate at which an employer's actions exclude a protected group to the rate at which others are excluded. Examples of employment practices that may be challenged include:

- Minimum height requirement
- Some educational requirements

- Physical agility tests
- Cognitive ability tests
- A “no beard” policy

The EEOC and other federal agencies have adopted guidelines that require employers to keep records to determine whether selection procedures for a position within the company create a disparate impact. These guidelines recommend using a “four-fifths rule” to assess impact. The four-fifths rule states that a selection rate for any race, sex or ethnic group which is less than four-fifths (or 80%) of the rate for the group with the highest rate of selection will generally be regarded as evidence of disparate impact. This rule is only a “rule of thumb”. Lesser disparities can also be found to have an adverse impact and greater disparities may not.

The Americans with Disabilities Act (ADA)

The ADA prohibits employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations.

The ADA prohibits discrimination against qualified individuals with a disability in all employment practices. A qualified individual with a disability is:

> an individual who meets the skill, experience, education, and other job-related requirements of a position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of a job.

On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA" or "Act"). The Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways.

An individual with a disability is a person who:

- has a physical or mental impairment that substantially limits at least one major life activity. The Act expands the definition of "major life activities" by including two non-exhaustive lists:
  - the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
  - the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");
- has a record of such an impairment; or
- is believed to have such an impairment.

The Act states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability. This means that people who have successfully managed disabilities, through medication, prosthesis or other means, will still be covered by the ADA. The person must be evaluated as if untreated for their disability.

The Act also clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Reasonable accommodation is a critical component of the ADA. An employer must make a reasonable accommodation for an individual with a disability who is otherwise qualified unless it can show that the accommodation would cause an undue hardship on the operation of its

business. Undue hardship means an action that requires significant difficulty or expense when considered in relation to factors such as a business' size, financial resources, and the nature and structure of its operation.

Accommodations may include any change in the work environment or in the way things are usually done that result in equal employment opportunity for an individual with a disability. This may include, but is not limited to:

- making existing facilities used by employees readily accessible to and usable by persons with disabilities
- job restructuring
- modification of work schedules
- providing additional unpaid leave
- reassignment to a vacant position
- acquiring or modifying equipment or devices
- adjusting or modifying examinations, training materials, or policies
- providing qualified readers or interpreters

Reasonable accommodation may be necessary to apply for a job, to perform job functions, or to enjoy the benefits and privileges of employment that are enjoyed by people without disabilities. An employer is not required to lower production standards to make an accommodation and is generally is not obligated to provide personal use items such as eyeglasses or hearing aids.

Under the Act, employers do not need to provide reasonable accommodations for individuals that are regarded as impaired, who are not actually impaired. Therefore, just because an employee has been regarded as disabled under someone else’s myths or fears, does not make that individual eligible for an accommodation.

The Act provides that an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is transitory and minor. In other words, if a person is treated adversely because of an actual perceived impairment, that is a violation of the law, regardless of whether the impairment actually limits or is perceived to limit a major life activity.

When analyzing the degree of limitation, the determination of whether an impairment substantially limits a major life activity can be made only with reference to a specific individual. The issue is whether an impairment substantially limits any of the major life activities of the person in question, not whether the impairment is substantially limiting in general.

The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(1) The nature and severity of the impairment;
(2) The duration or expected duration of the impairment; and
(3) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

An individual with a disability must also be qualified to perform the essential functions of the job with or without reasonable accommodation, in order to be protected by the ADA. This means that the applicant or employee must:

satisfy your job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related; and

be able to perform those tasks that are essential to the job, with or without reasonable accommodation.

The ADA does not interfere with an employer's right to hire the best qualified applicant. Nor does the ADA impose any affirmative action obligations. The ADA simply prohibits from discriminating against a qualified applicant or employee because of their disability. Qualification standards or selection criteria that screen out or tend to screen out an individual with a disability on the basis of disability must be job-related and consistent with business necessity. The employer must also consider if the individual could meet the standard with a reasonable accommodation and whether the job function that the disabled individual cannot perform is a marginal function or an essential function.

The ADA does not restrict an employer's authority to establish needed job qualifications such as education, skills, physical or mental abilities, or other job related requirements such as judgment, ability to work under pressure and interpersonal skills. However, as with other job qualification standards, if a physical or mental qualification standard screens out and individual with a disability or a class of individuals with disabilities, the employer must be prepared to show that the standard is:

1. Job related
2. Consistent with business necessity

Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.

An employer may require that an individual not pose a "direct threat" to the health or safety of themselves or others. A health or safety risk can only be considered if it is "a significant risk of substantial harm." An assessment of direct threat must be based strictly on valid medical analysis and/or objective evidence, not on speculation. Like any qualification standards, this requirement must apply to all applicants and employees, not just to people with disabilities.

If an individual appears to pose a direct threat because of a disability, the employer must first try to eliminate or reduce the risk to an acceptable level with reasonable accommodation. If an effective accommodation cannot be found, the employer may refuse to hire an applicant or discharge an employee who poses a direct threat.

Under the ADA, workers with disabilities must have equal access to all benefits and privileges of employment that are available to similarly situated employees without disabilities. The duty to provide reasonable accommodation applies to all non-work facilities provided or maintained by you for your employees. This includes cafeterias, lounges, auditoriums, company-provided transportation and counseling services. If making an existing facility accessible would be an undue hardship, you must provide a comparable facility that will enable a person with a disability to enjoy benefits and privileges of employment similar to those enjoyed by other employees, unless this would be an undue hardship.

The Age Discrimination in Employment Act (ADEA)

The ADEA protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA applies to employers with 20 or more employees (state law may allow an age discrimination claim with fewer employees), including state and local governments. It also applies to employment agencies and labor organizations, as well as to the federal government. The law states that:

> It shall be unlawful for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

The ADEA does not apply to independent contractors or elected officials. It does not usually cover police and fire personnel, certain federal employees in air traffic control or law enforcement, or certain highly paid executives. While persons in these positions could be retired on a mandatory basis, they cannot be denied a promotion or training base on age.

It is generally unlawful for apprenticeship programs, including joint labor-management apprenticeship programs, to discriminate on the basis of an individual's age. Age limitations in apprenticeship programs are valid only if they fall within certain specific exceptions under the ADEA or if the EEOC grants a specific exemption.

The ADEA makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. As a narrow exception to that general rule, a job notice or advertisement may specify an age limit in the rare circumstances where age is shown to be a "bona fide occupational qualification" (BFOQ) reasonably necessary to the essence of the business.

The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA.

The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to specifically prohibit employers from denying benefits to older employees. Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers, and that those greater costs would create a disincentive to hire older workers. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

An employer may ask an employee to waive his/her rights or claims under the ADEA either in the settlement of an ADEA administrative or court claim or in connection with an exit incentive program or other employment termination program. However, the ADEA, as amended by OWBPA, sets out specific minimum standards that must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver must:

1. Be in writing and be understandable;

2. Specifically refer to ADEA rights or claims;

3. Not waive rights or claims that may arise in the future;

4. Be in exchange for valuable consideration;

5. Advise the individual in writing to consult an attorney before signing the waiver; and

6. Provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

If an employer requests an ADEA waiver in connection with an exit incentive program or other employment termination program, the minimum requirements for a valid waiver are more extensive.

Although federal law requires at least 20 employees on staff to file an age discrimination claim, individual state law may allow an age discrimination claim with fewer employees. This is the most common difference between federal and state age discrimination laws. Therefore, even if a company has less than 20 employees, an age discrimination claim can still be filed with either the state's administrative agency, in court or both. The following list shows the minimum number of employees on staff needed file a claim in each state:

State	**Minimum number of employees**
Alabama	no state law
Alaska	2
Arizona	15
Arkansas	no state law
California	5
Colorado	1
Connecticut	3
Delaware	4
Florida	15
Georgia	no state law
Hawaii	1
Idaho	5
Illinois	15
Indiana	6
Iowa	4
Kansas	5
Kentucky	8
Louisiana	20

Maine	1 (but under 15 damages recovered may be limited
Maryland	varies by county)
Massachusetts	6
Michigan	1
Minnesota	1
Mississippi	no state law
Missouri	6
Montana	1
Nebraska	15
Nevada	15
New Hampshire	6
New Jersey	1
New Mexico	4
New York	4
North Carolina	state law allows filing a “public policy” claim based on anti-discrimination law under 20
North Dakota	1
Ohio	4 (state law allows filing a “public policy” claim based on anti-discrimination law if less than 4)
Oklahoma	15
Oregon	1
Pennsylvania	4
Rhode Island	4
South Carolina	15
South Dakota	1
Tennessee	8
Texas	15
Utah	15
Vermont	1
Virginia	6
Washington	8
West Virginia	15 (state law allows filing a “public policy” claim based on anti-discrimination law if less than 15)
Wisconsin	1
Wyoming	2

The Equal Pay Act of 1963 (EPA)

The Equal Pay Act requires men and women to be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. Unequal compensation can be justified only if the employer shows that the pay differential is attributable to a bona fide seniority, merit, incentive system, or any other factor other than sex. Specifically, the EPA states:

Employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment. Each of these factors is summarized below:

Skill - Measured by factors such as the experience, ability, education, and training required to perform the job. The key issue is what skills are required for the job, not what skills the individual employees may have. For example, two bookkeeping jobs could be considered equal under the EPA even if one of the job holders has a master's degree in physics, since that degree would not be required for the job.

Effort - The amount of physical or mental exertion needed to perform the job. For example, suppose that men and women work side by side on a line assembling machine parts. The person at the end of the line must also lift the assembled product as he or she completes the work, and place it on a board. That job requires more effort than the other assembly line jobs if the extra effort of lifting the assembled product off the line is substantial and is a regular part of the job. As a result, it would not be a violation to pay that person more, regardless of whether the job is held by a man or a woman.

Responsibility - The degree of accountability required in performing the job. For example, a salesperson who is delegated the duty of determining whether to accept customers' personal checks has more responsibility than other salespeople. On the other hand, a minor difference in responsibility, such as an assignment of locking up at the end of the day, would not justify a pay differential.

Working Conditions - This encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation, and (2) hazards. For example, suppose a male nurse's aide who works in a hospital is paid less than a female nurse's aid who works in patients' homes. This difference generally does not qualify as a difference in working conditions that would justify a pay differential, because the physical surroundings and hazards in the two locations typically are similar.

Establishment - The prohibition against compensation discrimination under the EPA applies only to jobs within any establishment. An establishment is a distinct physical place of business rather than an entire business or enterprise consisting of several places of business. However, in some circumstances, physically separate places of business should be treated as one establishment. For example, if a central administrative unit hires employees, sets their compensation, and assigns them to work locations, the separate work sites can be considered part of one establishment.

The employees, whose positions are being compared, need not have held their jobs at the same time. For example, a prima facie violation of the EPA can be established if a male

employee is replaced with a lower paid female, or a female employee is replaced with a higher paid male. On the other hand, if there have never been any men performing substantially the same work as women in a work establishment, or vice versa, it is not possible to establish an EPA violation.

Since Title VII, the ADEA, and the ADA all prohibit discrimination in "compensation" based on race, color, religion, sex, national origin, age, disability, or protected activity it is possible that a claim can violate more than one regulation. The term "compensation" includes any payments made to, or on behalf of, an employee for employment. Compensation discrimination in violation of Title VII, the ADEA, or the ADA can exist in a number of forms:

> An employer pays employees inside a protected class less than similarly situated employees outside the protected class, and the employer's explanation (if any) does not satisfactorily account for the differential;
>
> An employer maintains a neutral compensation policy or practice that has an adverse impact on employees in a protected class and cannot be justified as job-related and consistent with business necessity;
>
> An employer sets the pay for jobs predominantly held by protected class members below that suggested by the employer's job evaluation study, while the pay for jobs predominantly held by employees outside the protected class is consistent with the level suggested by the job evaluation study;
>
> A discriminatory compensation system has been discontinued, but salary disparities caused by the system have not been eradicated; or
>
> The compensation of one or more employees in a protected class is artificially depressed because of a discriminatory employer practice that affects compensation, such as steering employees in a protected class to lower paid jobs than persons outside the class, or discriminating in promotions, performance appraisals, procedures for assigning work, or training opportunities.

Base salaries or wages often make up only part of the compensation package for employees. Employee compensation also can consist of stock options, bonuses, perquisites, and other payments made as remuneration for employment. Non-base compensation can be discriminatory even if base compensation is not. Compensations such as bonuses, commissions, and benefits usually are a function of an employer policy defining who is eligible to receive them, and in what amount. Employers should examine their policy and make sure that those who receive such perks are not chosen by any bias or exclude, whether intentionally or not, people in a protected class.

The same is true for all forms of compensation, including fringe benefits. Wages also include payments whether paid periodically or at a later date, and include (but are not limited to) wages, salary, overtime pay, bonuses, vacation or holiday pay, cleaning or gasoline allowances, hotel accommodations, use of company car, medical, hospital, accident, life insurance, retirement benefits, stock options, profit sharing, or bonus plans, reimbursement for travel expenses, expense account, and benefits. Thus, for example, if male and female employees performing substantially equal work receive equal salaries but unequal fringe benefits, an EPA violation can be established.

Compensation discrimination under the EPA applies to jobs "within any establishment." An "establishment" is "a distinct physical place of business rather than . . . an entire business or 'enterprise' which may include several separate places of business." For example, separate facilities of a chain store generally cannot be compared to each other. In certain circumstances, however, physically separate places of business should be treated as one establishment. This would be the case if a central administrative unit hires the employees, sets the compensation, and assigns work locations.

If the evidence establishes a prima facie violation of the EPA, then the employer must prove that the compensation disparity is based on one of the four affirmative defenses in the statute. The burden is a heavy one, because the employer must show that sex played no part in the compensation differential. A sex-based compensation difference in substantially equal jobs is justified if it is based on:

a ***seniority system*** which rewards employees according to their length of employment;

a ***merit system*** which rewards employees for exceptional job performance;

an ***incentive system*** which measures earnings by quantity or quality of production; or

any other factor other than sex.

To be a bona fide system, it must not have been adopted with discriminatory intent; it must be based on predetermined criteria; it must have been communicated to employees; and it must have been applied consistently and even-handedly to employees of both sexes.

An employer asserting a "factor other than sex" defense must show that the factor is gender-neutral related to job requirements or otherwise is beneficial to the employer's business. Furthermore, the factor must be used reasonably in light of the employer's stated business purpose as well as its other practices. The following are some examples:

1. While the relative **education, experience, training**, and/or ability of individual jobholders are not relevant to determining whether their jobs require equal skill, these factors can, in some cases, justify a compensation disparity. Employers can offer higher compensation to applicants and employees who have greater education, experience, training, or ability where the qualification is related to job performance or otherwise benefits the employer's business. Such a qualification would not justify higher compensation if the employer was not aware of it when it set the compensation, or if the employer does not consistently rely on such a qualification. Furthermore, the difference in education, experience, training, or ability must correspond to the compensation disparity. Thus, a very slight difference in experience would not justify a significant compensation disparity.

2. A compensation disparity attributable to participation in a **bona fide training program** is permissible. While an organization might offer numerous types of training programs, a bona fide training program that can justify a compensation disparity must be a structured one with a specific course of activity. Elements of a legitimate training program include: (1) employees in the program are aware that they are trainees; (2) the training program is open

to both sexes; and (3) the employer identifies the position to be held at the program's completion.

3. While a difference between night and day work is not a difference in "working conditions," it could constitute a "factor other than sex" that justifies a compensation differential. A **shift differential** operates as a defense only if both sexes have an equal opportunity to work either shift, if sex was not the reason the employer established the compensation differential, and if there is a business purpose that the shift differential is being used reasonably to serve.

4. An employer's assertion that its compensation rates are based on a **job classification system** does not, by itself, justify a compensation disparity between men and women performing substantially equal work. The employer must prove that the job classification system accurately reflects job duties and/or job-related employee qualifications and is uniformly applied to men and women. For example, a store might have a job classification system under which head cashiers are paid more than cashiers. If the classification system accurately reflects job duties and/or job-related employee qualifications, the compensation disparity is justified.

5. **Red circling** or paying an employee a higher than normal compensation rate for a particular reason does not violate the EPA if sex is not a factor and it is supported by a valid business reason. For example, an employer might transfer a long-time employee who can no longer perform his regular duties because of deteriorating health to an otherwise lower paying job, but maintain the employee's higher salary in gratitude for his long tenure of service.

6. An employer may be able to justify a compensation disparity by proving that the higher paid employee **generates more revenue** for the employer than the lower paid employee. However, the Commission will scrutinize this defense carefully to determine whether the employer has provided reduced support for revenue production to the lower paid employee. If that is the case, then the difference in revenue will not justify the compensation disparity. Furthermore, a mere assumption that the higher paid employee will produce greater revenue will not justify the compensation disparity.

7. Like any "factor other than sex," if the employee can make out a prima facie case, an employer can justify paying **part-time or temporary workers** disproportionately less than full-time or permanent workers only if it can show that this justification is related to a legitimate business purpose and is used reasonably in light of that purpose. The classifications "part-time" or "temporary" also must be accurate. Thus, if workers designated as "part-time" work substantially the same number of hours as full-timers, or "temporary" workers appear not to be temporary, the investigator should not give credence to the employer's assertion that these designations satisfy the "factor other than sex" defense.

An employer's assertion that a compensation differential is attributable to a collective bargaining agreement does not constitute a defense under the EPA. If the union contributed to the creation of a compensation differential, the union should be added as a respondent.

When correcting a pay differential, no employee's pay may be reduced. Instead, the pay of the lower paid employee(s) must be increased. Employers may not reduce wages of either sex to equalize pay between men and women. The remedy should include a salary increase and back pay in the amount of the unlawful difference between the wages of the lower and higher paid comparator(s). It should also include attorneys' fees and costs, and appropriate damages. If the violation involved segregated job categories, the employer cannot correct the violation merely by opening the higher-paid category to all. Instead, the pay of the employees in the lower-paid job category must be raised to an equal level, and back pay must be provided. Furthermore, the employer cannot equalize an unlawful compensation differential by periodically paying the underpaid employees bonuses.

Lilly Ledbetter Fair Pay Act of 2009

The Lilly Ledbetter Fair Pay Act (signed into law by President Obama on January 29th, 2009) extends the time frame for employees to file pay discrimination cases based on the most recent allegedly discriminatory paycheck or other pay-related action, such as a decision setting a raise amount. The law overturns the Supreme Court's May 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, in which the Court held that the period for filing an EEOC charge of pay discrimination begins when the pay-setting decision is made and that charges under Title VII of the Civil Rights Act challenging discriminatory pay, therefore, ordinarily must be filed within 180 days of the allegedly discriminatory pay decision.

The Ledbetter Act extends statutes of limitation for most federal anti-discrimination laws, allowing an employee to file suit for discriminatory decisions made long ago if the employee's pay is still affected by the results of the decision. While recovery of back pay is limited to two years, other remedies such as punitive damages, emotional distress damages and reinstatement or promotion of an aggrieved employee is also available. For employers, this means that they may be held liable for employment decisions made years or even decades earlier, if the effects of those decisions are still reflected in employees' compensation.

The Act establishes definitions and language with respect to compensation discrimination which apply to Title VII, the ADEA, the ADA and the Rehabilitation Act. Under federal anti-discrimination law, an unlawful compensation practice occurs:

- when a discriminatory compensation decision or other practice is adopted
- when an individual becomes subject to a discriminatory compensation decision or other practice,
- when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such decision or other practice (including each time wages, benefits, or other compensation is paid). Thus, the statute of limitations restarts each time an employee receives a paycheck based on a discriminatory compensation decision.

The Immigration Reform and Control Act of 1986 (IRCA)

Under IRCA, employers may hire only persons who may legally work in the U.S., i.e., citizens and nationals of the U.S. and aliens authorized to work in the U.S. The employer must verify the identity and employment eligibility of anyone to be hired (after Nov. 6th 1986), which includes completing the Employment Eligibility Verification Form (I-9). Employers must keep each I-9 on file for at least three years, or one year after employment ends, whichever is longer.

A new hire must complete an I-9 within 3 business days of employment. This does not include accepting an offer. Employers who ask for documentation prior to the start of employment may be accused of "document abuse" which is considered an "unfair immigration-related employment practice" by the United States Department of Justice. If an employee will be employed for less than 3 days then the I-9 must be completed before the end of their first working day. Although some employers photocopy the documents that satisfy the I-9 requirements, it is not required.

Employers also may not continue to employ an alien upon learning that they have become unauthorized to work in the U.S. Nor may they discriminate against an individual (other than an unauthorized alien) while hiring, promotion or firing based on that person's immigration status. Examples of discrimination include asking an applicant for additional documents after they have already shown sufficient documentation or being inconsistent with document requests between applicants.

If an employer can show that there are no Americans to fill the position that they are seeking, they can take legal steps to sponsor an immigrant. Agricultural employers, who are greatly impacted by IRCA, can utilize an H-2A program which allows them to apply for permission to bring non-immigrant aliens into the U.S. to do temporary or seasonal agricultural work when they anticipate a shortage of domestic workers. To do this, employers must first certify that (1) there are not sufficient workers who are able, willing, qualified, and available to perform the work; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed workers in the U.S.

The penalty for employing an illegal immigrant ranges from $250 to $10,000 for each authorized alien. An employer who develops a pattern of hiring illegal immigrants faces a prison sentence of 6 months. If an employer is found guilty of discriminating against an individual that is authorized to work in the U.S. is subject to civil penalties ranging from $200 to $2,000 for each victim of stated discrimination. If the employer is a repeat offender, that penalty can go as high as $10,000 per individual discriminated against.

Genetic Information Nondiscrimination Act of 2008 (GINA)

On May 21, 2008, the President signed the Genetic Information Nondiscrimination Act (GINA) into law. Title I of GINA addresses the use of genetic information in health insurance. Title II of the Act prohibits the use of genetic information in employment, prohibits the intentional acquisition of genetic information about applicants and employees, and imposes strict confidentiality requirements. The provisions of GINA related to health coverage are effective as of May 21, 2009 and those related to employment are effective as of November 21, 2009.

Title I applies to health insurers and health plans. Title II applies to private, state, and local government employers with 15 or more employees, employment agencies, labor unions, and joint labor-management training programs. It also covers Congress and federal executive branch agencies.

Meaning of Genetic Information

It is important to note that *GINA* relates only to genetic information. The Act provides that "genetic information" encompasses the following types of information or requests:

(a) information about an employee's genetic tests;

(b) information about the genetic tests of a employee's family members, including a dependent or any other individual who is a first-degree, second-degree, third-degree, or fourth-degree relative;

(c) information about the genetic tests of any fetus being carried by a pregnant woman who is an employee or a family member of an employee, or of any embryo legally held by an employee or a family member;

(d) information on the manifestation of a disease or disorder in family members of the employee (*but not the employee*); and

(e) any request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by such individual or any family member of such individual. Such genetic services include the following:

   a. genetic test, meaning an analysis of human DNA, RNA, chromosomes, proteins or metabolites that detects genotypes, mutations or chromosomal changes, but the term does not include any analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes;
   b. genetic counseling; and
   c. genetic education.

Genetic information *does not* include information about the sex or age of any individual. Moreover, an employer shall not be considered in violation of Title II for the use, acquisition, or disclosure of medical information about a manifested disease, disorder, or pathological condition of an employee, including a manifested disease, disorder, or pathological condition that has or may have a genetic basis. In other words, the protection of employees under GINA does not extend to protection of employees with manifested diseases.

Title II - Genetic Discrimination in Employment

Title II works in tandem with existing state and other Federal laws – where the level of protection in a state is less than that provided by *GINA*, the minimum level of protection will be that of the Federal Act. However, where the level of protection under state laws is greater than that provided by *GINA*, the additional protections afforded to the employee in the relevant state will not be effected.

Title II of GINA prohibits use of genetic information in making decisions related to any terms, conditions, or privileges of employment, prohibits covered entities from intentionally acquiring genetic information, requires confidentiality with respect to genetic information (with limited exceptions), and prohibits retaliation.

Unlawful Employment Decisions

The law prohibits the use of genetic information in employment decisions, including hiring; firing; job assignments; and promotions by employers, unions, employment agencies, and labor-management training programs.

Acquisition of Genetic Information

Employers may not request, require, or purchase genetic information with respect to an employee/applicant or family member of an employee/applicant. One exception to this rule applies to inadvertent acquisition of genetic information, such as overhearing an employee conversation, receiving genetic information verbally when asking a general question about an employee's health, or receiving unsolicited genetic information as part of a documented request for a disability accommodation or leave of absence.

Confidentiality

Covered entities in possession of genetic information about applicants or employees must treat it the same way they treat medical information generally. They must keep the information confidential and, if the information is in writing, must keep it apart from other personnel information in separate medical files. A covered entity may keep genetic information in the same file as medical information subject to the Americans with Disabilities Act.

Title I - Genetic Discrimination in Health Insurance

GINA prohibits health insurers from engaging in three practices:

(1) using genetic information about an individual to adjust a group plan's premiums, or, in the case of individual plans, to deny coverage, adjust premiums, or impose a preexisting condition exclusion;
(2) requiring or requesting genetic testing; and
(3) requesting, requiring, or purchasing genetic information for underwriting purposes.

There are two aspects of Title I relating to employer-sponsored group health plans which employers should be aware of.

The first relates to the interaction between Title I and Title II – section 209(a)(2)(B) provides for a "firewall" provision intended to eliminate the possibility of double liability by preventing claims being made against employers under Title II, when it could have been made under Title I or under any other provisions contained in ERISA, the *Public Health Service Act* or the *Internal Revenue Code*.

However, the firewall does not prevent claims from arising under Title II against employers for decisions that "discriminate against any employee with respect to compensation, terms, conditions or privileges of employment because of the employee's genetic information". Specifically, this means that while all claims relating to discrimination with respect to the collection and use of genetic information by group health plans for underwriting purposes should be made under Title I, employers may still be liable under Title II if any discriminatory actions are taken as a result of the genetic information, for example, where an employer discharges an employee because of anticipated high health claims based on such genetic information.

Secondly, while provisions under Title I apply to group health plans and health insurers offering group health insurance coverage in connection with a group health plan, employers who sponsor such plans need to be aware of the prohibitions imposed by Title I with respect to the collection of genetic information pursuant to questions relating to the family medical history of an employee in pre *and* post-enrollment health risk assessment forms in the light of regulations issued by the Internal Revenue Service, the Department of Labor and the Department of Health and Human Services, applicable to plan years beginning after December 7, 2009, particularly if financial incentives are offered for completing the forms.

Remedies and Enforcement

Section 207 provides that the same remedies available under Title VII of the *Civil Rights Act of 1964* are available under Title II. Thus, an aggrieved individual may seek reinstatement, hiring, promotion, back pay, injunctive relief, pecuniary and non-pecuniary damages and attorneys' fees and costs. Title VII's cap on combined compensatory and punitive damages also applies to actions under Title II of GINA, which such cap ranging from $50,000 for employers with 15-100 employees to $300,000 for employers with more than 500 employees.

Punitive damages are not available against Federal, state, or local government employers.

State Specific Discrimination Laws

As is the case with the age discrimination laws, states generally have their own specific statutes addressing discrimination. Federal law requires at least 15 employees on staff to file a discrimination claim while individual state law may allow a discrimination claim with fewer employees. The chart on the next page shows the state statute, differences from Federal law, minimum number of employees needed to file a claim and website for each state.

State Specific Discrimination Laws				
State	**Law**	**Difference from Federal**	**# of Emp.**	**Website**
Alabama	Ala. Code §25-1-20	No state statute	15	eeoc.gov
Alaska	Alaska Stat. §18.80.220 Alaska Stat. §47.30.865	Broader interpretation	2	gov.state.ak.us/aschr
Arizona	Ariz. Rev. Stat. Ann. §41-1461	Same as Fed	1	ag.state.az.us/civil_rights
Arkansas	No State	No state statute	15	state.ar.us
California	Cal. Gov't. Code §12900	Addresses English only Broader interpretation Covers genetic discrimination	5	dfeh.ca.gov
Colorado	Colo. Rev. Stat. §27-34-401	Same as Fed	1	dora.state.co.us/civil_rights
Connecticut	Conn.Gen.Stat. §46a-51	Protects Age under 40 Broader interpretation	3	state.ct.us/chro
Delaware	Del. Code Ann. tit. 19, §710	Same as Fed	4	delawareworks.com
Florida	Fla. Stat. Ann. §760.50	Same as Fed	15	fchr.state.fl.us
Georgia	Georgia Fair Emp Practices	No state statute	15	eeoc.gov
Hawaii	Haw.Rev.Stat.§378-1	Covers arrest and court record	1	hawaii.gov/hcrc
Idaho	Idaho Code §67-5909	Same as Fed	5	www2.state.id.us
Illinois	775 ILCS 5/1-101	Covers sex orientation Broader intepretation for disability Covers aid and abet in discrim	1	state.il.us/dhr
Indiana	Ind. Code Ann. §§22-9-1-2 and §22-9-2	No court cases for age discrim Broader intepretation for disability	6	state.in.us/icrc
Iowa	Iowa Code Ann §216.1	Broader intepretation in some cities	4	state.ia.us/government
Kansas	Kan. Stat. Ann. §§44-1101	Prohibits genetic screening	6	khrc.net
Kentucky	Kentucky Rev.Stat §344.040 Kentucky Rev.Stat §207.135 Kentucky Rev.Stat §342.197	Covers smoking Covers AIDS and HIV Covers black lung disease	8	state.ky.us/agencies2/kchr
Louisiana	La.Rev.Stat.Ann §23:311-352	Same as Fed	20	gov.state.la.us
Maine	Me. Rev. Stat. Ann. tit. 5, §§4551-4663	Covers Workers' Comp Covers Whistleblower Protects Age under 40	1	state.me.us/mhrc
Maryland	Md. Code Ann. Â§49B	Covers sex orientation & genetic Some cities have local laws	Varies by County	mchr.state.md.us
Massachusetts	Mass.Gen.Laws Ann.ch 151B	Covers genetics and crim. record Broader sex harrassment Covers aid and abet in discrim	6	state.ma.us/mcad
Michigan	Mich.Comp.Laws §37-2202 Mich.Comp.Laws §37.1202	Covers weight, height, arrest Covers AIDS and HIV	1	michigan.gov/mdcr
Minnesota	Minn.Stat.Ann §363.01	Covers sex orient. & pub assistance Protects Age under 40	1	humanrights.state.mn.us
Mississippi	No state	No state statute	15	eeoc.gov
Missouri	Mo.Ann.Stat §213.010	Same as Fed	6	dolir.state.mo.us/hr
Montana	Mont.Code Ann §49-2-303	Protects Age under 40	1	erd.dli.state.mt.us

State Specific Discrimination Laws (continued)				
State	**Law**	**Difference from Federal**	**# of Emp.**	**Website**
Nebraska	Neb.Rev.Stat.Ann §48-1101	Age only for 25+ employees	15	nol.org.home/NEOC
Nevada	Nev. Rev. Stat. Ann. §613.330 & 335	Covers sex orientation	15	detr.state.nv.us/nerc
New Hampshire	N.H.Rev.Stat.Ann §354-A	Charitable org exempt Stronger protection for pregnancy	6	webster.state.nh.us/hrc
New Jersey	N.J.Stat.Ann.10:5-12	Covers sex orientation & genetic Protects age under 40 Broader interpretation for disability	1	state.nj.us/lps/dcr
New Mexico	N.M. Stat. Ann. §28-1-7	Covers sex orient if 15+ emp	4	dol.state.nm.us/dol_hrd
New York	N.Y.Exec.Law §§292, 296	Covers sex orient, genetic Covers arrest, obesity, stress NY City has its own laws	4	nysdhr.com nyc.gov/html/cchr/home
North Carolina	N.C.Gen.Stat §143-422.2 N.C.Gen.Stat §95-28.1-28.1A N.C.Gen.Stat §130A-148 N.C.Gen.Stat §168a	Same as Fed Covers sickle cell & hemoglobin C Covers AIDS & HIV Covers handicapped	15	eeoc.gov
North Dakota	NDCC Chapter 14-02.4	Covers non working hours	1	state.nd.us/labor
Ohio	Ohio Rev. Code §4112.04 & .14	Covers damages for age	4	state.oh.us/crc
Oklahoma	25 Okla. Stat. Ann. §§1301, 1302 & 1901	Private suits for disabilities	15	hrc.state.ok.us
Oregon	Or.Rev.Stat §659A.030 covers criminal proceedings rights for misleading advertising	Covers genetic & other	1 (6 for disability)	boli.state.or.us
Pennsylvania	Pa.Stat.Ann.tit.43, §§953, 954	Covers educ, abortion, sterilization	4	phrc.state.pa.us
Rhode Island		No state statute	15	state.ri.gov
South Carolina	S.C. Code §1-13-30 & 80	Same as Fed	15	state.sc.us/schac
South Dakota	No state	No state statute	15	state.sd.us
Tennessee	Tenn.Code Ann. §4-21-401 Tenn.Code Ann. §8-50-103	Same as Fed Covers disability	8	state.tn.us/humanrights
Texas	Texas Lab. Code §§21.051, 21.101	Same as Fed	15	twc.state.tx.us
Utah	Utah Code Ann., Title 34A Ch 5	Same as Fed	15 for age	laborcommission.utah.gov
Vermont	Vt. Stat. Ann. tit. 21, §§495-495d	Covers age, sex orient, HIV Broader inter for disability	1	state.vt.us
Virginia	Va. Code Ann. 2.1-714	Same as Fed	6	chr.state.va.us
Washington	Wash. Rev. Code Ann. §49.60.180	Covers service animals Broader interpretation for Disability & sex	8 (1 for wage)	wa.gov/hrc
West Virginia	W. Va. Code §5-11-1	Broader inter for disability & sex	15	state.wv.us/wvhrc
Wisconsin	Wisc. Stat. Ann. §111.321-11.36	Covers sex orient, arrest, military Covers non working hours Broader interpretation for disability Covers honesty testing, genetic	1	dwd.state.wi.us/er
Wyoming	Wyo. Stat. §27-9-105	Age is 40-69	2	wydoe.state.wy.us

Workplace Harassment

Harassment

Under the same laws that govern discrimination, employers are also responsible for preventing harassment in the workplace. Although there has been a lot of attention given to sexual harassment in recent years, harassment can take many forms. The same groups of people that are protected from discrimination are likewise protected from undergoing unwelcome offensive conduct based on sex, race or other protected characteristics. These types of behavior create a hostile work environment and constitute discriminatory harassment.

To determine if an action is considered harassment, it must be viewed as such by the people that it affected, not by the ones responsible for it. An employee may not have seen or even meant their words or actions to be harassing in nature, but if the victim felt uncomfortable or insulted, then it would be classified as harassment. If the action is not welcomed by the victim, then an offense has occurred. Some of the most common forms of unwelcome behavior are:

- Jokes that are sexual in nature or offends one's race or gender
- Lewd comments about sex or protected characteristics
- Offensive emails or instant messages
- Playing suggestive music
- Inappropriate written material such as love notes
- offensive or derogatory remarks about an applicant or employee's genetic information, or the genetic information of a relative of the applicant or employee
- Use of racially derogatory words, phrases, epithets
- Demonstrations of a racial or ethnic nature such as a use of gestures, pictures or drawings which would offend a particular racial or ethnic group
- Comments about an individual's skin color or other racial/ethnic characteristics
- Negative comments about an employee's religious beliefs (or lack of religious beliefs)
- Expressing negative stereotypes regarding an employee's birthplace or ancestry
- Negative comments regarding an employee's age when referring to employees 40 and over
- Derogatory or intimidating references to an employee's genetic information, mental or physical impairment

Accepting conduct is not the same as welcoming it. A person is not welcoming a conversation or action just because they fail to say anything. They may even participate in the conversation but they feel offended by what someone in the group is saying. Furthermore, just because a person likes something today doesn't mean that they will welcome it tomorrow. For example, if two employees are dating by mutual consent but then break up, what was acceptable a week ago may now be unwelcome.

Anyone, regardless of gender or job level can be guilty of harassment. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee. The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.

Harassment becomes unlawful where:

1) enduring the offensive conduct becomes a condition of continued employment, or

2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:

The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.

The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.

Unlawful harassment may occur without economic injury to, or discharge of, the victim.

Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Quid Pro Quo vs. Hostile Environment Harassment

The EEOC's Guidelines define two types of harassment: "quid pro quo" and "hostile environment." Quid pro quo harassment occurs when "submission to or rejection of such conduct (usually sexual in nature) by an individual is used as the basis for employment decisions affecting such individual," 29 C.F.R § 1604.11(a)(2). Hostile work environment harassment occurs when unwelcome comments or conduct based on sex, race or other legally protected characteristics unreasonably interferes with an employee’s work performance or creates an intimidating, hostile or offensive work environment.

Thus, sexual harassment consists of two types of prohibited conduct:

1. Quid pro quo - when submission to harassment is used as the basis for employment decisions; and
2. Hostile environment - when harassment creates an offensive working environment.

Although quid pro quo and hostile environment harassment are theoretically distinct claims, the line between the two is not always clear and the two forms of harassment often occur together. For example, an employee's tangible job conditions are affected when a hostile work environment results in their constructive discharge. Similarly, a supervisor who makes advances toward a subordinate employee may communicate an implicit threat to adversely affect the employee’s job status if they do not comply. Hostile environment harassment may acquire characteristics of quid pro quo harassment if the offending supervisor abuses their authority over employment decisions to force the victim to endure or participate in the sexual conduct.

To determine whether unwelcome conduct could be classified as a "hostile environment" in violation of Title VII, it must be decided whether the conduct "unreasonably interfer[es] with an individual's work performance" or creates "an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3). Since "hostile environment' harassment takes a

variety of forms, many factors may affect this determination, including:

(1) Whether the conduct was verbal or physical, or both;
(2) How frequently it was repeated;
(3) Whether the conduct was hostile and patently offensive;
(4) Whether the alleged harasser was a co-worker or a supervisor;
(5) Whether the others joined in perpetrating the harassment; and
(6) Whether the harassment was directed at more than one individual.

Sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment. Likewise, unless the conduct is quite severe, a single incident or isolated incidents of offensive conduct or remarks generally do not create an abusive environment. In previous cases, the court found that an isolated incidence of an ethnic or racial epithet which causes offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII. A hostile environment claim generally requires a showing of a pattern of offensive conduct.

In contrast, in quid pro quo cases a single sexual advance may constitute harassment if it is linked to the granting or denial of employment benefits. The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the condition of her working environment and constitute a violation of Title VII.

Vicarious Employer Liability Standards

The Supreme Court has ruled (*Burlington Industries, Inc. v. Ellerth*, and *Faragher v. City of Boca Raton*) that an employer can be held responsible for harassment committed by a supervisor if the harassment was committed by "a supervisor with immediate (or successively higher) authority over the employee". The standard of liability is based on two principles:

1) An employer is responsible for the acts of its supervisors

2) Employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment

The Supreme Court reasons that vicarious liability for supervisor harassment is appropriate because supervisors are aided in such misconduct by the authority that the employers delegated to them. Therefore, that authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment. The determination as to whether a harasser had such authority is based on his or her job function rather than job title (*e.g.*, "team leader") and must be based on the specific facts.

An individual qualifies as an employee's "supervisor" if:

a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*

b. the individual has authority to direct the employee's daily work activities.

This can include an individual who is temporarily authorized to direct another employee's daily work activities and qualifies as his or her "supervisor" during that time period. Accordingly, the

employer would be subject to vicarious liability if that individual commits unlawful harassment of a subordinate while serving as his or her supervisor.

On the other hand, someone who merely relays other officials' instructions regarding work assignments and reports back to those officials does not have true supervisory authority. Furthermore, someone who directs only a limited number of tasks or assignments would not qualify as a "supervisor." For example, an individual whose delegated authority is confined to coordinating a work project of limited scope is not a "supervisor."

In some circumstances, an employer may be subject to vicarious liability for harassment by a supervisor who does not have actual authority over the employee (i.e. if the employee reasonably believed that the harasser had such power). If the chains of command are unclear, then an employee may falsely believe that a person has authority of them when they in fact do not.

Harassment Resulting in a Tangible Employment Action

The Court says that an employer is always liable for a supervisor's harassment if it results in a tangible employment action (an action the significantly changes an employee's status such as hiring, firing, demoting, failure to promote, an undesirable work reassignment, change in benefits, etc.). Unfulfilled threats are insufficient. Characteristics of a tangible employment action are:

1. A tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates, as demonstrated by the following:

    - it requires an official act of the enterprise;
    - it usually is documented in official company records;
    - it may be subject to review by higher level supervisors; and
    - it often requires the formal approval of the enterprise and use of its internal processes.

2. A tangible employment action usually inflicts direct economic harm.
3. A tangible employment action, in most instances, can only be caused by a supervisor or other person acting with the authority of the company.

An action can be classified as tangible even if it doesn't result in a change in salary and/or benefits. For example, changing an employee's title to something less prestigious, thereby constituting a demotion or altering their position in such a way that it blocks their opportunity for a promotion or raise, would constitute a tangible employment action.

On the other hand, an employment action is not viewed as tangible if the change to an employee's job is insignificant and does not in any way alter their salary, benefits, duties or prestige but is for some reason unwelcome by the employee.

The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a

tangible job benefit. In both those situations the supervisor undertakes a tangible employment action on a discriminatory basis. The Supreme Court stated that there must be a significant change in employment status; it did not require that the change be adverse in order to qualify as tangible.

If a challenged action is deemed as tangible, an employer's only defense would be to show evidence of a non-discriminatory explanation for the tangible employment action. If so, then a determination must be made whether that explanation is a pretext designed to hide a discriminatory motive.

Harassment Not Resulting in a Tangible Employment Action

If there was not a tangible employment action, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

1. The employer exercised reasonable care to prevent and correct promptly any harassing behavior, and

2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

If an employer can prove that it fulfilled its duty of reasonable care and that the employee could have avoided all of the harm but unreasonably failed to do so, the employer will avoid all liability for unlawful harassment. However, if an employer cannot prove that it discharged its duty of reasonable care *and* that the employee unreasonably failed to avoid the harm, the employer will be liable. For example, if unlawful harassment by a supervisor occurred and the employer failed to exercise reasonable care to prevent it, the employer will be liable even if the employee unreasonably failed to complain to management or even if the employer took prompt and appropriate corrective action when it gained notice.

In some cases, unlawful harassment will occur and harm will result despite the exercise of requisite legal care by the employer and employee. For example, if an employee reports that their direct supervisor was harassing them, an employer may implement immediate corrective action but what has already occurred caused emotional harm from the beginning. Or, the actions taken by the employer fail to stop the harassment. In these cases, the employer would still be held liable.

The first prong of the affirmative defense requires a showing by the employer that it undertook reasonable care to prevent and promptly correct harassment. Such reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. There is no set means for accomplishing this task. Although a written policy is a good idea, it does not create a "safe harbor" for the employer. For example, if an employer has a written policy in place but fails to conduct a thorough investigation when a claimant makes a complaint, then they have not taken reasonable care to correct the harassment and therefore would have violated their duties.

The second prong of the affirmative defense requires a showing by the employer that the aggrieved employee failed to utilize the company complaint system. An employer who exercised reasonable care is not liable for unlawful harassment if the aggrieved employee could

have avoided harm. The burden lies with the employer to prove that the employee's failure to complain was unreasonable.

An employee might reasonably ignore a small number of incidents, hoping that the harassment will stop without resorting to the complaint process. The employee may directly say to the harasser that they want the misconduct to stop and then wait to see if that is effective in ending the harassment before complaining to management. If the harassment persists, however, then further delay in complaining might be found unreasonable.

A complaint by an employee does not automatically defeat the employer's affirmative defense. If, for example, the employee provided no information to support his or her allegation, gave untruthful information, or otherwise failed to cooperate in the investigation, the complaint would not qualify as an effort to avoid harm. Furthermore, if the employee unreasonably delayed complaining, and an earlier complaint could have reduced the harm, then the affirmative defense could operate to reduce damages.

Recommendations for Employers

The best way to avoid a harassment claim is to take as many steps as possible to prevent harassment from occurring in the first place. Employers must adopt a strong anti-harassment policy, periodically train each employee on its contents and procedures, and vigorously follow and enforce it. It is important that employees be able to recognize harassment and understand the consequences of a claim. The following is a list of procedures that an employer may follow to ensure that they are exercising as many preventive measures as possible.

1. Do a visual inspection of your facility and remove any pictures, cartoons or posters that could be considered offensive to employees (sexually, racially, etc…). This would include calendars that show men or women in suggestive poses or scantily dressed.

2. Consider how your staff interacts with one another. Does this interaction include:

- Sexually explicit or offensive jokes
- Jokes of racial, ethnic or other discriminatory origin
- Derogatory comments, epithets or slurs
- Physical gestures that are sexually or racially suggestive in nature

If you witness any of these behaviors, correct them immediately and discuss them at staff meetings using prior incidents as examples.

3. Place educational posters in areas frequented by all employees and applicants.

4. Develop an anti-harassment policy which outlines a clear explanation of the following:

- Prohibited conduct and examples
- Complaint process that provides multiple avenues of complaint
- Assurance that complaints will be protected against retaliation and information will be kept confidential to the extent that it’s possible
- Description of a prompt, thorough and impartial investigation which will result in immediate and appropriate corrective action when necessary

5. Distribute your company's policy to all employees, post it in a central location and incorporate it into the employee handbook.

6. Set up a training session that educates both employees and supervisors about harassment. Conduct periodic trainings as reminders and to educate any new hires.

7. Elect a three person Board to serve as a Grievance Committee to investigate any claims of harassment (Small employers may use a two member committee). The Board should include:

A Senior Manager
Personnel Manager
Employee Representative

The Board must include at least one male and one female. Guidelines for investigating a claim should be established and Board members should act independently of each other when handling an investigation.

An act of harassment, whether sexual or vicarious in nature, by itself is against the law. A victim may be entitled to damages even though no employment opportunity has been denied and there is no actual loss of pay or benefits. The Supreme Court's rulings in Ellerth and Faragher create an incentive for employers to implement and enforce strong policies prohibiting harassment as well as implementing effective complaint procedures. Employees must also do their part in alerting management about harassment before it becomes severe. If employers and employees undertake the appropriate steps, unlawful harassment can often be prevented, thereby effectuating an important goal of the anti-discrimination statues.

Equal Access To Jobs

Pre-Employment Exams and Testing

Under Title VII, an employer may be liable for employment discrimination not only if it treats persons in a protected class differently ("disparate treatment"), but also if it has facially neutral policies that have an adverse impact on protected classes without appropriate justification ("disparate impact"). Thus, if an employer uses a test for hiring or promotion purpose that has adverse effects on a protected class but does not accurately predict likely future job performance, the test may be a violation of the anti-discrimination laws.

The United States Supreme Court set the precedent for employee testing laws in the case of Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Court held that the employer has the burden of showing that any job requirement is a necessity to the position when that requirement diminishes job opportunities because of race. A key element of the Court's holding in Griggs was that, even though the employer did not intentionally use testing procedures to discriminate against a protected class, the employer was still found at fault since the testing was not pertinent to measuring job capability.

Soon after this case, the EEOC, in conjunction with the Department of Labor (DOL), the United States Department of Justice, and the United States Office of Personnel Management, released the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607, which outlined employment testing standards that complied with Title VII. Although the guidelines are not regulations, they are basis on which many courts make their ruling. And while the guidelines are meant as a resource for compliance with Title VII, they can also be applied to cases citing age (ADEA) or disability (ADA) discrimination.

The Guidelines explain the various permissible ways that employers can utilize selection criteria when hiring employees and how to conduct validation studies to confirm that the methods they implement are in compliance with federal regulations. According to the Guidelines:

> Procedure(s) having adverse impact constitutes discrimination unless justified. The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines.

In order to assure compliance, employers should use professionally developed ability tests from a source that can provide validation studies showing that the test does not negatively impact protected classes. An employer should monitor any testing that is done to verify that it is not resulting in fewer hires of protected classes. The Guidelines recommend using the “four-fifths rule” to check for adverse impact.

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

The ADA also includes several provisions directly addressing appropriate testing under the Act. It explains that the same standards used to judge validity in employment testing under Title VII also apply to disability cases even with respect to non-medical testing. Specifically, when dealing with a disability case, employers must make sure that any tests, do not unfairly disadvantage individuals because of an impaired skill (42 U.S.C.A. § 12112(b)(6) & (7)). The ADA also addresses pre-employment medical examinations and inquiries.

Fitness for Duty

Before a job offer has been made, employers may not require any medical tests, even if they are related to the job. After a job offer has been made, but before the employee begins working, employers may conduct medical exams regardless of whether they are related to the job, as long as they do so for all entering employees in the same job category. After the employee begins working, employers may require medical exams only if they are job-related and consistent with business necessity.

Physical agility or fitness tests are not considered medical examinations and may be given at any time during the application or employment process as long as the tests are given to every applicant for a particular job category (29 C.F.R. § 1630.14(a)). Frequently, these tests are seen in conjunction with public safety positions, such as police officers and firefighters. An employer may also require an applicant to demonstrate how they would perform the essential functions of a position (29 C.F.R. § 1630.14(a)).

Any employment test, whether physical or medical, must have a justifiable employment reason and cannot have an adverse impact on any protected class. Consider the following examples of companies that both implemented fitness for duty tests:

> 1. An employer implemented a pre-employment fitness for duty test which it administered to entry-level job candidates for positions that required physical activity and repetitive lifting. Despite having performed heavy physical labor in the past, meeting the job requirements and been given a conditional job offer, a female applicant failed the test and her job offer was rescinded. She sued for sex discrimination based on the test having a disparate impact on women.
>
> The company argued that the test was essential for the job and necessary to reduce injuries in physically demanding positions. However, it was shown that prior to the test being implemented there were not a higher incidence of woman being injured than men, the test required more lifting than the position itself called for, and while there was a reduction in overall injuries in the company, it was more likely related to other safety programs that had been implemented. Furthermore, the test was passed by 97% of male applicants but only 38% of female applicants. The company was found in violation of Title VII. (EEOC v. Dial Corp., S.D.IA, No. 3-02-CV-10109, 2005)
>
> 2. After suffering a brain aneurysm a reporter asked to be reinstated to his old job. Although he had a letter from his doctor saying that he could return to work, his aneurysm had affected his cognitive and

> speech abilities. His employer requested that before returning, he undergo a medical exam to determine whether he was capable of fulfilling the duties of his job. Based on the result of the exam, the employer decided that he would not be able to perform the functions of a reporter.
>
> The employee sued under the ADA but the court found in favor of the company. Based on the fact that the aneurysm had affected the employee's speech they were in their rights to have him tested as to whether or not he would be capable of fulfilling the position of reporter. (Rosenquist v. Ottaway Newspapers, Inc., 2nd Cir., No. 03-7340, 2004)

While both of these companies administered fitness for duty tests, the reasons for doing so were very different. In EEOC v. Dial the company failed to show that the test reduced worker injuries. Instead, the test created a disparate impact against women. In the case of Rosenquist v. Ottaway the company was within their rights because the requested medical exam legitimately related to the worker's ability to perform essential job duties.

Skill Testing

Some employers utilize skill testing to measure an applicant's aptitude of skills such as typing, transcription, or computer programs. As with other types of pre-employment tests, employers need to make sure that the skills they are testing are pertinent to the job to which they will apply. The Uniform Guidelines on Employee Selection Procedures advise that employers should avoid making employment decisions on the basis of measures of knowledge, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

Discrimination in Hiring

A big determining factor in who receives employment opportunities depends on how and where the employer looks for candidates. Title VII forbids not only recruitment practices that intentionally discriminate but also practices that unfairly limit employment opportunities for a protected group and are not related to job requirements or business needs. For example, recruiting from racially segregated sources, such as certain neighborhoods, schools, religious institutions, and social networks, leads to hiring practices that establish patterns of segregation.

The process of screening applicants can be an area susceptible to discrimination. Race obviously cannot be used as a screening criterion. Nor may employers use a screening criterion that has a significantly disparate racial impact unless it is proven to be job related and consistent with business necessity. For example, if a company is doing a search for an employee and they receive a number of resumes, it would be a violation to eliminate from the

pile applicants that live in certain zip codes that are from areas known to be predominantly Black or Hispanic.

Job Advertisements

Title VII specifically forbids job advertisements based on race, color, and other protected traits (42 U.S.C. § 2000e-3(b)). This includes employment agencies. If an employer asks an employee-referral agency or search firm not to refer or search for candidates of a particular race, both the employer that made the request and the employment agency that honored it would be liable.

Employers should be aware of phrases used in advertisements that favor younger workers, one gender over the other, or a particular ethnic group. Examples of phrases that might subject an employer to liability due to their discriminatory nature are:

> "Recent college grad" (potential ADEA violation)
> Gender specific titles such as "salesman" or "waitress" (potential Title VII violation)
> "Young" or "energetic" (ADEA)
> Making reference to marital status such as "single, fun-loving person" (Title VII)
> "Christian handyman" (Title VII)

Word-of-mouth referrals can be an effective way to recruit employees but only when it is done in a diverse workplace. If the workplace is predominately of a particular population then it would prevent equal employment opportunity and not reflect the diversity in a qualified labor market. Similarly, unions that are not racially diverse should avoid relying solely on member referrals as the source of new members.

It would be a violation of Title VII to recruit people from a largely homogeneous source (meaning a source that has people predominantly of the same race or makeup) if doing so has an intentional purpose or if it has a significant racial impact and cannot be justified as job related and consistent with business necessity. For example, if a city which is predominately white is hiring for their civic center and they are next to a city that has high Hispanic population but they only hire its own residents and refuse to advertise the position in adjoining city, then they would be violating Title VII. Likewise, if a company recruits exclusively at a predominantly White school when they have access to a range of sources, they too would be violating Title VII.

Bona Fide Occupational Qualifications (BFOQs)

Job requirements based on protected characteristics are lawful only when an employer can demonstrate that they are BFOQs reasonably necessary to the normal operation of business. [42 U.S.C. § 2000e-2(e)(1); 29 U.S.C. § 623(f)(1)]. If a job description includes a requirement based on employee's gender, national origin, religion, or age, all or substantially all of the individuals excluded from the requirement must be unable to safely and effectively perform the job duties which are reasonably necessary to the safe and efficient operation of the business.

A BFOQ can be a defense for an employer that has engaged in intentional discrimination. The burden is on the employer to prove a BFOQ, and it is a difficult burden. The BFOQ defense is available only in cases of discrimination because of:

- Religion
- Sex

- National origin
- Age

There is no argument for BFOQ for race or color discrimination. Title VII states that discrimination is OK "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Examples include:

- State prison hires only men as guards in male-only prison.
- French restaurant hires only French chefs. (It won't work when hiring janitors because it's not "reasonably necessary" to the authenticity of the restaurant.)
- Airlines require pilots to retire at the age of 60. (Won't work for flight engineers because the government does not require it and the Airline could individually test the engineers to see which ones would be a high risk.)

Interviews

When interviewing, employers should keep in mind that they are only allowed to ask applicants questions to obtain the information they need to determine which applicant can best fulfill the job requirements. Always avoid questions which ask about characteristics not pertaining to the job. The best way to focus questions on the applicant's qualifications is to do preparation before the interview and create lists of all the tasks that the applicant will need to perform in the job and what skills are needed to fulfill these tasks. Then use this list as a guide to create questions about the applicant's qualifications. Not only does this help the interviewer stick to the appropriate questions, it also ensures that all applicants are asked essentially the same questions thereby avoiding the appearance of treating applicants differently.

The following guide is to provide employers with guidance relating to inquiries that can be made to applicants and employees. It is not intended to be an exhaustive list of all acceptable and unacceptable inquiries.

Employment Inquiries		
Acceptable	**Subject**	**Unacceptable**
Name	**NAME**	• Maiden name
Place of residence	**RESIDENCE**	• Questions regarding owning or renting.
Statements that hire is subject to verification that applicants meet legal age requirements.	**AGE**	• Age • Birth date • Date of attendance/completion of school • Questions which tend to identify applicants over 40
Statements/inquiries regarding verification of legal right to work in the United States.	**BIRTHPLACE, CITIZENSHIP**	• Birthplace of applicant or applicant's parents, spouse or other relatives. • Requirements that applicant produce naturalization or alien card prior to employment.
Languages applicant reads, speaks or writes if use of language other than English is relevant to the job for which applicant is applying.	**NATIONAL ORIGIN**	• Questions as to nationality, lineage, ancestry, national origin, descent or parentage of applicant, applicant's spouse, parent or relative.
Statement by employer of regular days, hours, or shifts to be worked.	**RELIGION**	• Questions regarding applicant's religion. • Religious days observed.
Name and address of parent or guardian if applicant is a minor. Statement of company policy regarding work assignment of employees who are related.	**SEX, MARITAL STATUS, FAMILY**	• Questions to indicate applicant's sex, marital status, number/ages of children or dependents. • Questions regarding pregnancy, child birth, or birth control • Name/address of relative, spouse or children of adult applicant.
	RACE, COLOR, SEXUAL ORIENTATION	• Questions to applicant's race, color, or sexual orientation. • Questions regarding applicant's complexion, color of eyes, hair or sexual orientation.
	CREDIT REPORT	• Any report which would indicate information which is otherwise illegal to ask, e.g , marital status, age, residency, etc.
Statement that a photograph may be required after employment.	**PHYSICAL DESCRIPTION, PHOTOGRAPHS, FINGERPRINTS**	• Questions as to applicant's height/weight. • Requiring applicant to affix a photograph to application or submit one at his/her option. • Require a photograph after interview but before employment.
Employer may inquire if applicant can perform job-related functions. Statement that employment offer may be made contingent upon passing a job related mental/physical examination.	**MENTAL/PHYSICAL DISABILITY, MENTAL CONDITION (APPLICANTS)**	• Any inquiry into the applicant's general health, medical condition, or mental/physical disability. • Requiring a psychological/medical examination of any applicant.
A medical/psychological examination/inquiry may be made as long as the examination/inquiry is job-related and consistent with business necessity and all applicants for the same job classification are subject to the same examination/inquiry.	**MENTAL/PHYSICAL DISABILITY, MEDICAL CONDITION (POST- OFFER/PRE-EMPLOYMENT)**	• Any inquiry into the applicant's general health, medical condition, or physical/mental disability, if not job related and consistent with business necessity.
A medical/psychological examination/inquiry may be made as long as the examination is job-related and consistent with business necessity.	**MENTAL/PHYSICAL DISABILITY, MEDICAL CONDITION (EMPLOYEES)**	• Any inquiry into the employee's general health, medical condition, or mental/physical disability, if not job related and consistent with business necessity.
Job-related questions about convictions, except those convictions which have been sealed, or expunged, or statutorily eradicated.	**ARREST, CRIMINAL RECORD**	• General questions regarding arrest record.
Questions regarding relevant skills acquired during U.S. military service.	**MILITARY SERVICE**	• General questions regarding military service such as dates/type of discharge. • Questions regarding service in a foreign military.
Requesting lists of job-related organizations, clubs or professional societies omitting indications of protected bases.	**ORGANIZATIONS, ACTIVITIES**	• General questions regarding organizations, clubs, societies and lodges.
Name of persons willing to provide professional and/or character references for applicant.	**REFERENCES**	• Questions of applicant's former employers or acquaintances which elicit information specifying applicant's race, etc.
Name and address of person to be notified in case of accident or emergency.	**NOTICE IN CASE OF EMERGENCY**	• Name, address, and relationship of relative to be notified in case of accident or emergency.

Source: State of California DFEH

The Americans with Disabilities Act (ADA) also places some additional restrictions on the employer's pre-employment inquiries. The important thing to remember when asking applicants a question is to only ask questions that will provide information about a person's ability to perform a job with or without reasonable accommodation. An applicant may also be asked what prior job duties they performed.

Asking applicants about visible physical characteristics or their health status is prohibited. It is also illegal to inquire if the applicant has a psychiatric disability, a history of having a psychiatric disability, or if they have consulted with a psychiatrist. Nor may questions be asked about past drug addiction. Employers should review old application forms to ensure that medical histories are not requested, since this is no longer appropriate.

Compensation Discrimination and Equal Pay

General Compensation Issues

Title VII, the ADEA, and the ADA prohibit discrimination in "compensation" based on race, color, religion, sex, national origin, age, disability, or protected activity. The term "compensation" includes any payments made to, or on behalf of, an employee as remuneration for employment. Compensation discrimination in violation of Title VII, the ADEA, or the ADA can exist in a number of forms:

An employer pays employees inside a protected class less than similarly situated employees outside the protected class, and the employer's explanation (if any) does not satisfactorily account for the differential;

An employer maintains a neutral compensation policy or practice that has an adverse impact on employees in a protected class and cannot be justified as job-related and consistent with business necessity;

An employer sets the pay for jobs predominantly held by protected class members below that suggested by the employer's job evaluation study, while the pay for jobs predominantly held by employees outside the protected class is consistent with the level suggested by the job evaluation study;

A discriminatory compensation system has been discontinued, but salary disparities caused by the system have not been eradicated; or

The compensation of one or more employees in a protected class is artificially depressed because of a discriminatory employer practice that affects compensation, such as steering employees in a protected class to lower paid jobs than persons outside the class, discriminating in promotions, performance appraisals, procedures for assigning work, or training opportunities.

Base salaries or wages often make up only part of the compensation package for employees. Employee compensation also can consist of stock options, bonuses, benefits, and other payments made as remuneration for employment. Non-base compensation, such as bonuses, commissions and benefits can be discriminatory even if base compensation is not, since eligibility and amount is decided by the employer and can unfairly favor certain employees.

Compensation disparities also can arise because of discriminatory practices that affect compensation indirectly. For example, the "glass ceiling" phenomenon -- i.e., artificial barriers to the advancement of individuals within protected classes -- can depress the compensation of members of protected classes. These types of unlawful practices can include, for example, discriminatory promotion decisions, performance appraisals, procedures for assigning work or training opportunities, or a company practice of steering protected class members into low paying jobs or limiting their opportunity to transfer to better jobs.

Equal Pay for Equal Work

Although Title VII, the ADEA, GINA and the ADA prohibit discrimination in "compensation", the Equal Pay Act (EPA) is more targeted. The EPA requires employers to pay male and female employees at the same establishment equal wages "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Each of these factors is summarized below:

Skill - Measured by factors such as the experience, ability, education, and training required to perform the job. The key issue is what skills are required for the job, not what skills the individual employees may have. For example, two bookkeeping jobs could be considered equal under the EPA even if one of the job holders has a master's degree in physics, since that degree would not be required for the job.

Effort - The amount of physical or mental exertion needed to perform the job. For example, suppose that men and women work side by side on a line assembling machine parts. The person at the end of the line must also lift the assembled product as he or she completes the work and place it on a board. That job requires more effort than the other assembly line jobs if the extra effort of lifting the assembled product off the line is substantial and is a regular part of the job. As a result, it would not be a violation to pay that person more, regardless of whether the job is held by a man or a woman.

Responsibility - The degree of accountability required in performing the job. For example, a salesperson who is delegated the duty of determining whether to accept customers' personal checks has more responsibility than other salespeople. On the other hand, a minor difference in responsibility, such as turning out the lights at the end of the day, would not justify a pay differential.

Working Conditions - This encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards.

Establishment - The prohibition against compensation discrimination under the EPA applies only to jobs within an establishment. An establishment is a distinct physical place of business rather than an entire business or enterprise consisting of several places of business. However, in some circumstances, physically separate places of business should be treated as one establishment. For example, if a central administrative unit hires employees, sets their compensation, and assigns them to work locations, the separate work sites can be considered part of one establishment.

The jobs that are compared need be only substantially equal, not identical. Unequal compensation can be justified only if the employer shows that the pay differential is attributable to a bona fide seniority, merit, or incentive system, or any other factor other than sex. These are

known as "affirmative defenses" and it is the employer's burden to prove that they apply. In correcting a pay differential, no employee's pay may be reduced. Instead, the pay of the lower paid employee(s) must be increased.

Reductions in Force/Mass Layoffs

When faced with the need to reduce the head count or implement a mass layoff, an employer must make sure that the cuts are enforced in an evenhanded manner, without regard to race, color, religion, age, national origin, genetic information, disability, or sex. They should confirm that they can articulate a non-discriminatory business reason for the reductions and document that reason. Next they need to devise an objective selection procedure to identify the employees that will be terminated. Two key elements to consider are seniority and merit.

Seniority is straight forward and easily implemented. It also provides a degree of protection by most anti-discrimination statutes which allow an employer to observe the terms of a bona fide seniority system even if its application produces discriminatory results against persons in a protected class.

A selection process based on merit may not be as easily implemented as seniority and since it requires employer discretion, it subjects the employer to discrimination claims. However, this system of selection will allow the employer to keep its most qualified workers. To protect against such claims, employers should use objective performance criteria, judge each employee against those criteria, and be able to explain and justify each termination of a protected class member.

Once a list of employees to be terminated has been established, an employer should analyze the list to determine if any protected classes will be adversely impacted. If so, they may need to revise their list or be prepared to show that their selection process was objective and based on documented non-discriminatory factors.

Promotions, Demotions and Job Transfers

The law generally leaves it to the employer’s business judgment to determine who should be transferred, demoted, or promoted. Within that context, however, an applicant’s race, age, sex, nationality, pregnancy, religion, genetic information or disability should not affect their chances. A wise way for employers to achieve their business goals while complying with the law is to perform tangible employment actions (for more information see Chapter 3 on Workplace Harassment) based on job-related ability, as measured by uniform and consistently applied qualification/selection standards. Selection standards should be based on both job qualifications and employee performance.

Since a promotion, demotion or job transfer would qualify as a tangible employment action, employers need to take extra cautions when implementing these changes. It is a good business practice for employers to document job descriptions as well as performance issues so that when they want to implement a change in an employee’s status they have a good business reason for doing so.

Job Qualifications

The EEOC encourages employers to carefully assess whether their job qualifications or duties, although neutral or evenly applied, indirectly impact employees based on their protected

characteristics. Analyze the duties, functions, and competencies relevant to jobs. Then create objective, job-related qualification standards related to those duties, functions, and competencies and put them in writing as job descriptions. Job descriptions, properly prepared, can support the goal of eradicating unlawful employment discrimination. Racial requirements are never lawful in job descriptions and should not be used under any circumstances. Job requirements based on an employee's gender, national origin, religion, or age can be used in very limited circumstances. Job requirements based on these protected characteristics are lawful only when an employer can demonstrate that they are bona fide occupational qualifications ("BFOQs") reasonably necessary to the normal operation of business. 42 U.S.C. § 2000e-2(e)(1); 29 U.S.C. § 623(f)(1).

Educational requirements may be important for certain jobs. For example, graduation from law school is required to be a lawyer. However, employers often impose educational requirements out of their own sense of desirable qualifications. Such requirements may violate Title VII if they have a disparate impact and exceed what is needed to perform the job.

Employers should also make sure promotion criteria are made known, and that job openings are communicated to all eligible employees.

Performance

When making hiring and promotion decisions, employers must apply the same selection criteria to all employees and apply them equally, giving the same weight to each criterion for each person. The reasons given for selection decisions should be credible and supported by the evidence. One way to document evidence to support employment decisions is by conducting regular performance evaluations.

Most supervisors informally take note of performance factors throughout the year but make the mistake of not recording their observations. Employers should be sure to document performance issues. That way, if it is necessary to demote or fire an employee, there is solid evidence to support that decision.

A major pitfall in writing evaluations is in not establishing strong performance criteria, and therefore not addressing the issues related to performance. The basis of measurement by which the employee is evaluated needs to be established prior to conducting a review. During any review process, it is imperative that managers not only keep in mind an employee's job description, but explicitly state the specific performance objectives. It is a good idea to include tangible outcomes, realistic goals and precise expectations so that the employee understands exactly what is expected of them and if they fail to meet their goals, it is easily identified.

Written evaluations should be free of inflammatory and problematic language. The EEOC stipulates that the appraisal accurately reflect job-related performance, that is, it must be based on facts, not impressions. And most importantly, performance reviews should be unaffected by race bias.

Workplace Diversity Issues

Workforce Diversity Issues

Intentionally treating employees or applicants differently than others who hold or are applying for similar jobs is known as disparate treatment. Disparate treatment can occur in any area of employment, including hiring, discipline, performance appraisal, termination, working conditions, and benefits. Harassment is also a form of disparate treatment.

Sometimes a discriminatory decision is not made on a conscious level but is driven by racial biases or stereotypes. For example, an employer may implement policies or procedures that appear neutral but have a particularly negative effect on a group with a common race, color, sex, national origin, religion, age, or disability status. This is known as disparate impact.

Title VII prohibits both disparate treatment and disparate impact.

Race/Color

Under Title VII, equal employment opportunity cannot be denied any person because of their racial group or perceived racial group, their race-linked characteristics (e.g., hair texture, color, facial features), or because their marriage to or association with someone of a particular race or color. Employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups is also prohibited.

Since the enactment of Title VII, equal opportunity in employment has increased dramatically in America. People of various races and color now work in virtually every field, and opportunities are increasing at every level. But there is still work to be done. In 2005, the EEOC reported that charges alleging race discrimination accounted for 35.5 percent of their cases, which made race the most prevalent discrimination under federal law. Private surveys conducted in 2002-2003 provided similar data. A 2003 study found in the American Journal of Sociology in Milwaukee found that Whites with a criminal record received job call-backs at a rate more than three times that of Blacks with the same criminal record, and even at a rate higher than Blacks without a criminal record. Likewise, a 2003 study on Racial Preferences by Bussey and Trasviña in California found that temporary agencies preferred White applicants three to one over African American applicants. And, a 2002 study in Boston and Chicago by Marianne Bertrand and Sendhil Mullainathan found that résumés of persons with names common among Whites were 50 percent more likely to generate a request for an interview than equally impressive résumés of persons with names common among Blacks.

Title VII does not contain a definition of “race,” nor has the Commission adopted one. For the collection of federal data on race and ethnicity, the Office of Management and Budget (OMB) has provided the following five racial categories: *American Indian or Alaska Native*; *Asian*; *Black or African American*; *Native Hawaiian or Other Pacific Islander*; and *White*; and one ethnicity category, *Hispanic or Latino*. OMB has made clear that these categories are “social-political constructs . . . and should not be interpreted as being genetic, biological, or anthropological in nature.”

The statute also does not define “color.” The courts and the Commission read “color” to have its commonly understood meaning – pigmentation, complexion, or skin shade or tone. Therefore, color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person. Even though race and color clearly

overlap, they are not synonymous. Color discrimination can occur between people of different races or ethnicities, or between persons of the same race or ethnicity.

Title VII's prohibition of race discrimination generally encompasses:

Ancestry: Employment discrimination because of racial or ethnic ancestry. Discrimination against a person because of their ancestry can violate Title VII's prohibition against race discrimination. Note that there can be considerable overlap between "race" and "national origin," but they are not identical. For example, discrimination against a Chinese American might be targeted at her Asian ancestry and not her Chinese national origin. In that case, she would have a claim of discrimination based on race, not national origin.

Physical Characteristics: Employment discrimination based on a person's physical characteristics associated with race, such as a person's color, hair, facial features, height and weight. See more in-depth discussion on physical characteristics below.

Race-linked Illness: Discrimination based on race-linked illnesses. For example, sickle cell anemia is a genetically-transmitted disease that affects primarily persons of African descent. Other diseases, while not linked directly to race or ethnicity, may nevertheless have a disproportionate impact. For example, Native Hawaiians have a disproportionately high incidence of diabetes. If the employer applies facially neutral standards to exclude treatment for conditions or risks that disproportionately affect employees on the basis of race or ethnicity, the employer must show that the standards are based on generally accepted medical criteria.

Culture: Employment discrimination because of cultural characteristics related to race or ethnicity. Title VII prohibits employment discrimination against a person because of cultural characteristics often linked to race or ethnicity, such as a person's name, cultural dress and grooming practices, or accent or manner of speech. For example, an employment decision based on a person having a so-called "Black accent," or "sounding White," violates Title VII if the accent or manner of speech does not materially interfere with the ability to perform job duties.

Perception: Employment discrimination against an individual based on a belief that the individual is a member of a particular racial group, regardless of how the individual identifies himself. Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong.

Association: Employment discrimination against an individual because of his/her association with someone of a particular race. For example, it is unlawful to discriminate against a White person because he or she is married to an African American or has a multi-racial child, or because he or she maintains friendships or otherwise associates with persons of a certain race.

Subgroup: Title VII prohibits discrimination against a subgroup of persons in a racial group because they have certain attributes in addition to their race. Thus, for example, it would violate Title VII for an employer to reject Black women with preschool age children, while not rejecting other women with preschool age children.

"Reverse" Race Discrimination: Title VII prohibits race discrimination against all persons, including Caucasians. A plaintiff may prove a claim of discrimination through direct or

circumstantial evidence. Some courts, however, take the position that if a White person relies on circumstantial evidence to establish a reverse discrimination claim, he or she must meet a heightened standard of proof. The Commission, in contrast, applies the same standard of proof to all race discrimination claims, regardless of the victim's race or the type of evidence used. In either case, the ultimate burden of persuasion remains always on the plaintiff.

Title VII also does not permit racially motivated decisions driven by business concerns – for example, concerns about the effect on employee relations, or the negative reaction of clients or customers. Nor may race or color ever be a bona fide occupational qualification under Title VII.

As noted above, appearance standards must be neutral, adopted for non-discriminatory reasons, consistently applied to persons of all racial and ethnic groups, and, if the standard has a disparate impact, it must be job-related and consistent with business necessity. The following are examples of areas in which appearance standards may implicate Title VII's prohibition against race discrimination:

Height and Weight: Standards for height and weight sometimes are challenged as having an unlawful adverse impact. For example, a requirement that employees be at least six feet tall might have an adverse impact on Asian Americans due to average height and weight differences, and thus such a requirement would need to be job-related and consistent with business necessity.

Dress: An employer can impose the same dress code on all workers in similar jobs, regardless of their race or ethnicity, as long as the policy was not adopted for discriminatory reasons and is enforced evenhandedly. However, an employer must treat racial or ethnic attire that complies with the dress code the same as other attire that complies with the dress code. For example, Title VII prohibits employers from banning the wearing of traditional Hawaiian dress that complies with the employer's dress code requirements.

Hair: Employers can impose neutral hairstyle rules – e.g., that hair be neat, clean, and well-groomed – as long as the rules respect racial differences in hair textures and are applied evenhandedly. For example, Title VII prohibits employers from preventing African American women from wearing their hair in a natural, unpermed "afro" style that complies with the neutral hairstyle rule. Title VII also prohibits employers from applying neutral hairstyle rules more restrictively to hairstyles worn by African Americans.

Beards: Employers generally can require employees to be clean-shaven. However, Title VII requires an employer to make exceptions to a no-beard policy for men with pseudofolliculitis barbae, an inflammatory skin condition that occurs primarily in Black men and that is caused by shaving, unless being clean-shaven is job-related and consistent with business necessity.

Because discrimination often is subtle, and there rarely is a "smoking gun," determining whether race played a role in the decision making requires examination of all of the surrounding facts and circumstances. The presence or absence of any one piece of evidence often will not be determinative. Sources of information can include witness statements, including consideration of their credibility, documents, direct observation, and statistical evidence, among others. When

the EEOC investigates claims of racial discrimination or harassment they look at the following for potential evidence:

Race-related statements (oral or written) made by decision makers or persons influential to the decision. Race-related statements include not only slurs and blatantly biased statements, but also "code words" that are supposedly neutral on their face but which, in context, convey a racial meaning. The credibility of the witness(es) attesting to discriminatory statements, and the credibility of the witness(es) denying them, are critical to determining whether such statements actually were made. If racially discriminatory statements were made, their importance will depend on their egregiousness and how closely they relate – in time and content – to the decision in question. For example, a statement that there are "too many Asians" in a department, made by a hiring official when discussing applicants, would be strong evidence supporting an Asian American's failure-to-hire claim. Such a statement also would support a claim of hostile work environment by Asian American employees.

Comparative treatment evidence. This is evidence as to whether the claimant was treated the same as, or differently than, similarly situated persons of a different race. Such evidence is not always required, but a difference in the treatment of similarly situated persons of different races is probative of discrimination because it tends to show that the treatment was not based on a non-discriminatory reason. Conversely, an employer's consistent treatment of similarly situated persons of different races tends to support its contention that no discrimination occurred. Comparator evidence that supports either party's position must be weighed in light of all the circumstances. For example, if the group of similarly situated persons who were treated better than the claimant included persons of the claimant's race, that would weaken his or her claim, but it would not be conclusive proof of non-discrimination because the balance of the evidence overall might still more convincingly point to discrimination. Identification of persons who are similarly situated to the claimant should be based on the nature of the allegations, the alleged non-discriminatory reasons, and other important factors suggested by the context, but should not be based on unduly restrictive standards.

Relevant background facts. Specific employment decisions and issues should not be looked at in isolation. Other information that can shed light on whether the employer's adverse employment decision was motivated by race includes the employer's treatment of other employees (or customers, etc.), race-related attitudes, the work environment generally, and the context of the challenged employment decision. For example, background evidence that an employer has permitted racial jokes and slurs about Asian Americans in the workplace would support an Asian American employee's allegation that her termination was based on her race. Similarly, background evidence that an employer has discriminated against African Americans in hiring, pay, or promotions would support an African American employee's claim that a pattern of mistreatment – e.g., her supervisor undermining her work, ostracizing her, and making snide comments – is actually a pattern of race-based harassment. The point is that background evidence can help determine the employer's state of mind and otherwise provide important context. Also, as suggested by the above examples, the inquiry into background evidence can reveal other potential violations of the statute.

Relevant personnel policies. An employer's deviation from an applicable personnel policy, or a past practice, can support an inference of a discriminatory motive.

Conversely, acting in conformance with a consistently applied non-discriminatory policy or practice would suggest there is no such motive.

The decision maker's race. The race of the decision maker may be relevant, but is not controlling. In other words, it should not be presumed that a person would not discriminate against members of his own race. As the Supreme Court has noted, "because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."

Statistical evidence. Statistics reflecting the employer's general policy or practice can be helpful in determining whether race was a factor in a particular selection decision. For example, a Black applicant's allegation of hiring discrimination would be supported by evidence that the selection rate of qualified Black applicants is significantly below the selection rate of qualified applicants of other races, or that Blacks are significantly under-represented in the employer's workplace given their availability in the qualified labor market. Conversely, while a racially diverse workforce cannot immunize an employer from liability for specific acts of discrimination, the more racially diverse the relevant part of the employer's workforce is, the less credible would be the claim of discrimination. Statistical evidence also is important in determining whether the employer has a systemic pattern or practice of discriminating.

According to the EEOC, racial discrimination claims are the most common. In 2006, race accounted for 35.9% of charges filed. As shown below, cases with race alleged as a basis had a higher percentage of harassment alleged (48.4%) than any other issue; race cases alleging discharge ran second (40.6%).

Race Discrimination Issues	
	Percent
Harassment	48.4%
All Discharge	40.6%
Hiring	20.3%
Promotion	17.2%

Source: EEOC 2003

Religion

Religion refers to a person's religious background, religious beliefs (or lack of them) or membership in a religious group. Under Title VII, an employer is required to reasonably accommodate the religious belief of an employee or prospective employee, unless doing so would impose an undue hardship. Possible accommodations include flexible scheduling, voluntary substitutions or swaps, job reassignments, lateral transfers, modification of grooming requirements and other workplace practices, policies and/or procedures.

The following are examples of requests that employees may make in order to follow their religious teachings:

- Observance of a Sabbath or religious holidays
- Need for prayer break during working hours
- Practice of following certain dietary requirements
- Practice of not working during a mourning period for a deceased relative
- Prohibition against medical examinations
- Prohibition against membership in labor and other organizations
- Practices concerning dress and other personal grooming habits

If an employee's religion requires time for prayer during the workday, an employer may accommodate this by finding a conference room or private area that the employee can utilize during their breaks for this purpose. This does not necessarily mean that the employer is required to open up areas for other employees to hold weekly Bible studies or prayer groups as these activities may easily be held during off hours and at another location.

Employers may not treat employees or applicants more or less favorably because of their religious beliefs or practices - except to the extent a religious accommodation is warranted. For example, an employer may not refuse to hire individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion, and may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices.

Scheduling examinations or other selection activities in conflict with a current or prospective employee's religious needs, inquiring about an applicant's future availability at certain times, maintaining a restrictive dress code, or refusing to allow observance of a Sabbath or religious holiday is prohibited unless the employer can prove that not doing so would cause an undue hardship.

An employer can claim undue hardship when accommodating an employee's religious practices if allowing such practices:

- Require more than ordinary administrative costs
- Diminish efficiency in other jobs
- Infringe on other employees' job rights or benefits
- Impair workplace safety
- Cause co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work
- Conflict with another law or regulation

- If changing a bona fide seniority system to accommodate one employee's religious practices denies another employee the job or shift preference guaranteed by the seniority system

For example, if an employee is required to wear certain clothing because of their religious practice but that clothing poses a danger when worn around particular machinery, then permitting the employee to wear those clothes would be an undue hardship because of legitimate safety rules or concerns.

Employees cannot be forced to participate -- or not participate -- in a religious activity as a condition of employment. Mandatory "new age" training programs, designed to improve employee motivation, cooperation or productivity through meditation, yoga, biofeedback or other practices, may conflict with the non-discriminatory provisions of Title VII. Employers must accommodate any employee who gives notice that these programs are inconsistent with the employee's religious beliefs, whether or not the employer believes there is a religious basis for the employee's objection. An employee whose religious practices prohibit payment of union dues to a labor organization cannot be required to pay the dues, but may pay an equal sum to a charitable organization.

Since the attacks of September 11, 2001, the EEOC and state and local fair employment practices agencies have recorded a significant increase in the number of charges alleging discrimination based on religion and/or national origin. Many of the charges have been filed by individuals who are or are perceived to be Muslim, Arab, South Asian, or Sikh. These charges most commonly allege harassment and discharge.

While employers have an ongoing responsibility to address workplace discrimination, reaction to the events of September 11, 2001 may demand increased efforts to prevent discrimination. Some companies have avoided hiring employees that they perceive to be Muslim, Arab, South Asian or Sikh because they feel that their presence would make customers uncomfortable. Customer preference is never a justification for a discriminatory practice. Refusing to hire someone because customers or co-workers may be "uncomfortable" with that person's religion or national origin is just as illegal as refusing to hire that person because of religion or national origin in the first place.

According to the EEOC religious based discrimination accounted for 3.4% of the claims filed in 2006. As shown below, discharge was the issue most often alleged in religious discrimination suits (75%) with reasonable accommodation next at 45%. Harassment was the issue in 40% of the cases filed with religion as a basis.

Religious Discrimination Issues	
	Percent
All Discharge	75.0%
Reas. Accom.	45.0%
Harassment	40.0%

Sex

Sex discrimination can take many forms. The following are prohibited under sex discrimination:

Sex Discrimination - Unfair treatment or denial of standard privileges of employment based on a person's sex or gender.

Unequal Pay - Men and women should be given equal pay for equal work in the same establishment.

Sexual Harassment - This includes practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment for persons of either gender, including same sex harassment.

Pregnancy Based Discrimination - Pregnancy, childbirth, and related medical conditions must be treated in the same way as other temporary illnesses or conditions.

A person's gender should never be a factor when making employment decisions unless there is a bona fide occupational reason for that distinction. Labeling positions ``Men's jobs'' and ``Women's jobs'' tend to deny employment opportunities unnecessarily to one sex or the other. The EEOC does not classify the following as bona fide occupational qualifications:

- The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

- The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment or that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

- The refusal to hire an individual because of the preferences of coworkers, the employer, clients, or customers.

Where it is necessary for the purpose of authenticity or genuineness, the EEOC will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

Many States have enacted laws with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The EEOC has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The EEOC has concluded that such laws and regulations conflict with and are superseded by Title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

It is also unlawful for an employer to discriminate between men and women with regard to fringe benefits. When an employer offers benefits only to those employees who are “head of household” or the “principal wage earner” the benefits are usually available only to male employees and their families. This affects the rights of the female employees based on a condition that bears no relationship to job performance and will be found in violation of Title VII.

Likewise, it is unlawful for an employer to offer benefits to:

- The wives and families of male employees when the same benefits are not made available for the husbands and families of female employees
- The wives of male employees which are not made available for female employees
- The husbands of female employees which are not made available for male employees

An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

The Pregnancy Discrimination Act, which is an amendment to Title VII, prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions. Women who are pregnant or affected by related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations. Title VII's pregnancy-related protections include:

Hiring
An employer cannot refuse to hire a pregnant woman because of her pregnancy, because of a pregnancy-related condition or because of the prejudices of co-workers, clients, or customers.

Pregnancy and Maternity Leave
An employer may not single out pregnancy-related conditions for special procedures to determine an employee's ability to work. However, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements.

If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee. For example, if the employer allows temporarily disabled employees to modify tasks, perform alternative assignments or take disability leave or leave without pay, the employer also must allow an employee who is temporarily disabled due to pregnancy to do the same.

Pregnant employees must be permitted to work as long as they are able to perform their jobs. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, her employer may not require her to remain on leave until the baby's birth. An employer also may not have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.

Employers must hold open a job for a pregnancy-related absence the same length of time jobs are held open for employees on sick or disability leave.

Health Insurance
Any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as costs for other medical conditions. Health insurance for expenses arising from abortion is not required, except where the life of the mother is endangered.

Pregnancy-related expenses should be reimbursed exactly as those incurred for other medical conditions, whether payment is on a fixed basis or a percentage of reasonable-and-customary-charge basis.

The amounts payable by the insurance provider can be limited only to the same extent as amounts payable for other conditions. No additional, increased, or larger deductible can be imposed.

Employers must provide the same level of health benefits for spouses of male employees as they do for spouses of female employees.

Fringe Benefits
Pregnancy-related benefits cannot be limited to married employees. In an all-female workforce or job classification, benefits must be provided for pregnancy-related conditions if benefits are provided for other medical conditions.

If an employer provides any benefits to workers on leave, the employer must provide the same benefits for those on leave for pregnancy-related conditions.

Employees with pregnancy-related disabilities must be treated the same as other temporarily disabled employees for accrual and crediting of seniority, vacation calculation, pay increases, and temporary disability benefits.

While discrimination based on sexual orientation is not a violation of federal civil rights laws, such discrimination is not permitted under the Department of Commerce Diversity Policy and may be a prohibited personnel practice under the Civil Service Reform Act of 1978. The formal EEO complaint process is not currently available for allegations of discrimination based on sexual orientation. However, the President's Executive Order states, as a matter of Federal policy, that a person's sexual orientation should not be the basis for the denial of a job or a promotion. As the Nation's largest employer, the Federal Government sets an example for other employers that employment discrimination based upon sexual orientation is not acceptable.

In 2006, the EEOC reported that sex based discrimination accounted for 30.7% of the claims filed. As shown below, 67.4% of cases with sex as a basis alleged some form of harassment; 55.4% of the cases with sex as a basis alleged some form of discharge.

Sex Discrimination Issues	
	Percent
Harassment	67.4%
All Discharge	55.4%
Terms/Conditions	15.4%
Hiring	9.1%
Wages	8.0%

National Origin

National origin discrimination means treating someone less favorably because they come from a particular place, are married or associated with someone of a particular nationality, their ethnicity or accent, or because it is believed that they have a particular ethnic background. The following are examples of discrimination which violate Title VII:

> **Ethnicity:** Employment discrimination against members of an ethnic group, for example, discrimination against someone because he is Arab. National origin discrimination also includes discrimination against anyone who does *not* belong to a particular ethnic group, for example, less favorable treatment of anyone who is not Hispanic.
>
> **Physical, linguistic, or cultural traits:** Employment discrimination against an individual because she has physical, linguistic, and/or cultural characteristics closely associated with a national origin group, for example, discrimination against someone based on their traditional African style of dress.
>
> **Perception:** Employment discrimination against an individual based on the employer's belief that he is a member of a particular national origin group, for example, discrimination against someone perceived as being Arab based on his speech, mannerisms, and appearance, regardless of how they identify themselves or whether they are, in fact, of Arab ethnicity.

For example, John Chu has seven years of experience working as a salesman for ABC Hardware store and applies for an opening at the store as a manager. He is denied the promotion and instead it goes to his co-worker, Tim Smith who has less experience and Chu feels is less qualified. Chu suspects that the reason he was not given the promotion is because he is Chinese and he files a charge of discrimination in violation of Title VII.

Chu has a legitimate claim, and if it were to be established that he was turned down for the promotion because he is from China, then ABC would be in violation of Title VII. It isn't necessary to establish that Chu is actually from China because national origin discrimination includes the presumption that the claimant is from a particular place or that their ancestors are from there.

Taking it one step further, if ABC Hardware argued that the owners were of Korean descent and they had a track record for hiring Asian employees, they could still be found in violation of Title VII. The only issue is whether Chu suffered adverse treatment due to his national origin. Perhaps ABC hired other Koreans and Japanese but they didn't like to hire employees of Chinese descent.

While accommodation requirements do not apply to national origin, Title VII prohibits employers from imposing more restrictive workplace policies on some national origin (or religious) groups than on others. For example, an employer may not require that Hispanic workers wear business attire while permitting non-Hispanic workers in similar positions to wear more casual attire. However, an employer could impose the same dress code on all workers in similar jobs, regardless of their national origin, as long as the policy was not adopted for discriminatory reasons and is enforced evenhandedly.

The Immigration Reform and Control Act (IRCA) of 1986 requires employers to assure that employees hired are legally authorized to work in the U.S. However, an employer who requests employment verification only for individuals of a particular national origin, or individuals who appear to be or sound foreign, may violate both Title VII and IRCA; verification must be obtained from all applicants and employees. Employers who impose citizenship requirements or give preferences to U.S. citizens in hiring or employment opportunities also may violate IRCA.

Title VII also prohibits discrimination based on linguistic characteristics common to a specific ethnic group. An employer must show a legitimate non-discriminatory reason for the denial of employment opportunity because of an individual's accent or manner of speaking. Requiring employees or applicants to be fluent in English or to speak English only in the workplace may also violate Title VII if the rule is adopted to exclude individuals of a particular national origin and is not related to job performance.

Accent discrimination
Falling under national origin discrimination is accent discrimination. An employer may not base a decision on an employee's foreign accent unless the accent materially interferes with job performance. This assessment depends upon the specific duties of the position in question and the extent to which the individual's accent affects their ability to perform job duties. Employers should distinguish between a merely discernible foreign accent and one that interferes with communication skills necessary to perform job duties. Generally, an employer may only base an employment decision on accent if effective oral communication in English is required to perform job duties and the individual's foreign accent materially interferes with his or her ability to communicate orally in English. Positions for which effective oral communication in English may be required include teaching, customer service, and telemarketing. Even for these positions, an employer must still determine whether the particular individual's accent interferes with the ability to perform job duties.

For example, if Juan Garcia applied for a position as a bill collector who called customers on a regular basis, an employer might be justified in not hiring him based on the fact that he speaks with a heavy Mexican accent and would not be understood by the customers. However, if Garcia applied as web developer who worked at a desk and didn't rely on spoken communication with customers, then an employer could not use the fact that he spoke with an accent as a reason for not hiring him.

Furthermore, employers cannot reject an applicant solely because their accent would not be a customer preference. For example, if an applicant of middle eastern descent applied for a salesman position, and he speaks with an accent that reflects his heritage but is easy to understand, an employer could not reject him based on the fact that post 9/11 customers might be afraid to do business with someone they perceive as being part of a particular group.

English fluency
A fluency requirement is only permissible if required for the effective performance of the position for which it is imposed. The degree of fluency that may be lawfully required varies from one position to the next, therefore, employers should avoid general fluency requirements that may not be applicable in particular positions within the company. As with a foreign accent, an individual's lack of proficiency in English may interfere with job performance in some circumstances, but not in others. For example, an individual who is sufficiently proficient in spoken English to qualify as a cashier at a fast food restaurant may lack the written language skills to perform a managerial position at the same restaurant requiring the completion of

abundant paperwork in English. The employer should not require a greater degree of fluency than is necessary for the relevant position.

With American society growing more diverse, employers have increasingly required that some employees be fluent in languages other than English. For example, a business that provides services to Spanish-speaking customers might have a sound business reason for requiring that some of its employees speak Spanish. As with English fluency requirements, requirements for fluency in foreign languages must actually be necessary for the positions for which they are imposed.

A business with a diverse clientele may assign work based on foreign language ability. For example, an employer may assign bilingual Spanish-speaking employees to provide services to customers who speak Spanish, while assigning employees who only speak English to provide services to English-speaking customers. Of course, employers should make such assignments based on language ability. In most cases, employers also may lawfully assign comparable work to employees based on their language skills, and are not required by Title VII to provide additional compensation for work that is performed in a foreign language.

English-only rules
Many employers have implemented an “English-only” rule in the workplace. Title VII permits employers to adopt English-only rules under certain circumstances which must be for non-discriminatory reasons. An English-only rule may be used if it is needed to promote the safe or efficient operation of the employer's business, effectively fulfills the business purpose it is supposed to serve and there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact. If the employer believes such a rule is necessary, employees must be informed when English is required and the consequences for violating the rule. The employer may provide notice by any reasonable means under the circumstances, such as a meeting, e-mail, or posting. In some cases, it may be necessary for an employer to provide notice in English *and* in the other native languages spoken by its workers. A grace period before the effective date of the rule also may be required to ensure that all workers have received notice.

In evaluating whether to adopt an English-only rule, an employer should weigh business justifications for the rule against possible discriminatory effects of the rule. While there is no precise test for making this evaluation, relevant considerations include:

- Evidence of safety justifications for the rule
- Evidence of other business justifications for the rule, such as supervision or effective communication with customers
- Likely effectiveness of the rule in carrying out objectives
- English proficiency of workers affected by the rule

The following are some situations in which business necessity would justify an English-only rule:

- For communications with customers, coworkers, or supervisors who only speak English
- In emergencies or other situations in which workers must speak a common language to promote safety

- For cooperative work assignments in which the English-only rule is needed to promote efficiency
- To enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with coworkers or customers

Before adopting an English-only rule, the employer should consider whether there are any alternatives to an English-only rule that would be equally effective in promoting safety or efficiency. Courts would likely uphold a policy that is limited in scope to employees interacting with customers who do not understand the employee's preferred language or where is needed for the sake of safety concerns. Prohibiting employees from speaking other languages during non-working time such as break periods would likely be found unlawful. The EEOC offers the following examples:

> XYZ Textile Corp. adopts a policy requiring employees to speak only English while in the workplace, including when speaking to coworkers during breaks or when making personal telephone calls. XYZ places Hispanic workers under close scrutiny to ensure compliance and replaces workers who violate the rule with non-Hispanics. Jose, a native Spanish speaker, files a charge with the EEOC alleging that the policy discriminates against him based on his national origin. XYZ states that the rule was adopted to promote better employee relations and to help improve English skills. However, the investigation reveals no evidence of poor employee relations due to communication in languages other than English. Nor are proficient English skills required for any of the positions held by non-native English speakers. Because XYZ's explanation is contradicted by the evidence, the English-only rule is unlawful.

The following is an example of a narrowly crafted English-only rule promoting safety in the workplace.

> XYZ Petroleum Corp. operates an oil refinery and has a rule requiring all employees to speak only English during an emergency. The rule also requires that employees speak in English while performing job duties in laboratories and processing areas where there is the danger of fire or explosion. The rule does not apply to casual conversations between employees in the laboratory or processing areas when they are *not* performing a job duty. The English-only rule does not violate Title VII because it is narrowly tailored to safety requirements.

"Employee morale" is not an acceptable reason for implementing an English-only rule. If the speaking of other languages creates tension among the employees, the employer should remind everyone that harassment is not permitted in the workplace and it is never appropriate to exclude someone based on language.

An English-only rule would be unlawful if it were adopted with the intent to discriminate on the basis of national origin. Likewise, a policy that prohibits some but not all of the foreign languages spoken in a workplace, such as a no-Vietnamese rule, would be unlawful.

In 2006, the EEOC reported that sex based discrimination accounted for 11.0% of the claims filed. As shown in the following table, discharge was the most frequently alleged issue in suits with national origin as a basis (71%) followed by harassment as the second most alleged issue (50% of the suits).

National Origin Discrimination Issues	
	Percent
All Discharge	71.0%
Harassment	50.0%
Terms & Conditions	28.9%
Hiring	10.5%

Disability

Like Title VII, the Americans with Disabilities Act of 1990 (42 USC 12101) aims to eradicate discrimination in the workplace. (See Applicable State and Federal Laws in this manual for more information on the ADA) The ADA prohibits discrimination against qualified individuals with a disability in all employment practices. A qualified individual with a disability is:

> an individual who meets the skill, experience, education, and other job-related requirements of a position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of a job.

The Act does not interfere with an employer's authority to establish appropriate job qualifications to hire people who can perform jobs effectively and safely, and to hire the best qualified person for a job. The ADA requirements are designed to assure that people with disabilities are not excluded from jobs that they can perform.

As with most protected classes of employees, individuals with disabilities must not be subject to discrimination in any employment practice. This means that:

- They should have equal access to any employment opportunity available to a similarly situated individual who is not disabled.

- Employment decisions concerning an employee or applicant should be based on objective factual evidence about the particular individual, not on assumptions or stereotypes about the individual's disability.

  For example, an employer shouldn't exclude all persons who have epilepsy from jobs that require use of dangerous machinery without looking at the life experience and work history of that person. The type of job, degree of seizure control, the types of seizures, whether the person has an "aura" warning, the reliability of taking anti-convulsant medication, or have sufficient warning of a seizure so that they can prevent any hazards from occurring must all be considered. To make a general policy to not hire individuals with epilepsy would be a violation of the provisions of the ADA and qualify as disability discrimination.

- The qualifications of an individual with a disability may be evaluated on ability to perform all job-related functions, with or without reasonable accommodation. However, an individual may not be excluded from a job because a disability prevents performance of marginal job functions.

- An employer must provide a reasonable accommodation that will enable an individual with a disability to have an equal opportunity in every aspect of employment, unless a particular accommodation would impose an undue hardship.

- An employer may not use an employment practice or policy that screens out or tends to screen out an individual with a disability or a class of individuals with disabilities, unless the practice or policy is job related and consistent with business necessity and the individual cannot be accommodated without undue hardship.

- An employer may not limit, segregate, or classify an individual with a disability in any way that negatively affects the individual in terms of job opportunity and advancement.

- An individual with a disability should not because of a disability be treated differently than a similarly situated individual in any aspect of employment, except when a reasonable accommodation is needed to provide an equal employment opportunity or when another Federal law or regulation requires different treatment.

Employers have a legal obligation to ensure that qualification standards or selection criteria that screen out or tend to screen out an individual with a disability must be job-related and consistent with a business necessity. Even if a standard is job-related and consistent with a business necessity, if it screens out an individual with a disability, the employer must then consider if the individual could meet the standard with a reasonable accommodation.

Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.

Reasonable accommodations must be provided to qualified employees regardless of whether they work part- time or full-time, or are considered "probationary." Generally, the individual with a disability must inform the employer that an accommodation is needed.

There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed. These include:

making existing facilities accessible;

job restructuring;

part-time or modified work schedules;

acquiring or modifying equipment;

changing tests, training materials, or policies;

providing qualified readers or interpreters; and

reassignment to a vacant position.

For example, if an employer has an opening for a position in which the employee would be occasionally using the phone to contact customers, they can’t rule out an applicant solely because the applicant has a hearing disability when they meet all other job requirements. The applicant may offer that they use a TTY (device that permits individuals with hearing and speech impairments to communicate by telephone) to call a relay service operator who can place the call and relay the conversation between parties. This is "reasonable" because a TTY is a common device used to facilitate communication between hearing and hearing-impaired individuals. Moreover, it would be effective in enabling the employee to perform his job.

An employer is not required to lower existing production standards applicable to the quality or quantity of work for a given job in considering qualifications of an individual with a disability, if these standards are uniformly applied to all applicants and employees in that job. Likewise, an employer should not give employees with disabilities special treatment. They should not be evaluated on a lower standard or disciplined less severely than any other employee.

If an individual with a disability cannot perform a marginal function of a job because of a disability, an employer may base a hiring decision only on the individual's ability to perform essential functions of the job, with or without reasonable accommodation. For example:

> An employer may ask candidates for a clerical job if they have a driver's license because it would desirable to have a person in the job who could occasionally run errands or take packages to the post office in an emergency. This requirement is job-related but it relates to an incidental, not an essential, job function. If it disqualifies a person who could not obtain a driver's license because of a disability, it would not be justified as a business necessity under the ADA.

In the above example, the employer could not reduce the pay of that employee because of the need to eliminate the marginal job function of running errands. The employer could give the employee other marginal functions which they are able to perform to make up for the ones they could not perform. If, however, an employee must be reassigned to a lower paying job or provided a part-time job as an accommodation, they may be paid the lower amount that would apply to such positions consistent with the employer's regular compensation practices.

One circumstance that may prevent an employer from hiring or promoting an individual with a disability is when that individual poses a direct threat to the health and safety of that individual or others. However, an employer must meet very specific and stringent requirements under the ADA to establish such a direct threat exists. The employer must be prepared to show:

- Significant risk of substantial harm
- The specific risk must be identified
- It must be a current risk, not one that is speculative or remote
- The assessment of risk must be based on objective medical or other factual evidence regarding a particular individual
- Even if a genuine significant risk of substantial harm exists, the employer must consider whether the risk can be eliminated or reduced below the level of direct threat by reasonable accommodation

This means that an employer cannot deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. Furthermore, the assessment of risk cannot be based on mere speculation unrelated to the individual in question. For example, an employer cannot assume that a person with cerebral palsy who has restricted manual dexterity cannot work in a laboratory because they will post a risk of breaking vessels with dangerous contents. The abilities or limitations of a particular individual with cerebral palsy must be evaluated.

The evidence of a direct threat must be based on objective, factual evidence related to that individual's present ability to safely perform the essential functions of a job. It cannot be based on unfounded assumptions, fears or stereotypes about the nature or effect of a disability or a disability in general. Likewise, such a determination cannot be based on patronizing

assumptions that an individual with a disability may endanger themselves by performing a particular job. For example, an employer may not exclude a person with a vision impairment from a job that requires a great deal of reading because of concern that the strain of heavy reading may further impair their sight.

In 2006, the EEOC reported that disability based discrimination accounted for 20.6% of the claims filed. As the following table indicates, discharge was the most frequently alleged issue with disability as a basis (58.7% of all suits filed). Reasonable accommodation was the issue next most often alleged (39.1%). Hiring was the issue in 32.6% of the cases filed with disability as a basis.

Disability Discrimination Issues	
	Percent
All Discharge	58.7%
Reas. Accom.	39.1%
Hiring	32.6%

Age

The Age Discrimination in Employment Act (ADEA) protects individuals, age 40 and older, from discrimination in the workplace. (See Chapter on Applicable State and Federal Laws for more information on ADEA) Much like Title VII and ADA, the ADEA is intended to provide equal opportunity in employment regardless of their age. The issue of an employee's age is usually most prevalent during the hiring process and when reducing the workforce (or forced early retirement).

When advertising a job opening, employers may violate the provisions of the ADEA by using such terms as "younger persons wanted", "girl", "boy" or "excellent first job". Even statements of "recent college grad" could send up a red flag. The ADEA makes it unlawful, unless a specific exemption applies (such as age requirements for law enforcement and fire personnel) for an employer to utilize job advertising that discriminates on account of age against persons because of their age.

A court will examine not only the language used in the advertisement but the context in which it is used in order to determine whether persons in the protected age group would be discouraged from applying. Consider the following ad:

Looking for a young, energetic person who has strong selling skills. Applicants who are selected would be required to stand for long periods of time and lift 25-35 pounds.

If a charge was brought against the company advertising this position, the EEOC would find them in violation. The use of the word "young" specifically indicates a preference, limitation, specification or discrimination based on age. If the company ran that same ad but eliminated the word "young", it would likely be acceptable since people of all ages could be energetic and have strong selling skills. Furthermore, being able to stand for long periods of time and lift 25-35 pounds are not age related criteria and could be legitimate requirements for the job in question.

The next contact with a prospective employee is at the application stage. Employers need to be sensitive about not asking unnecessary questions that reveal age. The Act states:

> A request on the part of an employer for information such as "date of birth" or "state age" on an application form is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise discriminate based on age, employment application forms which request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act (29 CFR 1625.5).

The purpose of this statement is to insure that older applicants are judged on their ability to do the job and not on their age. If employers have a valid reason for inquiring about age, it would be advisable that they include a statement on the form saying that the employer does not discriminate based on age and explain why information concerning age is being requested.

Once an applicant is called in for an interview, the same rules apply when asking questions as they do on applications. Employer shouldn't ask someone their age, date of birth, or even what year they graduated from school unless there is a valid reason for it. If there is a minimum age for a job position (have to be at least 21 to tend bar) then only ask the general question of "are you over the age of 21?"

When deciding to promote an employee, the decision should always be made on merit alone. Age should never be a factor. It is always best to communicate and document business decisions and discussions in case the decision is ever called into question.

The same is true about letting an employee go. The decision should always be based on performance in workplace and not factored based on age. Clearly communicating with an employee helps avoid misunderstandings. If an employer sees an employee's performance declining, they should discuss it with them to give the employee a chance to improve. Then, if the employee continues to demonstrate poor performance, they will not be shocked if it is necessary that they are terminated. There will be no misunderstanding as to the employer's reasoning. Consider the following examples of terminating Mr. Smith:

> Mr. Smith, we are sorry that we have to let you go. You have been a loyal employee that has worked hard for this company but we have to cut our staff. Thank you for all your contribution to our company and best of luck to you in your new endeavors.

While this tactic may soften the blow of being terminated, it is misleading if Mr. Smith was actually let go for performance issues. If Mr. Smith then sees a job ad seeking new employees at the company in the position he just vacated he may come to the conclusion that he was terminated because of his age. After all, he was told that he was a good employee so why else would they be terminating him?

Now look at the same conversation done in a truthful manner:

> We are sorry Mr. Smith but you have failed to improve your performance since our last meeting in which we talked to you about poor demeanor with customers. You have also failed to show up to work 6 days in the last month and the days you are here, you consistently fail to meet your quota for calls. Based on this, we are going to have to let you go.

In this circumstance, Mr. Smith should be very clear about the reasons for being let go and will be less likely to jump to the conclusion that his age played a role. Even if he filed a claim, the employer in the second example would have detailed reasons that supported their decision.

Another issue that arises in the workplace with regard to age is when companies reduce their workforce or "trim the fat". Although some companies base the decision on who to keep and who to let go based on seniority, keeping their "seasoned" employees, others take the opposite approach. There is a tendency in some companies to keep the most recently hired employees and get rid of the ones that have been around for a while. The rationale is that the older employees will be retiring soon anyway and they want to keep the employees that will be around for 10 or 20 years to come. There is also the thinking that younger employees bring in some "new blood" and with it, new ideas.

Employers should always think through their decision carefully and decided on the criteria (performance, experience, knowledge, closing one whole division) that will be used to evaluate who will be cut. If that criteria results in a disproportionate number of older employees being fired then less discriminatory methods should be considered. If using performance evaluations, it is wise to take into consideration a whole history of evaluations rather than just the latest one. A court may be suspicious if someone had 10 straight evaluations with an "excellent" rating and

then a “poor” rating just before the layoff. It could be an attempt to disguise an age-based action.

The Older Workers Benefit Protection Act of 1990 (OWBPA) which amended the ADEA to specifically prohibit employers from denying benefits to older employees. Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers, and that those greater costs would create a disincentive to hire older workers. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

In recent years, companies have started to fear a lawsuit when they let go of employees in a protected class, so they have begun offering terminated employees extra cash or benefits in exchange for a signed waiver saying that the employee won’t sue. While this is within an employer’s rights, the ADEA, as amended by OWBPA, sets specific minimum standards that must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver must:

1. Be in writing and be understandable;
2. Specifically refer to ADEA rights or claims;
3. Not waive rights or claims that may arise in the future;
4. Be in exchange for valuable consideration;
5. Advise the individual in writing to consult an attorney before signing the waiver; and
6. Provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

In 2006, the EEOC reported that age based discrimination accounted for 17.9% of the claims filed. As shown below, discharge was the most frequently alleged issue in age discrimination suits (62.9%). Hiring and promotion issues, at 22.2% each, ranked higher than under other bases; harassment was the issue in 11.1% of the cases with age as a basis.

Age Discrimination Issues

	Percent
All Discharge	62.9%
Promotion	22.2%
Hiring	22.2%
Harassment	11.1%

Genetic Information

A joint report by the Department of Labor, the Department of Health and Human Services, the EEOC, and the Department of Justice summarized the various studies on discrimination based on genetic information and argued for the enactment of federal legislation. The report stated that “genetic predisposition or conditions can lead to workplace discrimination, even in cases where workers are healthy and unlikely to develop disease or where the genetic condition has no effect on the ability to perform work” and that “because an individual’s genetic information has implications for his or her family members and future generations, misuse of genetic information could have intergenerational effects that are far broader than any individual incident of misuse.” Concluding that existing protections are minimal, the report went on to call for the enactment of legislation.

Two types of genetic testing can occur in the workplace: genetic screening and genetic monitoring. Genetic screening examines the genetic makeup of employees or job applicants for specific inherited characteristics. It may be used to detect general heritable conditions that are not associated with workplace exposures in employees or applicants. For example, employers used genetic screening in the early 1970s to identify African Americans who carried a gene mutation for sickle cell anemia. Those carrying the gene mutation were denied jobs-even though many of them were healthy and would never develop the disease. In these cases, genetic screening to identify the sickle cell trait often occurred without the consent of the individuals.

Genetic screening can also be used to detect the presence of genetically determined traits that render an employee susceptible, or "hyper-susceptible," to a certain disease if exposed to specific environmental factors or substances that may be present in the workplace. In theory, genetic screening for occupationally relevant traits has the potential to be used to assign employees who are genetically susceptible to certain occupational diseases away from harmful exposure. However, no consensus currently exists regarding the validity of the scientific evidence or the usefulness of the genetic tests reported to predict an individual's susceptibility to exposure.

Genetic monitoring, a second type of testing, ascertains whether an individual's genetic material has changed over time due to workplace exposure to hazardous substances. Evidence of genetic changes in a population of workers could be used to target work areas for increased safety and health precautions and to indicate a need to lower exposure levels for a group exposed to a previously unknown hazard. The ultimate goal of genetic monitoring is to prevent or reduce the risk of disease caused by genetic damage.

Although genetic changes such as chromosomal damage have been associated with exposure to radiation and some chemical mutagens or carcinogens, little is known about which changes are predictive of subsequent disease risk. Much more research is required to establish the relationship, if any, between those changes and subsequent disease risk for affected populations and individuals. For this reason, use of genetic monitoring results to make employment decisions is rarely justifiable.

In addition, some employers may seek to use genetic tests to discriminate against workers - even those who have not yet or who may never show signs of disease-because the employers fear the cost consequences. Based on genetic information, employers may try to avoid hiring workers who they believe are likely to take sick leave, resign, or retire early for health reasons (creating extra costs in recruiting and training new staff), file for workers' compensation, or use health care benefits excessively.

GINA was passed in part, to address these concerns of workplace discrimination. Title II of GINA prohibits use of genetic information in making decisions related to any terms, conditions, or privileges of employment, prohibits covered entities from intentionally acquiring genetic information, requires confidentiality with respect to genetic information (with limited exceptions), and prohibits retaliation.

The law prohibits the use of genetic information in employment decisions, including hiring; firing; job assignments; and promotions by employers, unions, employment agencies, and labor-management training programs.

Employers may not request, require, or purchase genetic information with respect to an employee/applicant or family member of an employee/applicant. One exception to this rule applies to inadvertent acquisition of genetic information, such as overhearing an employee conversation, receiving genetic information verbally when asking a general question about an employee's health, or receiving unsolicited genetic information as part of a documented request for a disability accommodation or leave of absence.

There are exceptions to the prohibition on employers, employment agencies, labor unions, and training programs. The first exception applies when one of these entities inadvertently requests or requires family medical history of the employee, individual, union member, or a family member. The House Education and Labor Report noted that this exception "addresses the so-called 'water cooler' problem, in which an employer unwittingly receives otherwise protected genetic information in the form of family medical history through casual conversations with a worker."

The second exception is for health or genetic services offered by the entity as part of a wellness program. To qualify for the exemption:

- the employee, individual or union member must provide prior, knowing, voluntary, and written authorization;

- only the employee, individual, union member, or family member and the licensed health care profession or board certified genetic counselor involved in providing such services can receive individually identifiable information concerning the results of the services; and

- any individually identifiable genetic information is only available for such services and shall not be disclosed to the employer except in aggregate terms that do not identify individuals.

The third exception is for information necessary for certification procedures under federal and state family and medical leave laws. This exception was described as "eliminat[ing] the potential for conflict with existing laws."

The fourth exception, like the first, concerns the inadvertent acquisition of genetic information by the purchase of documents, such as newspapers, that are commercially and publicly available and that include family medical history. This exception was intended to address the concern that GINA could be violated by such actions as the purchase of a newspaper "containing the obituary of an employee's parent who died of breast cancer."

The fifth exception applies when the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace. However, in order for this exception to apply:

- the employer, employment agency, labor union, or training program must provide written notice of the genetic monitoring to the employee;
- the employee, individual, or union member must provide prior, knowing, voluntary, and written authorization; or the genetic monitoring is required by federal or state law;
- the employee, individual, or union member must be informed of individual monitoring results;
- the monitoring must be in compliance with federal genetic monitoring regulations, or state genetic monitoring regulations; and
- the employer, employment agency, labor union, or training program, excluding any licensed health care professional or board certified genetic counselor, must receive the results only in aggregate terms that do not disclose the identity of specific employees.

There is a sixth exception for employers and training programs but not for employment agencies or labor unions. This exception, which was changed by H.Con.Res. 340, would allow employers and training programs that conduct DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification to request or require genetic information from their employees, but only when it is used for analysis of DNA identification markers for quality control to detect sample contamination.

Covered entities in possession of genetic information about applicants or employees must treat it the same way they treat medical information generally. They must keep the information confidential and, if the information is in writing, must keep it apart from other personnel information in separate medical files. A covered entity may keep genetic information in the same file as medical information subject to the Americans with Disabilities Act.

GINA contains several rules of construction, including a provision concerning the relationship between Title I and Title II of the act. GINA provides that nothing in Title II is to be construed to limit the rights or protections of an individual under any federal or state statute that provides equal or greater protection. In addition, nothing in Title II is to limit the rights or protections of an individual to bring an action, or provide for enforcement of, or penalties for, any violation under Title I of GINA, certain sections of ERISA, the Public Health Services Act, and the Internal Revenue Code. This provision has been referred to as a “firewall” between Titles I and II, and has been described as clarifying “that employers are not liable for health insurance violations under civil rights laws unless the employer has separately violated a provision of Title II governing employers.”

GINA also specifies that any reference in Title II to genetic information concerning an individual or family member also includes the genetic information of any fetus carried by a pregnant woman. In addition, genetic information on any embryo legally held by the individual or family member would also be included in the reference to genetic information.

Retaliation

Retaliation

The same laws that prohibit discrimination based on a protected class also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding. An employer may not fire, demote, harass, or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination.

In addition to the protections against retaliation that are included in all of the laws enforced by EEOC, the Americans with Disabilities Act (ADA) also protects individuals from coercion, intimidation, threat, harassment, or interference in their exercise of their own rights or their encouragement of someone else's exercise of rights granted by the ADA.

There are three main terms that are used to describe retaliation. Retaliation occurs when an employer, employment agency, or labor organization takes an **adverse action** against a **covered individual** because he or she engaged in a **protected activity**. These three terms are described below.

Adverse Action - An adverse action is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples of adverse actions include:

> employment actions such as termination, refusal to hire, and denial of promotion;
>
> other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance; and
>
> any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

Adverse actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history.

Even if the prior protected activity alleged wrongdoing by a different employer, retaliatory adverse actions are unlawful. For example, it is unlawful for a worker's current employer to retaliate against him for pursuing an EEO charge against a former employer.

Of course, employees are not excused from continuing to perform their jobs or follow their company's legitimate workplace rules just because they have filed a complaint with the EEOC or opposed discrimination.

Covered Individuals - Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, genetic information or disability. Individuals who have a close association with someone who has engaged in such protected activity also are covered individuals. For example, it is illegal to terminate an employee because his spouse participated in employment discrimination litigation.

Individuals who have brought attention to violations of law other than employment discrimination are NOT covered individuals for purposes of anti-discrimination retaliation laws. For example, "whistleblowers" who raise ethical, financial, or other concerns unrelated to employment discrimination are not protected by the EEOC enforced laws.

Protected Activity - Protected activities are those which are part of a discrimination claim, including opposition to a practice believed to be unlawful discrimination and participation in an employment discrimination proceeding. Opposition is informing an employer that you believe that he/she is engaging in prohibited discrimination. Opposition is protected from retaliation as long as it is based on a reasonable, good-faith belief that the complained of practice violates anti-discrimination law and the manner of the opposition is reasonable. Examples of protected opposition include:

Complaining to anyone about alleged discrimination against oneself or others
Threatening to file a charge of discrimination
Picketing in opposition to discrimination
Refusing to obey an order reasonably believed to be discriminatory

Examples of activities that are NOT protected opposition include:

Actions that interfere with job performance so as to render the employee ineffective
Unlawful activities such as acts or threats of violence

Participation means taking part in an employment discrimination proceeding. Participation is a protected activity even if the proceeding involved claims that ultimately were found to be invalid. Examples of participation include:

Filing a charge of employment discrimination
Cooperating with an internal investigation of alleged discriminatory practices
Serving as a witness in an EEO investigation or litigation

A protected activity can also include requesting a reasonable accommodation based on religion or disability.

In 2006 the EEOC reported that 29.8% of suits filed were based on retaliation all statutes and 25.8% of those under Title VII only. As shown below, discharge was alleged in 67.2% of the suits filed with retaliation as a basis.

Retaliation Discrimination Issues	
	Percent
All Discharge	67.2%
Hiring	4.6%
Wages	4.6%

Burden of Proof

When making a discrimination claim based on retaliation, the employee initially has the burden of proof and must show that the employer's actions were "materially adverse" and likely to "dissuade a reasonable worker from making or supporting a charge of discrimination". In addition, the employee must show that the employer or the person that makes the job decisions was aware that the employee engaged in protected conduct. While the most obvious way that the decision maker could learn about the protected activity is by the employee telling them, they could also have heard about it through a third party. Without proof that the employer knew of the protected activity, the employee would not be able to prove a case of retaliation.

Once an employee has established that the decision maker had knowledge of the protected activity, then they must show the connection between that and the adverse action that was inflicted. One of the strongest evidences of the connection would be the timing. If an employee was terminated shortly after they filed a charge of discrimination, it would be inferred that the reason they were terminated was because of the charge being filed.

Other evidence an employee could use to prove their case would be to show that other employees who had engaged in the same protected activity were also terminated or that the employer's excuse is factually untrue and is insufficient or unworthy of credence. Circumstantial evidence is very powerful in these cases and that is why employers need to take extra precautions that their employment decisions can always be supported by documented reasons.

If the employee is successful in making a *prima facie* case, the burden of proof shifts to the employer to show a legitimate non-discriminatory reason for the adverse employment action. If the employer can show just cause for their action, the burden shifts back to the plaintiff to show that the employer's proffered reason is a "pretext" for discrimination.

Documenting performance and employment decisions

Documentation is an important step when it comes to making employment decisions. If an employer does not have documented reasons for their decisions they may be opening themselves up to a discrimination claim. If an employee files a claim and the employer has no documentation as support of their actions, the employee is much more likely to win the case.

Perhaps the most important documentation created during an employee's employment will be documentation regarding the employee's performance. When making employment decisions such as promotions or terminations, the employers should make them based solely on merit (or lack there of) in order to avoid decisions based on discrimination. By utilizing documented performance records, employers are not only able to make more informed decisions, they also are covered by a paper trail in case their decisions are questioned.

Although most employers have a performance evaluation policy in place, many employers fail to follow their own policies, which can be the subject of a lawsuit if the employee claims that they were treated differently because they were not given an evaluation. Without performance evaluations, employees may also claim that they were never notified about performance issues.

Perhaps even worse than not giving an evaluation is over-documenting an employee's performance when other employees have relatively little documentation. Of course, problem

employees will have more paperwork documenting performance issues, but employers should avoid documenting insignificant issues with problem employees that would not also be documented for other employees. Doing so would give rise to the argument that the problem employee is being singled out and treated differently, which would open the employer up to a discrimination claim.

Common mistakes that employers make when doing performance evaluations is to inflate the rating system. The worst employees get rated at “fair” or “good” and the scale goes up from there. Employers find it difficult to tell someone that they are performing poorly, so they soften the blow by giving them an inflated rating. Even if both the employee and the employer know that a “good” rating is less than satisfactory, a court would view that rating as stated or “good”. Therefore, if the employer was trying to prove that they terminated an employee based on performance, such an evaluation would work against them in demonstrating their point.

Another reason that employers tend to inflate evaluations is because they feel that it will motivate employees and improve morale. As evidenced above, this tactic can backfire on the employer by increasing the company’s legal risk. Furthermore, giving an employee a positive but inaccurate performance evaluation may not motivate problem employees but instead lower the bar for expectations and encourage poor performance.

The best practice for employers when doing performance evaluations is to clearly define a problem area and refer to specific situations. For example, instead of saying that the employee doesn’t do what they are told, point out that they repeatedly miss deadlines (site specific projects) and fail to complete the weekly budget report. This puts the focus on the employee’s conduct and not a personality trait which could be perceived as discriminatory. It also gives the employee notice that their conduct needs to be improved and gives the employee a fair chance to succeed.

Also, when discussing an area of conduct that needs improvement, it is always a good idea to document the consequences of failing to improve. In stating what discipline will occur before the fact, the employee cannot claim that they weren’t aware that such action would take place. It also emphasizes the seriousness of the situation which may motivate the employee to make changes. Furthermore, it demonstrates the employer’s consistency and fairness in disciplining employees.

Exit interviews

An exit interview is a key tool for employers in learning where problems exist in the company. Departing employees can be a wealth of information because they will reveal things that current employees are unwilling to bring forth due to fear of the consequences. They may be able to point out problem managers or discrimination and harassment issues that nobody has brought forth. Obtaining this information is valuable for employers and allows them to confront a bad situation before it becomes a legal issue.

An exit interview can also help the departing employee to leave with a good feeling about the company. Having been asked their opinion demonstrates that their opinion is valuable. It also reduces the tendency that they will bad-mouth your company or look for possible lawsuits.

An employer can use the information that they obtain in a variety of ways. The most useful ways fall into two categories:

1. **Corrective and preventative**, for example improving harassment or discrimination issues.

2. **Strategic improvement**, for example improved management training, team building initiatives, process development, or efficiency improvements.

When conducting the exit interview, employers can get the most out of them by following best practice procedures including:

1. Start the exit interview by assuring the employee that no negative consequences will result from an honest discussion.

2. Make sure that both HR personnel and departing employees understand that the exit interview is an important element of the employment process.

3. Establish a standard exit interview to ensure that all employees are treated equally and asked the same questions.

4. Conduct the interview prior to the employee's last day so that the information is current and the employee is motivated to assist you to deal with company issues.

5. End the meeting on a positive note by wishing the employee success in with their new endeavor and tell them that you will use the information provided to improve your workplace.

Complaint Investigation Process

Investigation

Discrimination is usually subtle and there is rarely a “smoking gun”. To determine what factors were considered in the decision making process, an investigation of all of the surrounding facts and circumstances should be done. Generally, just one piece of evidence is not enough to determine whether discrimination was a factor. Multiple avenues may need to be investigated to find evidence that substantiates the claim. Sources of information can include witness statements, including consideration of their credibility; documents; direct observation; and statistical evidence, among others. Some important areas of inquiry and analysis include:

Discriminatory statements (oral or written) made by decision makers or persons influential to the decision. Discriminatory statements include not only slurs and patently biased statements, but also “code words” that are purportedly neutral on their face but which, in context, convey a discriminatory meaning. The credibility of the witness(es) attesting to discriminatory statements, and the credibility of the witness(es) denying them, are critical to determining whether such statements actually were made. If discriminatory statements were made, their importance will depend on their egregiousness and how closely they relate – in time and content – to the decision in question. For example, a statement that there are “too many Asians” in a department, made by a hiring official when discussing applicants, would be strong evidence supporting an Asian American’s failure-to-hire claim. Such a statement also would support a claim of hostile work environment by Asian American employees.

Comparative treatment evidence. This is evidence as to whether the claimant was treated the same as, or differently than, similarly situated persons. Such evidence is not always required, but a difference in the treatment of similarly situated persons is probative of discrimination because it tends to show that the treatment was not based on a non-discriminatory reason. Conversely, an employer’s consistent treatment of similarly situated persons tends to support its contention that no discrimination occurred. Comparator evidence that supports either party’s position must be weighed in light of all the circumstances. For example, if the group of similarly situated persons who were treated better than the claimant included persons of the claimant’s protective class, that would weaken his or her claim, but it would not be conclusive proof of non-discrimination because the balance of the evidence overall might still more convincingly point to discrimination. Identification of persons who are similarly situated to the claimant should be based on the nature of the allegations, the alleged non-discriminatory reasons, and other important factors suggested by the context, but should not be based on unduly restrictive standards.

Relevant background facts. Specific employment decisions and issues should not be looked at in isolation. Other information that can shed light on whether the employer’s adverse employment decision was motivated by a bias includes the employer’s treatment of other employees (or customers, etc.), attitudes, the work environment generally, and the context of the challenged employment decision. For example, background evidence that an employer has permitted racial jokes and slurs about Asian Americans in the workplace would support an Asian American employee’s allegation that her termination was based on her race. Similarly, background evidence that an employer has discriminated against African Americans in hiring, pay, or promotions would support an African American employee’s claim that a pattern of mistreatment – e.g., her supervisor undermining her work, ostracizing her, and making snide comments – is actually a pattern of race-based harassment. The point is that background evidence can

help determine the employer's state of mind and otherwise provide important context. Also, as suggested by the above examples, the inquiry into background evidence can reveal other potential violations of the statute.

Relevant personnel policies. An employer's deviation from an applicable personnel policy, or a past practice, can support an inference of a discriminatory motive. Conversely, acting in conformance with a consistently applied non-discriminatory policy or practice would suggest there is no such motive.

The decision maker's race. The race of the decision maker may be relevant, but is not controlling. In other words, it should not be presumed that a person would not discriminate against members of his own race. As the Supreme Court has noted, "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."

Statistical evidence. Statistics reflecting the employer's general policy or practice can be helpful in determining whether bias was a factor in a particular selection decision. For example, a female applicant's allegation of hiring discrimination would be bolstered by evidence that the selection rate of qualified female applicants is significantly below the selection rate of qualified male applicants, or that females are significantly under-represented in the employer's workplace given their availability in the qualified labor market. Conversely, while a sexually diverse workforce cannot immunize an employer from liability for specific acts of discrimination, the more sexually diverse the relevant part of the employer's workforce is, the less credible would be the claim of discrimination. Statistical evidence also is important in determining whether the employer has a systemic pattern or practice of discriminating.

The credibility of the employer's explanation is a key factor in the investigation and must be weighed heavily against the other information obtained. If an employer's explanation for the employee's treatment ultimately is not credible, that is powerful evidence that discrimination is the most likely explanation. An employer's credibility will be undermined if its explanation is unsupported by or contrary to the balance of the facts. Similarly, the credibility of the explanation can be called into question if it is unduly vague, appears to be an after-the-fact explanation, or appears otherwise fabricated (e.g., the explanation shifts, or inconsistent reasons are given).

Even if the employer's explanation lacks credibility, discrimination will not be found if the evidence demonstrates that the employer's real motivation was not a protected EEO trait. Also, an employer's business decision cannot be found discriminatory simply because it appears that the employer acted unwisely, or that the employer's decision was in error or a misjudgment. At the same time, the reasonableness of the employer's explanation is an important part of the overall picture. The person conducting the investigation must look at the totality of the evidence to determine if there is reason to believe the employer acted in a discriminatory manner.

An investigation should also examine whether the company or department in question has a pattern of discrimination whether intentional or unintentional. This can be done by evaluating statistical and/or other evidence that points to the fact that a particular practice is the norm and not the exception. For example, a pattern or practice would be evident if, despite the fact that Blacks made up 20 percent of a company's applicants for jobs, not one of the 87 jobs filled during a six year period went to a Black applicant.

When possible, the statistical analysis must include non-discriminatory factors that might account for any disparity. For example, a company's hiring practices might qualify applicants based on a test or certain appearance and grooming standards and those factors in turn may unintentionally eliminate people from a particular racial group. The disparity also should be "statistically significant," or unlikely to have occurred by chance. Other instances and evidence of discrimination should be examined in conjunction with the statistics. If the statistical disparity is blatant, it alone can establish a pattern or practice claim.

Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged discrimination or harassment. As soon as management learns about alleged discrimination, it should determine whether a detailed fact-finding investigation is necessary. For example, if the supervisor or alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly discriminated against, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further discrimination does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the person who allegedly partook in the discrimination or harassment; or in the case of harassment, placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The people being investigated should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged offender, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

Who, what, when, where, and how: Who committed the alleged offense? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur?

How did you react? What response did you make when the incident(s) occurred or afterwards?

How did the offense affect you? Has your job been affected in any way?

Are there any persons who have relevant information? Was anyone present when the alleged offense occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged offense?

Did the person who offended you offend anyone else? Do you know whether anyone complained about offenses by that person?

Are there any notes, physical evidence, or other documentation regarding the incident(s)?

How would you like to see the situation resolved?

Do you know of any other relevant information?

Questions to Ask the Alleged Offender:

What is your response to the allegations?

If the offender claims that the allegations are false, ask why the complainant might lie.

Are there any persons who have relevant information?

Are there any notes, physical evidence, or other documentation regarding the incident(s)?

Do you know of any other relevant information?

Questions to Ask Third Parties:

What did you see or hear? When did this occur? Describe the alleged offender's behavior toward the complainant and toward others in the workplace.

What did the complainant tell you? When did s/he tell you this?

Do you know of any other relevant information?

Are there other persons who have relevant information?

Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

Inherent plausibility: Is the testimony believable on its face value? Does it make sense?

Demeanor: Did the person seem to be telling the truth or lying?

Motive to falsify: Did the person have a reason to lie?

Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

Past record: Did the alleged offender have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged offense by no means necessarily defeats the complainant's credibility, since discrimination or harassment often occurs behind closed doors. Furthermore, the fact that the alleged offender engaged in similar behavior in the past does not necessarily mean that he or she did so again.

Reaching a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether discrimination or harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documention or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.

Assurance of Immediate and Appropriate Corrective Action

An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that discrimination or harassment has occurred in violation of the employer's policy. Management should inform both parties about these measures.

Remedial measures should be designed to stop the offensive actions, correct its effects on the employee, and ensure that the offense does not recur. These remedial measures need not be those that the employee requests or prefers, as long as they are effective.

In determining disciplinary measures, management should keep in mind that the employer could be found liable if the discrimination or harassment does not stop. At the same time, management may have concerns that overly punitive measures may subject the employer to claims such as wrongful discharge, and may simply be inappropriate.

To balance the competing concerns, disciplinary measures should be proportional to the seriousness of the offense. If the offense was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the offense was severe or persistent, then suspension or discharge may be appropriate.

Remedial measures should not adversely affect the complainant. Thus, for example, if it is necessary to separate the parties, then the offender should be transferred (unless the complainant prefers otherwise). Remedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the offender.

Remedial measures also should correct the effects of the discrimination or harassment. Such measures should be designed to put the employee in the position s/he would have been in had the misconduct not occurred.

Some examples of measures to stop the discrimination or harassment and ensure that it does not recur include:

- oral or written warning or reprimand;
- transfer or reassignment;
- demotion;
- reduction of wages;
- suspension;
- discharge;
- training or counseling of offender to ensure that s/he understands why his or her conduct violated the employer's anti-discrimination or anti-harassment policy; and
- monitoring of offender to ensure that discrimination or harassment stops.

Examples of Measures to Correct the Effects of the Offense:

- restoration of leave taken because of the offense;
- expungement of negative evaluation(s) in employee's personnel file that arose from the discrimination or harassment;
- reinstatement;
- apology by the offender;
- monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the offender or others in the work place because of the complaint; and
- correction of any other harm caused by the discrimination or harassment (e.g., compensation for losses).

Remedies

In a disparate treatment case, the statute allows the following remedies (as applicable): injunctive relief, reinstatement, front pay (until or in lieu of reinstatement), back pay, attorney's fees and costs, compensatory damages for any past or future out-of-pocket losses and any emotional harm, and punitive damages if the employer acted with malice or with reckless indifference to the individual's federally protected rights. Punitive damages are unavailable against a federal, state, or local government employer.

The law places caps on the sum of compensatory and punitive damages for which an employer may be liable. The caps are based on the size of the employer's workforce:

Employers with 15 - 100 employees: up to $50,000

Employers with 101 - 200 employees: up to $100,000

Employers with 201 - 500 employees: up to $200,000

Employers with 501 or more employees: up to $300,000

Model EEO Policy Statements

Formulating an Effective EEO Policy

It generally is necessary for employers to establish, publicize, and enforce anti-discrimination and anti-harassment policies and complaint procedures. As the Supreme Court stated, "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms" (Ellerth, 118 S. Ct. at 2270). While the Court noted that this "is not necessary in every instance as a matter of law," failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment.

An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities.

An anti-discrimination, anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

A clear explanation of prohibited conduct;

Assurance that employees who make complaints of discrimination/harassment or provide information related to such complaints will be protected against retaliation;

A clearly described complaint process that provides accessible avenues of complaint;

Assurance that the employer will protect the confidentiality of discrimination/harassment complaints to the extent possible;

A complaint process that provides a prompt, thorough, and impartial investigation; and

Assurance that the employer will take immediate and appropriate corrective action when it determines that discrimination/harassment has occurred.

The following pages include examples of EEO policies that companies have implemented.

Example 1

This company is committed to ensuring equal employment opportunity (EEO) and promoting workforce diversity to maintain a strong, effective, high-performing public service organization. We support and vigorously enforce all applicable Federal EEO laws, regulations, Executive Orders, and management directives to ensure that all individuals are afforded an equal opportunity for success. The relevant laws include Title VII of the Civil Rights Act of 1964; the Rehabilitation Act of 1973, as amended; the Age Discrimination in Employment Act of 1975; and the Equal Pay Act of 1963. This company will not tolerate discrimination or harassment on the basis of race, color, religion, national origin, sex, sexual orientation, age, genetic information or disability; or retaliation for opposing discriminatory practices or participating in discrimination complaint proceedings. This applies to all personnel practices and terms and conditions of employment, including recruitment, hiring, promotions, transfers, reassignments, training, career development, benefits, and separation. In addition, this company will provide reasonable accommodation to qualified individuals with disabilities and for religious practices, as provided by the applicable laws and procedures.

To enforce this policy, this company is empowered to administer an impartial and effective complaint management process to address and resolve complaints of discrimination at the earliest possible stage. Employees may report allegations of discrimination to their immediate supervisor, another management official, their collective bargaining unit or Human Resources, as appropriate. Please note that employees must report such allegations within 45 calendar days of the date of the alleged incident in order for a complaint to be investigated. Allegations of discrimination and harassment will be immediately addressed and appropriate corrective action, up to and including termination, will be taken if allegations are substantiated.

This company is firmly committed to ensuring that all its employees, applicants, contract employees, clients, customers, and anyone doing business with this company is not subjected to discrimination. Harassment is a form of prohibited discrimination and will not be tolerated. The following defines what constitutes harassment:

Harassment is any unwelcome, hostile, or offensive conduct taken on the basis of race, color, religion, national origin, sex, sexual orientation, age, genetic information or disability that interferes with an individual's performance or creates an intimidating, hostile or offensive environment.

Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (1) submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of one's employment, or (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or (3) such conduct interferes with an individual's performance or creates an intimidating, hostile or offensive environment.

Retaliation against individuals for opposition to discrimination or participation in the discrimination complaint process is unlawful and will not be tolerated. This company supports the rights of all employees to engage in protected activity under civil rights statutes, Executive Orders, and whistleblower protection laws. We will work aggressively to protect employees from

reprisal for participation in such protected activity. Information and training is available to all employees.

Both supervisors and employees bear responsibility to maintain a work environment free from discrimination and harassment. Employees must not engage in harassing conduct and should report such conduct to their supervisor, another management official, their collective bargaining unit, and/or Human Resources, as appropriate. If an employee brings an issue of harassment to a supervisor's attention, the supervisor must promptly investigate the matter and take appropriate and effective corrective action. Supervisors are encouraged to seek guidance from Human Resources when addressing issues of discrimination or harassment. Both employees and supervisors are encouraged to resolve such issues at the earliest stage and participate in the alternative dispute resolution. It is every supervisor's responsibility to inform his/her staff of this policy and to ensure that discrimination and workplace harassment of any type will not be tolerated.

Each of us bears the responsibility to ensure that discrimination in the workplace is not tolerated and that diversity is valued. Supervisors and managers serve as agents of this company and bear a special responsibility to ensure that the work environment is free from discrimination and harassment. Promoting the complementary principles of equity and diversity in the workplace is a pivotal element in *building a strong company*. We remain committed to these principles as it pursues its critical mission of *protecting and promoting America's health.*

Example 2

Discrimination is Unlawful

This company is an equal opportunity employer and we do not engage in practices that discriminate against any person employed or seeking employment based on race, color, gender, religion, sex, national origin, age, marital status, sexual orientation, genetic information, disability, veterans' status, or any other protected status.

Discrimination by executives, supervisors, employees, clients, vendors and/or contractors will not be tolerated. In addition, retaliation against any individual who has complained about unlawful discrimination, or retaliation against individuals for cooperating with an investigation of a complaint of unlawful discrimination, also will not be tolerated. Persons who violate this policy will be subject to disciplinary action up to and including termination of employment, and/or termination of the contractual relationship.

Discrimination Defined

Black's Law Dictionary defines discrimination as the failure to treat all persons equally where no reasonable distinction can be found between those favored and those who are not favored.

In other words, discrimination is the unfair treatment or denial of standard privileges of employment (such as benefits, working hours, pay increases, transfers, or promotions) based on one's race, age, sex, nationality, pregnancy, religion, genetic information, marital or veteran status, or handicap whether physical or mental.

Race or Color Discrimination - Equal employment opportunity cannot be denied any person because of their racial group or perceived racial group, their race-linked characteristics (e.g., hair texture, color, facial features), or because their marriage to or association with someone of a particular race or color. Employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups is also prohibited.

National Origin Discrimination - It is illegal to discriminate against an individual because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group.

A rule requiring that employees speak only English on the job may violate Title VII unless an employer shows that the requirement is necessary for conducting business. If the employer believes such a rule is necessary, employees must be informed when English is required and the consequences for violating the rule.

Sex Discrimination - This includes practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment for persons of either gender, including same sex harassment.

Pregnancy Based Discrimination - Pregnancy, childbirth, and related medical conditions must be treated in the same way as other temporary illnesses or conditions.

Age Discrimination – Unlawful age discrimination is treating an employee or applicant who is 40 years of age or older differently than a person in a similar position who is substantially younger.

Statements or specifications in job notices or advertisements of age preference and limitations is prohibited. An age limit may only be specified in the rare circumstance where age has been proven to be a *bona fide* occupational qualification.

An employer also cannot deny benefits to older employees. Benefits may be reduced based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

Disability Discrimination – Employers cannot discriminate against an individual who has a physical or mental impairment that substantially limits at least one major life activity, such as walking, seeing, hearing, speaking, learning, or working. It also includes people who have a record of or is believed to have such impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question.

Religious Discrimination - Employers may not treat employees or applicants more or less favorably because of their religious beliefs or practices. Employees cannot be forced to participate -- or not participate -- in a religious activity as a condition of employment.

Employers must reasonably accommodate employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer.

Genetic Information Discrimination - Employers may not use genetic information for any decisions regarding terms of employment. Health Insurers and health plan administrators are prohibited from requesting or requiring genetic information of an individual or their family members, or using it for decisions regarding coverage, rates, or pre-existing conditions.

Equality is the Law

Title VII of the Civil Rights Act of 1964 protects all employees and applicants from employment discrimination based on **race, color, sex** (gender), **religion** and **national origin**.

The **Americans with Disabilities Act of 1990** (ADA) protects qualified individuals with disabilities from employment discrimination based on **disability**.

The **Age Discrimination in Employment Act** (ADEA) of 1967 protects employees and applicants who are 40 years of age or older from employment discrimination based on **age**.

The **Equal Pay Act** (EPA) of 1963 protects all employees and applicants from employment discrimination in wages based on **sex** (gender).

Genetic Information Non discrimination Act (GINA) of 2008 protects employees from being treated unfairly because of differences in their DNA that may affect their health.

Discrimination in the Workplace

It is illegal to discriminate in any aspect of employment including:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff, or recall;
- job advertisements;

recruitment;
testing;
use of company facilities;
training and apprenticeship programs;
fringe benefits;
pay, retirement plans, and disability leave; or
other terms and conditions of employment.

Examples of Discrimination

Harassment on the basis of race, color, religion, sex, national origin, genetic information, disability, or age;

Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;

Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, genetic information, or ethnic group, or individuals with disabilities;

Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group;

Verbal abuse, offensive innuendo or derogatory words, concerning a person's race, color, gender, age, sexual orientation, religion, ethnic or national origin, disability, veterans' status, or any other protected status;

Intentionally treating employees or applicants differently than others who hold or are applying for similar jobs. Disparate or unequal treatment can occur in any area of employment, including hiring, discipline, performance appraisal, termination, working conditions, and benefits. Harassment is a form of disparate treatment;

Having employer policies or procedures that appear neutral but have a particularly negative effect on a group with a common race, color, sex, national origin, religion, age, or disability status. This is known as disparate impact and its effect does not have to be intended.

Filing a Complaint

If you feel that you have been subjected to discrimination or harassment, by any person employed by or doing business with this company, or you have witnessed such activity, please report the incident immediately to your supervisor. If reporting the incident to your supervisor is inappropriate because your complaint involves your supervisor or you fear reprisal, then please report the incident to:

_____

Name, Title and Phone Number

Anyone that receives a complaint of discrimination or harassment must treat the matter seriously and conduct a prompt, impartial and thorough investigation and report it to:

_____

Name, Title and Phone Number

Investigations and resolutions will be handled with as much privacy, discretion and confidentiality as possible without compromising diligence and fairness. Everyone involved in the investigation process shall conduct themselves with professionalism and respect.

If after investigation, it is found that inappropriate conduct occurred, immediate action will be taken, which may include but is not limited to reprimand, suspension, change in assignments, mandatory training, loss of privileges and/or termination. Retaliation against the person filing the complaint is unlawful and will be subject to disciplinary action which may include termination.

In addition, a complaint of discrimination or harassment may be filed with either the appropriate state or federal agency listed below. Failure to first utilize the internal company complaint process available to you may result in an unfavorable ruling.

U.S. Equal Employment Opportunity Commission
P.O. Box 7033
Lawrence, Kansas 66044
800-669-4000
TTY 800-669-6820
www.eeoc.gov

State Office _____
_____
_____
Phone:

Example 3

TITLE

This policy and procedure shall be known as the (insert company name) Equal Employment Opportunity Policy and Procedure. It may be referred to as the EEO Policy.

PURPOSE

The purpose of this EEO Policy is to ensure full realization of non-discrimination and equal employment opportunity by selecting, training, and promoting employees based on their ability and job performance and to provide equal opportunities in all aspects of employment without regard to sex, race, color, ethnicity, national origin, ancestry, religion, pregnancy, age, sexual-orientation, sexual identity, genetic information, physical or mental disability, medical condition, marital status, veterans status, citizenship, or any other protected group status ("protected classification"). Unlawful discrimination, harassment and retaliation in any form will not be tolerated.

SCOPE

This EEO Policy is applicable to all company Agencies and Departments, and to the heads of company Agencies and Departments, their managers, supervisors and employees.

POLICY

A. Agencies, Departments, and their managers, supervisors and employees are responsible for full support and commitment to a policy of non-discrimination and equal employment opportunity.

B. Agencies and Departments are responsible for preparing and submitting to the Human Resources Department an Equal Employment Opportunity Plan.

C. Equal employment opportunity will be achieved through leadership and aggressive implementation of a program of equal employment opportunity. The program will include the periodic and systematic review of recruitment, selection and promotional practices, attention to upward mobility, periodic training and educational opportunities, audits of progress through a review of statistics, and annual Certificates of Compliance and/or Equal Employment Opportunity Plans.

D. Any person who believes he or she has been the victim of unlawful discrimination, harassment or retaliation should report the incident immediately to his or her supervisor, manager, Agency or Department Human Resources staff, or the Human Resources Department. All allegations will be investigated promptly.

Complaints will be kept as confidential as possible. If the allegation is sustained, prompt, appropriate remedial action shall be taken.

E. The Human Resources Department is charged with the responsibility for administering this Policy.

COMPLIANCE PROCEDURES

A. The Human Resources Department is responsible for overseeing the administration of the company's EEO Policy and may act as necessary to carry out this Policy.

B. Agencies and Departments are responsible for ensuring that they do not discriminate, harass or retaliate in any policy, practice, or procedure on the basis of any protected classification.

C. The Human Resources Department will gather and provide to Agencies and Departments workforce statistics for their particular Agency or Department. This information may be used to insure that employment related decisions are made in compliance with federal and state non-discrimination law and this Policy.

D. Each Agency and Department will appoint an EEO Coordinator who is responsible for administering this Policy within his or her respective Agency or Department.

E. All Agency and Department Heads and EEO Coordinators shall on an annual basis timely submit a Certificate of Compliance to Equal Employment Opportunity. Those Agencies and Departments required under the provisions of state or federal contracts or grants to prepare Equal Employment Opportunity Plans must do so by timely preparing and updating their existing plans and contacting the EEO Access Office for assistance as needed.

F. Unlawful discrimination based on a person's protected status or classification will not be tolerated. Discrimination includes any employment related policy, practice, procedure or decision based upon a person's status, such as sex, race, color, national origin, ancestry, ethnicity, religion, pregnancy, age, sexual-orientation, sexual identity, genetic information, physical or mental disability, medical condition, marital status, veteran status, citizenship status, or other protected group status rather than merit.

G. Harassment based on a person's protected status or classification will not be tolerated. Harassment consists of unwelcome conduct, whether verbal, physical, or visual, that is based upon a person's actual or perceived status, such as sex, race, color, national origin, ancestry, ethnicity, religion, pregnancy, age, sexual-orientation, sexual identity, genetic information, physical or mental disability, medical condition, marital status, veteran status, citizenship status, or other protected group status. Harassment in the form of retaliation for complaints of discrimination will likewise not be tolerated. This company will not tolerate harassing conduct that affects tangible job benefits, that interferes unreasonably with an individual's work performance, or that creates an intimidating, hostile, or offensive work environment. Whenever an employee alleges harassment, or at any time where it is believed that harassment is taking place, this company will act promptly to investigate and take swift and appropriate remedial action in dealing with those found in violation of the company's EEO Policy.

H. Harassment based on a person's sex includes, but is not limited to: unwelcome sexual advances, requests for sexual favors, any physical, verbal, or visual conduct based on sex where such conduct is an explicit or implicit term or condition of employment or where harassment is so severe or pervasive that a reasonable person would conclude the conduct creates a hostile or abusive work environment or the conduct involves a concerted pattern of harassment of a repeated, routine or generalized nature. Sexual harassment may include same sex as well as opposite sex misconduct where it is based on the person's gender.

Occasional, isolated, sporadic, or trivial acts that are simply annoying in nature may not constitute harassment. Nonetheless, Agencies and Departments are expected to investigate and remedy promptly any seemingly minor acts of harassment to avoid the development of a hostile work environment.

Examples of sexual harassment include, but are not limited to the following, when such acts or behavior come within the above:

- explicitly or implicitly conditioning any term of employment (e.g. continued employment, wages, evaluation, advancement, assigned duties or shifts) on the provision of sexual favors;
- participating in conduct the purpose or effect of which is to unreasonably interfere with an individual's work performance or create an intimidating, hostile, or offensive working environment;
- unwelcome touching or grabbing any part of an employee's body;
- continuing to ask an employee to socialize on or off-duty when that person has indicated she or he is not interested;
- displaying or transmitting in person or through any media sexually suggestive pictures, objects, cartoons, or posters if it is known or should be known that the behavior is unwelcome;
- continuing to send sexually suggestive notes or letters if it is known or should be known that the person does not welcome such behavior;
- regularly telling sexual jokes or using sexually vulgar or explicit language in the presence of another person;
- using foul language or gestures;
- harassing acts or behavior directed against a person on the basis of his or her sex;
- derogatory or provocative remarks about or relating to an employee's sex or appearance;
- off-duty conduct which falls within any of the above and affects the work environment; and
- making unwelcome, inappropriate inquiries about a person's private or personal behavior.

I. This company is dedicated to providing equal employment opportunities to persons with disabilities. Discrimination based on a person's disability will not be tolerated. A person with a disability is one who has a physical or mental impairment or medical condition that limits one or more major life activities, any person who has a past history of such an impairment, or any person who is treated as if he or she has such an impairment. To insure that persons protected by the American's with Disabilities Act are considered on the basis of merit, all employment related decisions will be based upon neutral criteria to determine each candidate's ability to perform a position's essential functions with or without reasonable accommodations.

· Qualified employees with disabilities shall have the same access to benefits as employees without a disability.

· An individual with a disability is responsible for making his or her supervisor or recruiter aware of his or her need for an accommodation. When the need for accommodation has been identified, or if the supervisor is aware of the disability, the supervisor or recruiter is responsible for entering into an "interactive process" with the individual and taking the following steps:

1. Identifying the essential functions of the job based upon the job description, job announcement, policies and procedures manuals;

2. Consulting with the individual who requested the accommodation to identify which duties are affected by the individual's disability and what accommodations could enable the individual to perform those duties or the duties of another vacant position;

3. Conferring with the Human Resources team, to evaluate the reasonableness of the requested accommodations and/or to identify alternate accommodations on a case-by-case basis;

4. Giving a qualified applicant with a disability, who is able to perform the essential functions of the position, an equal opportunity to compete for the position; and

5. Implementing those reasonable accommodations that allow an employee to perform the essential functions of his or her position.

J. Discrimination or retaliation because of an employee's exercise of his or her rights to a leave of absence as provided for by law will not be tolerated.

K. In all cases, the better qualified applicant or employee shall be selected for a position, promotion, assignment, training, or other employment action.

PROCESSING COMPLAINTS

A. Any employee or applicant for employment who believes he or she has been the victim of discrimination, harassment or retaliation in violation of this company’s EEO Policy is encouraged to file a complaint. When this company receives a complaint of discrimination, harassment or retaliation or otherwise has reason to believe that discrimination, harassment or retaliation is occurring, it will take all necessary steps to ensure that the matter is promptly investigated and that prompt, appropriate remedial action is taken. This company is committed to take action if it learns of discrimination, harassment or retaliation in violation of this Policy whether or not the aggrieved employee files a complaint.

B. The complainant must be given the option to file a discrimination, harassment or retaliation complaint with his or her department manager/supervisor, Human Resources team, or with an outside compliance agency such as a State Agency or the United States Equal Employment Opportunity Commission (EEOC). The complainant and the accused are entitled to know and shall be promptly informed at the conclusion of the investigation whether allegations have been found to be founded, unsubstantiated or unfounded.

C. Where a complaint is filed against an employee with whom the company has a reporting relationship, the complaint will be directed to the CEO. The Human Resources team will not conduct the investigation. The CEO will appoint an independent investigator who will report to the CEO on the complaint.

D. All supervisory and management employees are responsible for promptly responding to, and/or reporting any suspected acts of discrimination, harassment, and retaliation. Supervisors and managers must immediately report suspected discrimination, harassment and retaliation to their Agency or Department Human Resources team. The Agency/Department Human Resources team shall report any suspected discrimination, harassment and retaliation to the

CEO. Failure by a manager/supervisor to appropriately report and address known or suspected incidents of discrimination, harassment or retaliation shall be considered to be a violation of this Policy and appropriate disciplinary action may be taken.

E. Although the company encourages an employee who believes he or she may be the victim of discrimination, harassment or discrimination to report such conduct, the company will not tolerate false accusations of discrimination, harassment or retaliation.

ADMINISTRATION OF EQUAL EMPLOYMENT OPPORTUNITY POLICY AND PROCEDURE

Human Resources is responsible for administering this EEO Policy. To ensure that this Policy is administered consistently on a companywide basis and to ensure accurate record-keeping, information regarding Agency or Departmental investigations, including the nature of the complaint or the suspected misconduct involved, the steps taken in the investigation, and the proposed disposition must be reported to Human Resources before any final action is taken. Human Resources will ensure that all employees are advised of this Policy and ensure uniform and effective implementation of this Policy.

Training Materials

EEO Training Sheet

>> Discrimination in the Workplace

Discrimination in any aspect of employment is illegal and employees are protected from such conduct under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA) of 1963.

Black's Law Dictionary defines discrimination as the failure to treat all persons equally where no reasonable distinction can be found between those favored and those who are not favored. In other words, discrimination is the unfair treatment or denial of standard privileges of employment (such as benefits, working hours, pay increases, transfers, or promotions) based on one's race, age, sex, nationality, pregnancy, religion, marital or veteran status, or handicap whether physical or mental.

Discrimination is prohibited in all phases of employment including:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff, or recall;
- job advertisements;
- recruitment;
- testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans, and disability leave; or other terms and conditions of employment.

Discriminatory practices under these laws also include:

- Harassment on the basis of race, color, religion, sex, national origin, disability, or age;
- Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
- Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities; and
- Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

There are two categories under which most employment discrimination claims fall; disparate treatment and disparate impact. Disparate treatment occurs when an employer commits intentional discrimination such as harassment or refusing to promote or hire an individual because of their color. Disparate impact is generally not intentional but results from an employment practice that on the surface appears to be neutral in treatment but actually treats one group of people more negatively than another. Furthermore, these practices are not justified by a business necessity. Examples of disparate impact include establishing a dress code, educational requirements or height and weight requirements.

EEO Training Sheet

>> Race Discrimination

Under Title VII, equal employment opportunity cannot be denied any person because of their racial group or perceived racial group, their race-linked characteristics (e.g., hair texture, color, facial features), or because their marriage to or association with someone of a particular race or color. Employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups is also prohibited.

Title VII's prohibition of race discrimination generally encompasses:

Ancestry: Employment discrimination because of racial or ethnic ancestry.

Physical Characteristics: Employment discrimination based on a person's physical characteristics associated with race, such as a person's color, hair, facial features, height and weight.

Race-linked Illness: Discrimination based on race-linked illnesses. For example, sickle cell anemia is a genetically-transmitted disease that affects primarily persons of African descent.

Culture: Title VII prohibits employment discrimination against a person because of cultural characteristics often linked to race or ethnicity, such as a person's name, cultural dress and grooming practices, or accent or manner of speech.

Perception: Employment discrimination against an individual based on a belief that the individual is a member of a particular racial group, regardless of how the individual identifies himself.

Association: Employment discrimination against an individual because of his/her association with someone of a particular race.

Subgroup: Title VII prohibits discrimination against a subgroup of persons in a racial group because they have certain attributes in addition to their race. Thus, for example, it would violate Title VII for an employer to reject Black women with preschool age children, while not rejecting other women with preschool age children.

"Reverse" Race Discrimination: Title VII prohibits race discrimination against all persons, including Caucasians.

Harassment on the basis of race and/or color violates Title VII. Ethnic slurs, racial "jokes," offensive or derogatory comments, or other verbal or physical conduct based on an individual's race/color constitutes unlawful harassment if the conduct creates an intimidating, hostile, or offensive working environment, or interferes with the individual's work performance.

EEO Training Sheet

>> Religious Discrimination

Religion refers to a person's religious background, religious beliefs (or lack of them) or membership in a religious group. Under Title VII, an employer is required to reasonably accommodate the religious belief of an employee or prospective employee, unless doing so would impose an undue hardship. Possible accommodations include flexible scheduling, voluntary substitutions or swaps, job reassignments, lateral transfers, modification of grooming requirements and other workplace practices, policies and/or procedures.

The following are examples of requests that employees may make in order to follow their religious teachings:

- Observance of a Sabbath or religious holidays
- Need for prayer break during working hours
- Practice of following certain dietary requirements
- Practice of not working during a mourning period for a deceased relative
- Prohibition against medical examinations
- Prohibition against membership in labor and other organizations
- Practices concerning dress and other personal grooming habits

Scheduling examinations or other selection activities in conflict with a current or prospective employee's religious needs, inquiring about an applicant's future availability at certain times, maintaining a restrictive dress code, or refusing to allow observance of a Sabbath or religious holiday is prohibited unless the employer can prove that not doing so would cause an undue hardship.

An employer can claim undue hardship when accommodating an employee's religious practices if allowing such practices:

- Require more than ordinary administrative costs
- Diminish efficiency in other jobs
- Infringe on other employees' job rights or benefits
- Impair workplace safety
- Cause co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work
- Conflict with another law or regulation
- If changing a bona fide seniority system to accommodate one employee's religious practices denies another employee the job or shift preference guaranteed by the seniority system

Employees cannot be forced to participate -- or not participate -- in a religious activity as a condition of employment. Mandatory "new age" training programs, designed to improve employee motivation, cooperation or productivity through meditation, yoga, biofeedback or other practices, may conflict with the non-discriminatory provisions of Title VII.

Refusing to hire someone because customers or co-workers may be "uncomfortable" with that person's religion or national origin is just as illegal as refusing to hire that person because of religion or national origin in the first place.

EEO Training Sheet

>> Age Discrimination

The Age Discrimination in Employment Act (ADEA) protects individuals, age 40 and older, from discrimination in the workplace. Much like Title VII and ADA, the ADEA is intended to provide equal opportunity in employment regardless of their age. The issue of an employee's age is usually most prevalent during the hiring process and when reducing the workforce (or forced early retirement).

When advertising a job opening, employers may violate the provisions of the ADEA by using such terms as "younger persons wanted", "girl", "boy" or "excellent first job". Even statements of "recent college grad" could send up a red flag. The ADEA makes it unlawful, unless a specific exemption applies (such as age requirements for law enforcement and fire personnel) for an employer to utilize job advertising that discriminates on account of age against persons because of their age.

The next contact with a prospective employee is at the application stage. Employers need to be sensitive about not asking unnecessary questions that reveal age. The Act states:

> A request on the part of an employer for information such as "date of birth" or "state age" on an application form is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise discriminate based on age, employment application forms which request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act (29 CFR 1625.5).

When deciding to promote an employee, the decision should always be made on merit alone. Age should never be a factor. It is always best to communicate and document business decisions and discussions in case the decision is ever called into question.

The same is true about letting an employee go. The decision should always be based on performance in workplace and not factored based on age. Clearly communicating with an employee helps avoid misunderstandings. If an employer sees an employee's performance declining, they should discuss it with them to give the employee a chance to improve. Then, if the employee continues to demonstrate poor performance, they will not be shocked if it is necessary that they are fired. There will be no misunderstanding as to the employer's reasoning.

Another issue that arises in the workplace with regard to age is when companies reduce their workforce. Employers should always think through their decision carefully and decided on the criteria (performance, experience, knowledge, closing one whole division) that will be used to evaluate who will be cut. If that criteria results in a disproportionate number of older employees being fired then less discriminatory methods should be considered. If using performance evaluations, it is wise to take into consideration a whole history of evaluations rather than just the latest one. A court may be suspicious if someone had 10 straight evaluations with an "excellent" rating and then a "poor" rating just before the layoff. It could be an attempt to disguise an age-based action.

The Older Workers Benefit Protection Act of 1990 (OWBPA) which amended the ADEA to specifically prohibit employers from denying benefits to older employees. Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers, and that those greater costs would create a disincentive to hire older workers. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

In recent years, companies have started to fear a lawsuit when they let go of employees in a protected class so they have begun offering terminated employees extra cash or benefits in exchange for a signed waiver saying that the employee won't sue. While this is within an employer's rights, the ADEA, as amended by OWBPA, sets specific minimum standards that must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid.

EEO Training Sheet

>> Disability Discrimination

Like Title VII, the Americans with Disabilities Act of 1990 (42 USC 12101) aims to eradicate discrimination in the workplace. The ADA prohibits discrimination against qualified individuals with a disability in all employment practices. The ADA as amended by the ADA Amendments Act of 2008 (effective January 1, 2009) defines an individual with a disability as a person who has a physical or mental impairment that substantially limits at least one major life activity (including activities such as reading, bending and communicating and/or affects major bodily functions such as digestive, bowel, bladder or neurological functions), has a record of such an impairment or is believed to have such an impairment.

The Act does not interfere with an employer's authority to establish appropriate job qualifications to hire people who can perform jobs effectively and safely, and to hire the best qualified person for a job. The ADA requirements are designed to assure that people with disabilities are not excluded from jobs that they can perform.

As with most protected classes of employees, individuals with disabilities must not be subject to discrimination in any employment practice. This means that:

- They should have equal access to any employment opportunity available to a similarly situated individual who is not disabled.
- Employment decisions concerning an employee or applicant should be based on objective factual evidence about the particular individual, not on assumptions or stereotypes about the individual's disability.
- The qualifications of an individual with a disability may be evaluated on ability to perform all job-related functions, with or without reasonable accommodation. However, an individual may not be excluded from a job because a disability prevents performance of marginal job functions.
- An employer must provide a reasonable accommodation that will enable an individual with a disability to have an equal opportunity in every aspect of employment, unless a particular accommodation would impose an undue hardship.
- An employer may not use an employment practice or policy that screens out or tends to screen out an individual with a disability or a class of individuals with disabilities, unless the practice or policy is job related and consistent with business necessity and the individual cannot be accommodated without undue hardship.
- An employer may not limit, segregate, or classify an individual with a disability in any way that negatively affects the individual in terms of job opportunity and advancement.
- An individual with a disability should not because of a disability be treated differently than a similarly situated individual in any aspect of employment, except when a reasonable accommodation is needed to provide an equal employment opportunity or when another Federal law or regulation requires different treatment.

There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed. These include:

- making existing facilities accessible;
- job restructuring;
- part-time or modified work schedules;
- acquiring or modifying equipment;
- changing tests, training materials, or policies;
- providing qualified readers or interpreters; and
- reassignment to a vacant position.

One circumstance that may prevent an employer from hiring or promoting an individual with a disability is when that individual poses a direct threat to the health and safety of that individual or others. However, an employer must meet very specific and stringent requirements under the ADA to establish such a direct threat exists.

EEO Training Sheet

>> National Origin

National origin discrimination means treating someone less favorably because they come from a particular place, are married or associated with someone of a particular nationality, their ethnicity or accent, or because it is believed that they have a particular ethnic background. The following are examples of discrimination which violate Title VII:

Ethnicity: Employment discrimination against members of an ethnic group, for example, discrimination against someone because he is Arab. National origin discrimination also includes discrimination against anyone who does not belong to a particular ethnic group, for example, less favorable treatment of anyone who is not Hispanic.

Physical, linguistic, or cultural traits: Employment discrimination against an individual because she has physical, linguistic, and/or cultural characteristics closely associated with a national origin group.

Perception: Employment discrimination against an individual based on the employer's belief that he is a member of a particular national origin group.

Title VII also prohibits discrimination based on linguistic characteristics common to a specific ethnic group. An employer must show a legitimate nondiscriminatory reason for the denial of employment opportunity because of an individual's accent or manner of speaking. Requiring employees or applicants to be fluent in English or to speak English only in the workplace may also violate Title VII if the rule is adopted to exclude individuals of a particular national origin and is not related to job performance.

Accent discrimination

An employer may not base a decision on an employee's foreign accent unless the accent materially interferes with job performance. This assessment depends upon the specific duties of the position in question and the extent to which the individual's accent affects their ability to perform job duties. Positions for which effective oral communication in English may be required include teaching, customer service, and telemarketing. Even for these positions, an employer must still determine whether the particular individual's accent interferes with the ability to perform job duties. Furthermore, employers cannot reject an applicant solely because their accent would not be a customer preference.

English fluency

A fluency requirement is only permissible if required for the effective performance of the position for which it is imposed. The degree of fluency that may be lawfully required varies from one position to the next, therefore employers should avoid general fluency requirements that may not be applicable in particular positions within the company. The employer should not require a greater degree of fluency than is necessary for the relevant position. As with English fluency requirements, requirements for fluency in foreign languages must actually be necessary for the positions for which they are imposed.

English-only rules

Title VII permits employers to adopt English-only rules under certain circumstances which must be for nondiscriminatory reasons. An English-only rule may be used if it is needed to promote the safe or efficient operation of the employer's business, effectively fulfills the business purpose it is supposed to serve and there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact. If the employer believes such a rule is necessary, employees must be informed when English is required and the consequences for violating the rule. The following are some situations in which business necessity would justify an English-only rule:

- For communications with customers, coworkers, or supervisors who only speak English
- In emergencies or other situations in which workers must speak a common language to promote safety
- For cooperative work assignments in which the English-only rule is needed to promote efficiency
- To enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with coworkers or customers

"Employee morale" is not an acceptable reason for implementing an English-only rule. A policy that prohibits some but not all of the foreign languages spoken in a workplace, such as a no-Vietnamese rule, would be unlawful.

EEO Training Sheet

>> Sex Discrimination

Sex discrimination can take many forms. The following are prohibited under sex discrimination:

- Sex Discrimination - Unfair treatment or denial of standard privileges of employment based on a person's sex or gender.
- Unequal Pay - Men and women should be given equal pay for equal work in the same establishment.
- Sexual Harassment - This includes practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment for persons of either gender, including same sex harassment.
- Pregnancy Based Discrimination - Pregnancy, childbirth, and related medical conditions must be treated in the same way as other temporary illnesses or conditions.

A person's gender should never be a factor when making employment decisions unless there is a bona fide occupational reason for that distinction. Labeling positions ``Men's jobs'' and ``Women's jobs'' tend to deny employment opportunities unnecessarily to one sex or the other. The EEOC does not classify the following as bona fide occupational qualifications:

- The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general.
- The refusal to hire an individual based on stereotyped characterizations of the sexes.
- The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers.

Where it is necessary for the purpose of authenticity or genuineness, the EEOC will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

It is also unlawful for an employer to discriminate between men and women with regard to fringe benefits. When an employer offers benefits only to those employees who are "head of household" or the "principal wage earner" the benefits are usually available only to male employees and their families. This affects the rights of the female employees based on a condition that bears no relationship to job performance and will be found in violation of Title VII.

The Pregnancy Discrimination Act, which is an amendment to Title VII, prohibits discrimination on the basis of pregnancy, childbirth, or related medical. Women who are pregnant or affected by related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations. Title VII's pregnancy-related protections include:

Hiring

An employer cannot refuse to hire a pregnant woman because of her pregnancy, because of a pregnancy-related condition or because of the prejudices of co-workers, clients, or customers.

Pregnancy and Maternity Leave

An employer may not single out pregnancy-related conditions for special procedures to determine an employee's ability to work. If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee.

An employer also may not have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.

Employers must hold open a job for a pregnancy-related absence the same length of time jobs are held open for employees on sick or disability leave.

Health Insurance

Any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as costs for other medical conditions.

Fringe Benefits

Pregnancy-related benefits cannot be limited to married employees. In an all-female workforce or job classification, benefits must be provided for pregnancy-related conditions if benefits are provided for other medical conditions.

EEO Training Sheet

>> Harassment

Under the same laws that govern discrimination, employers are also responsible for preventing harassment in the workplace. The same groups of people that are protected from discrimination are likewise protected from undergoing unwelcome offensive conduct based on sex, race or other protected characteristics. These types of behavior create a hostile work environment and constitute discriminatory harassment.

To determine if an action is considered harassment, it must be viewed as such by the people that it affected, not by the ones responsible for it. An employee may not have seen or even meant their words or actions to be harassing in nature but if the victim felt uncomfortable or insulted then it would be classified as harassment. If the action is not welcomed by the victim then an offense has occurred. Some of the most common forms of unwelcome behavior are:

- Jokes that are sexual in nature or offends one's race or gender
- Lewd comments about sex or protected characteristics
- Offensive emails or instant messages
- Playing suggestive music
- Inappropriate written material such as love notes
- Use of racially derogatory words, phrases, epithets
- Demonstrations of a racial or ethnic nature such as a use of gestures, pictures or drawings which would offend a particular racial or ethnic group
- Comments about an individual's skin color or other racial/ethnic characteristics
- Negative comments about an employee's religious beliefs (or lack of religious beliefs)
- Expressing negative stereotypes regarding an employee's birthplace or ancestry
- Negative comments regarding an employee's age when referring to employees 40 and over
- Derogatory or intimidating references to an employee's mental or physical impairment

Accepting conduct is not the same as welcoming it. A person is not welcoming a conversation or action just because they fail to say anything. They may even participate in the conversation but they feel offended by what someone in the group is saying. Furthermore, just because a person likes something today doesn't mean that they will welcome it tomorrow.

Anyone, regardless of gender or job level can be guilty of harassment. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee. The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.

Harassment becomes unlawful where:

1) enduring the offensive conduct becomes a condition of continued employment, or

2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Harassment can occur in a variety of circumstances, including, but not limited to, the following:

- The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.
- The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
- Unlawful harassment may occur without economic injury to, or discharge of, the victim.

Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

>> The Genetic Information Nondiscrimination Act (GINA)

On May 21, 2008, the President signed the Genetic Information Nondiscrimination Act (GINA) into law. Title I of GINA addresses the use of genetic information in health insurance. Title II of the Act prohibits the use of genetic information in employment, prohibits the intentional acquisition of genetic information about applicants and employees, and imposes strict confidentiality requirements. The provisions of GINA related to health coverage are effective as of May 21, 2009 and those related to employment are effective as of November 21, 2009.

Title I applies to health insurers and health plans.Title II applies to private, state, and local government employers with 15 or more employees, employment agencies, labor unions, and joint labor-management training programs. It also covers Congress and federal executive branch agencies.

What is Genetic Information?

GINA defines *genetic information* as information about:

- An individual's genetic tests (including tests for colon cancer, breast cancer, Huntington's Disease, Sickle Cell anemia, etc..);
- Genetic tests of an individual's family members (defined as dependents and up to and including 4th degree relatives);
- Genetic tests of any fetus of an individual or family member who is a pregnant woman, and genetic tests of any embryo legally held by an individual or family member utilizing assisted reproductive technology;
- The manifestation of a disease or disorder in an individual's family members (family history); or
- Any request for, or receipt of, genetic services or participation in clinical research that includes genetic services (genetic testing, counseling, or education) by an individual or an individual's family members.

Genetic information does not include information about the sex or age of an individual or the individual's family members, or information that an individual *currently has* a disease or disorder. Genetic information also does not include tests for alcohol or drug use.

Genetic Discrimination in Employment

Title II of GINA prohibits use of genetic information in making decisions related to any terms, conditions, or privileges of employment, prohibits covered entities from intentionally acquiring genetic information, requires confidentiality with respect to genetic information (with limited exceptions), and prohibits retaliation.

Unlawful Employment Decisions

The law prohibits the use of genetic information in employment decisions, including hiring; firing; job assignments; and promotions by employers, unions, employment agencies, and labor-management training programs.

Acquisition of Genetic Information
Employers may not request, require, or purchase genetic information with respect to an employee/applicant or family member of an employee/applicant.One exception to this rule applies to inadvertent acquisition of genetic information, such as overhearing an employee conversation, receiving genetic information verbally when asking a general question about an employee's health, or receiving unsolicited genetic information as part of a documented request for a disability accommodation or leave of absence.

Confidentiality

Covered entities in possession of genetic information about applicants or employees must treat it the same way they treat medical information generally. They must keep the information confidential and, if the information is in writing, must keep it apart from other personnel information in separate medical files. A covered entity may keep genetic information in the same file as medical information subject to the Americans with Disabilities Act.

Genetic Discrimination in Health Insurance

GINA prohibits health insurers from engaging in three practices:

(1) using genetic information about an individual to adjust a group plan's premiums, or, in the case of individual plans, to deny coverage, adjust premiums, or impose a preexisting condition exclusion;
(2) requiring or requesting genetic testing; and
(3) requesting, requiring, or purchasing genetic information for underwriting purposes.

Discrimination in Premium Setting and Eligibility

GINA prohibits health plans, group and individual health insurers and issuers, and issuers of Medicare supplemental policies from adjusting a group or individual's premium based on genetic information about an individual in the group, an individual seeking individual coverage, or an individual's family members. It also prohibits individual insurers from conditioning eligibility or continuing eligibility on genetic information, and prohibits individual insurers from treating genetic information as a preexisting condition. Issuers of supplemental Medicare policies may not deny or condition the issuance of a policy based on genetic information (and may not impose a preexisting condition exclusion based on genetic information).

Unlawful Genetic Testing Requirements

GINA prohibits health plans, group and individual health insurers and issuers, and issuers of Medicare supplemental policies from requesting or requiring that individuals or their family members undergo a genetic test. This prohibition does not limit the authority of a health care professional to request that an individual undergo genetic testing as part of his or her course of health care. The act provides for a research exception to this provision, by allowing a group or individual insurance issuer to request, but not require, an individual to undergo genetic testing if specific conditions are met.

Restricted Collection and Use of Genetic Information

GINA prohibits health plans, group and individual health insurers and issuers, and issuers of Medicare supplemental policies from requesting, requiring, or purchasing genetic information for the purposes of underwriting prior to an individual's enrollment or in connection with enrollment. "Incidental collection" of genetic information would not be considered a violation.

Documentation Forms

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