Employment Discrimination

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EMPLOYMENT DISCRIMINATION

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This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult your lawyer concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to other unique state requirements that extend beyond the scope of this booklet.

Almost fifty years ago, Congress began expanding statutes designed to protect employees from discrimination based on unfounded stereotypes, broad generalizations, and sexual or racial bias. These laws prohibit employers from considering certain factors when making employment decisions, such as hiring, promotion, demotion, or firing of individuals. Chief among such laws is Title VII of the Civil Rights Act of 1964 (Title VII) which protects individuals from discrimination on the basis of race, color, national origin, sex, and religion.

A few years after passing Title VII, Congress added another protected class by passing the Age Discrimination in Employment Act (ADEA) which prohibits discrimination in employment against individuals who are at least 40 years old. Since that time Congress has passed additional laws that protect other categories of individuals, such as those with certain disabilities, who are protected by the Americans with Disabilities Act (ADA).

While all this legislation has certainly benefited racial and ethnic minorities, women, disabled employees, and others, the sheer volume and complexity of these laws has made it challenging for even the most well-intentioned employer to comply. Because of the potential for substantial legal liability, all employers should have at least a basic understanding of the major provisions of federal employment discrimination laws and how they have generally been interpreted by the courts.

This booklet — outlining key provisions of the major discrimination statutes is intended to provide busy executives and human resource professionals preliminary information on the subject of employment discrimination. Although not intended as a substitute for legal advice, this booklet provides practical assistance interpreting, recognizing, and resolving claims of employment discrimination. Keep in mind that the scope of this booklet is limited to federal laws. While some states mirror the federal provisions, other states have laws that provide greater protection to employees.

THE CIVIL RIGHTS ACT OF 1964

The landmark Civil Rights Act of 1964 was aimed at attacking discrimination in nearly every aspect of our society. Title VII of the Act protects employees from discrimination based on race, color, national origin, sex (including pregnancy), and religion. Once a business is deemed an "employer" for purposes of Title VII, all aspects of the employment relationship must be conducted in a nondiscriminatory fashion, including hiring, compensation, promotion, discharge, and the allocation of non-monetary opportunities or benefits.

A. Who Is A Covered Employer Under Title VII?

Title VII defines an "employer" as an entity engaged in a business affecting commerce, which has 15 or more employees for each working day, in each of 20 or more weeks in the current or preceding calendar year. Since virtually all business enterprises are considered to affect commerce, the key standards in this definition are the 15-employee and 20-week period requirements.

When evaluating the 20-week requirement, the "current" year is the calendar year in which the alleged discrimination occurred, while the "preceding year" is the year prior to the "current" year. The 20-week period need not be consecutive weeks.

For purposes of the 15-employee requirement, courts generally look to whether the employer has the right to control the work of a particular person. If so, then that person, whether part-time or full-time, is deemed an employee for purposes of Title VII and counts toward the 15-employee requirement. Independent contractors, volunteers, and corporate directors have generally **not** been included.

B. Title VII's Protected Classes

1. Race and Color

The prohibition against discrimination on the basis of race is well known — you cannot discriminate against

people simply because they are African-American, Asian, Hispanic, etc. What is not commonly appreciated is that Title VII protects whites, as well as minorities, from unlawful discrimination.

An infrequently used provision of Title VII is its prohibition against discrimination based on color. Typically, color discrimination is synonymous with race discrimination. There are, however, cases extending Title VII protection to situations where, for instance, light-skinned African-Americans are preferred over those with darker complexions.

2. Sex

It is obviously unlawful for a company to generally favor men over women (or *vice versa*) in its employment decisions. Less obviously, perhaps, you cannot evaluate a potential or current employee by measuring that person's performance against stereotyped expectations of behavior. For instance, it would be unlawful sex discrimination for an employer to describe a female candidate or employee as "macho," "overcompensating for being a woman," or "a lady using foul language," and then make an employment-related decision based upon this perception, or to advise her to "walk more femininely, wear make-up, have her hair styled, and wear jewelry" in order to improve her chances for hire or promotion.

Similarly, it is unlawful sex discrimination to refuse to hire women who, for example, have children or are of childbearing age because of the employer's belief that these women will not be able to work as hard due to their family commitments.

With very few exceptions, it is unlawful sex discrimination to reject a woman because she is pregnant, and it is unlawful to reject a woman because she has secured, or refuses to secure, an abortion. In addition, benefits must be provided to pregnant women on the same terms as to employees having other temporary disabilities.

Sex-based discrimination in compensation is also outlawed by the Equal Pay Act of 1963, which generally applies to employers of two or more persons with annual sales volumes exceeding $500,000. This statute prohibits pay differentials based upon sex for substantially equivalent work requiring equal skill, effort, and responsibility under similar working conditions.

Most recently, in January 2009, Congress passed the Lilly Ledbetter Fair Pay Act, which amended the Civil Rights Act of 1964, stating that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new discriminatory paycheck. This law was a direct response to *Ledbetter v. Goodyear Tire & Rubber Co.*, a U.S. Supreme Court decision, which held that the statute of limitations for presenting an equal-pay lawsuit begins at the date the pay was agreed upon, not at the date of the most recent paycheck.

Generally, the most common type of Title VII claim relating to sex has been sexual harassment. While harassment based on race, religion, national origin, and other characteristics is also actionable, the area of sexual harassment has received the most national attention. Essentially, there are two types of claims: those where harassment culminates in a tangible adverse employment action (such as discharge, demotion, or undesirable reassignment) and harassment which is not accompanied by an adverse employment action.

The Supreme Court's rulings specifically target supervisors as the greatest source of potential liability for employers. An employer is strictly liable to a victimized employee for harassment created by a supervisor with immediate or successively higher authority over the employee where there is a tangible job detriment. There generally is no defense in this situation, and the only issue will be the extent of the damages. Thus, all employers should take affirmative steps to properly train their supervisors to help prevent such situations.

In contrast, in harassment claims against supervisors where there is no corresponding job detriment, an employer is afforded an affirmative defense. According to the Supreme Court, this defense consists of two elements: 1) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and 2) that the victimized employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

This affirmative defense is a compelling reason for establishing an effective internal complaint handling procedure to minimize your potential liability in these harassment actions. But just as important is the need to regularly train supervisors and employees on the anti-harassment policy and the complaint procedure that should be used if employees feel as though they have been harassed.

If the accused harasser is not a supervisor, employers can be liable for unwelcome sexual conduct so severe or pervasive that it unreasonably interferes with the individual's work performance. Once again, your best defense to such claims includes maintaining a policy prohibiting unlawful harassment in a manner that meets the above criteria.

Sexual harassment is discussed in more depth in a separate booklet in this series.

3. Religion

The prohibition against religious discrimination is similar to the other types of discrimination prohibitions with one important difference — employers have a duty to reasonably accommodate the religious activities of employees. While this may appear to create a substantial economic burden for your business, it need not.

You have no duty to accommodate religious needs if the accommodation creates an undue hardship, which the

Supreme Court has defined as anything that has "more than a *de minimis* [token] cost." For example, you are generally not obligated to change work schedules to accommodate an employee's religious practices if it would violate collectively bargained seniority rules or require excessive scheduling of overtime. On the other hand, allowing an employee to solicit another employee to switch work days voluntarily could be a reasonable accommodation.

While an attempt at reasonable accommodation includes inviting the individual to offer proposed solutions, you are not required to choose the accommodation preferred by the employee. An employer should seek an accommodation which effectively eliminates any religious conflict and reasonably preserves the person's employment status.

4. National Origin

Generally, national origin refers to the country from which a person or his or her ancestors originated. Consequently, discrimination against someone because of his or her heritage is proscribed. For instance, you may not discriminate against someone because they are originally from Libya or because their parents or grandparents were from Russia.

Title VII's ban on national origin discrimination also extends to bias based on ethnic backgrounds, even if the persons involved are not associated with a particular nation (such as Gypsies) or are associated with groups that are clearly Americans (such as Cajuns).

C. Intentional Discrimination – Disparate Treatment

The most easily identified type of discrimination is intentional and is referred to as disparate treatment. This means that some people are intentionally being treated less favorably because they belong to a protected group. For instance, one person is fired because he is of a particular race, or another is not given a promotion because of her sex.

1. Direct Evidence of Intentional Discrimination – Mixed-Motive Cases

In proving intentional discrimination, it is obviously helpful for a plaintiff to have direct evidence of an illegal motive, such as race-based comments made in the course of an employment decision by a supervisor, or an internal memorandum discussing the benefits of firing members of a certain age or religious group. If a plaintiff can prove through this direct evidence that a discriminatory reason was a motivating factor in an adverse employment action, the burden then shifts to the employer to show that the employment action would have taken place even if the plaintiff's protected status had not been taken into account.

For instance, assume there is proof, such as an internal memo, of a supervisor mentioning his own racial bias when discussing the dismissal of an African-American employee. If a discrimination suit is filed by the terminated employee based on the dismissal and the contents of the memo, the company can still defeat the claim by producing evidence that it had legitimate, nondiscriminatory reasons for the termination, such as the employee's chronic tardiness, poor performance, or inability to get along with co-workers.

Unless the plaintiff can demonstrate that those business reasons are really a pretext, i.e., not the real reason, the employer can avoid paying certain damages in this "mixed-motive" case. If, however, the plaintiff is deemed a "prevailing party" even if only minimal damages are awarded, the company might still be liable for some of the plaintiff's attorneys' fees and the costs directly attributable to pursuing the claim.

2. The BFOQ Defense

In rare cases, an employer will have no choice but to discriminate against certain groups. For instance, a film director may have a movie role that, for authenticity, can

only be performed by a woman. Congress created a limited exception for this type of discrimination called the bona fide occupational qualification (BFOQ) defense, which applies both to Title VII and age-based claims. To state a successful BFOQ defense, an employer must demonstrate that all or substantially all of the members of the excluded class cannot perform *essential* job duties.

A BFOQ cannot be based on customer preference or even on concern for the welfare of the employee (unless the injury to the employee affects the safety of others). For instance, an airline could not refuse to hire male flight attendants because its passengers preferred women; nor could a manufacturing plant refuse to hire women out of fear that chemicals used in production could adversely affect their reproductive systems.

On the other hand, customer privacy may be relevant in the BFOQ defense. Certain clothing store positions, such as a changing room monitor, could be available only for members of a particular sex based solely on customer privacy concerns. The BFOQ defense is rarely successful, however, and you should not rely on it except in the most limited circumstances.

3. Indirect Evidence of Discrimination

Most plaintiffs are unable to provide direct evidence of discrimination; nonetheless, courts have allowed them to proceed on their Title VII claims and establish illegal motive by presenting *indirect evidence* of discrimination. The framework for doing this is relatively straightforward. Initially, the plaintiff must demonstrate that: 1) he or she is a member of a protected class, 2) was qualified for the position, 3) an adverse employment action took place, and 4) a person of another class received the position, or the position remained open and the company continued to seek persons to fill it.

If the plaintiff can establish those four elements, a *prima facie* case has been established. As with mixed-motive cases described above, the burden then shifts to the employer to present a legitimate, nondiscriminatory reason for the plaintiff's treatment. If the employer is unable to do this, the plaintiff will prevail. If, however, the employer can articulate a legitimate, business-based reason for the adverse employment action, the burden then shifts back to the plaintiff to try to establish that the employer's stated reason is a pretext.

In attempting to prove pretext, the plaintiff can rely upon a host of evidence: proof of differential treatment, inconsistent standards in discipline or hiring, statistical proof, etc. According to the Supreme Court, the plaintiff can prove pretext directly "by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

D. Unintentional Discrimination — Disparate Impact

Before offering a person a job, many employers ask that the applicant meet certain requirements or pass some type of examination. Although not intended to discriminate against a particular group, the test or requirement may nonetheless have an adverse impact on a protected class.

For example, you may require a high school diploma for a particular position. If this requirement results in members of a protected class being disproportionately excluded from the potential applicant pool, they could challenge the diploma requirement. To defend against this disparate impact challenge, you would need to show that the requirement is based upon a *legitimate business necessity* for the particular position.

Similarly, you may require employees to go through a series of tests in order to evaluate them for promotion. If

one of the tests excludes a disproportionately high number of persons in a protected class, then it is subject to challenge even if the final promotion decision does not yield disparate results. For instance, assume that a company has ten employees, five women and five men, who seek promotion into two available upper-management positions. To evaluate the candidates, the company designs a series of tests which must be passed for an individual to qualify for the promotion. If four of the male employees failed the first test, removing them from consideration, while all of the female employees passed, the men could state an adverse impact claim even if the company's final decision was to promote one man and one woman.

Disparate impact claims extend not only to tests or educational requirements, but also to subjective criteria such as politeness, attitude, enthusiasm, or reliability. Such subjective criteria may legitimately be used, but only if they do not unfairly screen out those in a protected class.

EXECUTIVE ORDER 11246

Executive Order 11246 applies to federal contractors with government contracts in excess of $10,000 in any 12-month period, and prohibits discrimination on the basis of race, religion, sex, color, or national origin.

The prohibition against such discrimination is no different from that under Title VII of the Civil Rights Act, however, Executive Order 11246 is enforced by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) rather than by the Equal Employment Opportunity Commission which enforces Title VII.

Additionally, Executive Order 11246 requires that employers with federal contracts valued at over $50,000, and who employ more than 50 employees, must adopt and update annually a written affirmative action plan. There is no comparable affirmative action obligation under Title VII of the Civil Rights Act.

CIVIL RIGHTS ACT OF 1871

Following the Civil War, Congress enacted several civil rights statutes designed to advance the goals of the newly ratified Thirteenth, Fourteenth, and Fifteenth Amendments. Of significance to employment discrimination law are Sections 1981 and 1983 of the Civil Rights Act of 1871.

A. Section 1981

While originally designed to protect former slaves from discrimination, Section 1981 has been interpreted as also protecting whites and others who allege race discrimination. The statute does not expressly apply to discrimination based on religion or national origin, but courts have defined race rather broadly, including Jews and Arabs under Section 1981's protection, since they "were among the people considered by Congress to be distinct races."

Important differences from Title VII provide both advantages and disadvantages to plaintiffs. Unlike Title VII, Section 1981 covers *all* private employers, regardless of size, as well as federal, state, and local government employers. In Section 1981 cases, there is no requirement that a plaintiff first file a charge of discrimination with an administrative agency like the EEOC before commencing the lawsuit. The time period for bringing a Section 1981 claim is four years, which is much longer than the time period for filing Title VII discrimination charges. Under Section 1981, however, the plaintiff's burden of proof is higher than under Title VII. Intentional discrimination must be proved; unintended disparate impact is not actionable.

B. Section 1983

Section 1983 provides a remedy for violations of an employee's Constitutional or statutory rights. Unlike Section 1981, it generally does not apply to private employers or to discrimination by the federal government, but predominantly covers acts taken by state or local governments. As such, it has been used to reach employment discrimination involving

police and fire departments, public schools, colleges and universities, hospitals, and transportation authorities.

Section 1983 is most often used by public-sector employees when they feel their First Amendment rights have been violated. For instance, a state hospital employee may publicly criticize the director of the hospital for alleged Medicaid fraud. If the director subjects the employee to an adverse employment action based upon those comments, the employee may raise a Section 1983 claim.

In evaluating these First Amendment claims, courts balance the employee's free speech rights against the employer's interest in controlling the work environment. The employer need only show a **likelihood** of workplace interference, rather than an actual disturbance of the work environment. However, "the closer the employee's speech reflects on matters of public concern, the greater must be the employer's showing that the speech is likely to be disruptive before it may be punished." As such, speech on purely private issues, such as an employee's own employment condition, is normally unprotected, while employee speech criticizing the illegal or unethical acts of a public official is normally protected.

AGE DISCRIMINATION IN EMPLOYMENT ACT

Generally speaking, the ADEA protects employees 40 years old or older from discrimination based on age. Its definition of covered "employer" is identical to Title VII except that the ADEA has a 20-employee requirement, rather than Title VII's 15-employee requirement. The ADEA is also similar to Title VII in that it allows mixed-motive cases, but unlike Title VII in such situations, the burden of persuasion does not shift to the employer. Rather, in a mixed-motive ADEA claim, the plaintiff must prove by a preponderance of the evidence that age was the "but-for" cause of the challenged adverse employment action.

Some courts have found certain company policies invalid because of their effect upon older workers, such as:

- not hiring teachers with more than 5 years of experience;
- denying severance to employees who are eligible for retirement benefits;
- setting different standards for lateral applicants and entry level applicants;
- using a computer program to measure performance that led to the termination of 10 of 27 older workers but only 1 of 25 younger ones; and
- selecting employees for demotion on the basis of their higher seniority.

A. Indirect Evidence of Discrimination

While it is sometimes possible to prove an ADEA disparate treatment claim by direct evidence, most plaintiffs try to prove discrimination indirectly by using a pattern similar to that used under Title VII. An ADEA plaintiff must prove that he or she was:

- 40 years old or older;
- qualified for the position in question;
- subjected to an adverse employment action; and
- the person hired, promoted, or retained was younger than the plaintiff.

With respect to the fourth element, the person hired, promoted, or retained need not be under 40 for a plaintiff to plead a valid ADEA claim, but only "substantially younger" than the plaintiff.

As in Title VII cases, once the plaintiff states a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the plaintiff's treatment. The plaintiff can then try to show that the employer's proffered justification is a pretext.

B. Reductions in Force

Claims of age discrimination are more likely when businesses dramatically scale back the work force. Employers sometimes target higher wage earners in a reduction in force. Often these higher wage earners tend to be older workers. Plaintiffs in these cases have problems meeting the four-element test mentioned above since their positions are normally eliminated and they are not replaced by anyone, much less by a younger employee. Courts have dealt with this fact by establishing different elements for reduction in force cases. In such cases, the plaintiff must show that he or she:

- is a member of the protected age group;
- was performing according to the employer's legitimate expectations;
- was terminated; and
- others not in the protected class were treated more favorably.

In support of this indirect evidence of discrimination, plaintiffs in reduction in force cases also rely on such factors as: the number of people fired who were over 40 compared to those under 40; performance evaluations of a discharged employee compared with those of younger employees who were retained; the percentage of employees over 40 who were terminated; and direct age-related statements by decision makers. Generally, plaintiffs need to show that younger employees were treated more favorably than older ones in the reduction in force.

C. Early Retirement Plans

While you are generally prohibited from forcing older workers to retire you may offer early retirement plans as long as the plans are voluntary and consistent with the relevant purposes of the ADEA.

In assessing whether a plan is voluntary, courts normally consider the following factors:

- Whether the employee has had sufficient time to consider his or her options;
- whether accurate and complete information has been provided regarding the benefits available under the early separation plan; and
- whether there have been threats, intimidation, or coercion by the employer.

According to a Senate report addressing the third element, the "critical question . . . is whether, under the circumstances, a reasonable person would have concluded that there was no choice but to accept the offer." The case law on what satisfies this standard is inconsistent at best.

Generally speaking, you cannot offer an employee a "choice" between early separation or termination. On the other hand, offering an employee a plan so generous it is "too good to refuse" will not be considered involuntary. In between those two extreme examples, courts have reached differing conclusions. This suggests that you should exercise caution before offering early separation incentives, and your decision should be well thought out.

D. Release of ADEA Claims

In order to reduce exposure to discrimination claims, many employers attempt to get employees to sign releases waiving any employment-based claims upon their termination, usually

in exchange for some benefit such as enhanced severance pay. When age claims are being waived, however, special standards mandated by the Older Workers Benefits Protection Act (OWBPA) must also be met. The OWBPA requires that:

- the waiver must be in writing and in plain English;
- it must specifically refer to ADEA claims and rights;
- it must not release or waive future claims or rights;
- it must be in exchange for valuable consideration **beyond** any benefits or amounts to which the employee is already entitled;
- the employee must be advised to consult with an attorney prior to signing the agreement containing the waiver;
- the employee must be given at least 21 days to consider the agreement. (If the waiver is sought in connection with a termination of a group of employees, this period must be at least 45 days); and
- the waiver must be revocable for at least seven days following the employee's execution of the agreement.

If the waiver is requested in connection with a severance program offered to a group or class of employees, then at the outset of the 45-day waiting period you must also inform each eligible employee, in writing, of the class of employees eligible, the specific eligibility requirements, any applicable time limits on participation, the job titles and ages of all employees eligible or selected for the program, and the ages of all employees in the same job classification or organizational unit who are not eligible or selected. These requirements apply both to voluntary early separation plans and involuntary reductions in force.

Failure to comply with the OWBPA requirements will render the waiver agreement void, which means that the former employee might then bring an age discrimination claim against the employer. This may be so even if the former employee accepted the additional consideration given in exchange for the waiver agreement.

DISABILITY DISCRIMINATION

Two federal statutes deal with disability discrimination — the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973. The statutes are similar in many respects, but there are important differences. For instance, the ADA applies to all private, state, and local government employers with 15 or more employees. In contrast, Section 503 of the Rehabilitation Act applies to federal government contractors, and Section 504 applies to recipients of federal funds. In addition, unlike the ADA, Section 503 of the Rehabilitation Act imposes affirmative action obligations on all covered federal contractors. There are also other distinctions, including how the statutes are enforced, the available remedies, and what accommodations would be considered reasonable.

Since the ADA is dealt with extensively in two prior booklets in this series, only the major provisions the ADA and the Rehabilitation Act share in common will be outlined here.

Generally speaking, both statutes prohibit discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." To prevail in an action brought under either statute, a plaintiff must establish that he or she:

- is a member of the protected class;
- can perform the *essential functions* of the job with or without *reasonable accommodation*; and

- was subjected to an adverse employment action because of a disability.

A. The Protected Class

Both the ADA and the Rehabilitation Act include in the protected class any individual who: 1) has a physical or mental impairment that substantially limits one or more of such person's major life activities, 2) has a record of such an impairment, or 3) is regarded as having such an impairment.

In assessing whether a person is actually disabled, courts should not take into account measures taken by the person to mitigate an impairment. For example, persons with diabetes who takes insulin should be evaluated for purposes of determining whether or not they have a "disability" in their unmedicated condition. This represents a significant change in how the ADA had historically been interpreted.

Neither the ADA nor the Rehabilitation Act Protects current abusers of drugs or alcohol.

B. Accommodation Duty

The ADA and the Rehabilitation Act not only prohibit discrimination against a protected employee, they also place an affirmative obligation on businesses to *reasonably accommodate* employees with disabilities. These accommodation requirements apply to all employment decisions, not just to hiring and promotion. For instance, the obligation to accommodate is applicable to employer-sponsored placement or counseling services and to employer-provided cafeterias, lounges, gymnasiums, auditoriums, transportation, and the like.

While these provisions are certainly broader in scope than the *de minimis* accommodation provision for religion in Title VII, they are similar to their Title VII counterpart in that neither the ADA nor the Rehabilitation Act requires the

best accommodation possible or the one that the employee desires the most. The accommodation must merely be sufficient to meet the job-related needs of the individual being accommodated.

Obviously, not all requests for accommodation are reasonable, and neither statute requires an accommodation that would create an "undue hardship" on the business. "Undue hardship" refers to any accommodation that would be unduly costly, burdensome, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.

While no precise standard has been articulated, courts normally consider a number of factors when determining whether an accommodation would create an undue burden: the size of the facility, the expense of the required accommodation, the number of employees affected, the impact on the organization as a whole, and the potential disruption to the work of the company.

IMMIGRATION REFORM AND CONTROL ACT

As discussed at greater length in another booklet in this series, the Immigration Reform and Control Act (IRCA) requires employers to document an employee's legal right to work in the United States by completing INS Form I-9. In addition, IRCA contains three anti-discrimination provisions.

The first prohibits national origin discrimination, extending this protection to all employers with four or more employees (as opposed to Title VII's 15-employee requirement). Also unlike Title VII, an IRCA plaintiff must show intentional discrimination and cannot proceed under an adverse impact theory.

The second provision prohibits discrimination in hiring and discharge based upon citizenship status, subject to three caveats. First, at the time of the alleged discrimination, the

employee must be either a U.S. citizen or an alien: 1) lawfully admitted for permanent residence; 2) lawfully admitted for temporary resident status; 3) admitted as a refugee; or 4) granted asylum. Second, IRCA permits an employer to prefer a U.S. citizen over an alien "if the two individuals are equally qualified," but this provision is construed extremely narrowly. In effect, the two individuals must be nearly identical but for their citizenship status. Third, you may discriminate on the basis of citizenship status if required to do so by law, regulation, or executive order. This provision is also construed extremely narrowly, and it must be quite clear that the law forbids hiring a non-citizen for a particular job.

The third anti-discrimination provision applies in the I-9 process and is known as "document abuse" discrimination. There are three components to this prohibition. First, you may not specify which documents an employee presents in connection with verification of identity and employment eligibility. This means that you cannot require all new hires to produce only a driver's license and Social Security card, or to require presentation of an INS-issued document, for example. Second, you may not require an employee to produce more documents than are minimally necessary to establish identity and employment eligibility. Third, you may not refuse to accept documents that appear to be reasonably genuine on their face and relate to the employee in question. Note that the document abuse provisions apply for all employees, regardless of their citizenship status.

RIGHTS ARISING FROM MILITARY SERVICE

A. Vietnam Era Veterans' Readjustment Assistance Act

The Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) prohibits discrimination against veterans by federal contractors and subcontractors with contracts of $25,000 or more. For contracts entered after December 1, 2003, the contracts must total $100,000 or more. The protected

class includes special disabled veterans who are entitled to compensation (administered by the Department of Veterans Affairs) for a disability rated at 30% or more. The Act also protects veterans with a disability rating of 10 or 20 %, if the veteran has a serious employment handicap or has been discharged or released from active duty because of a service-connected disability.

VEVRAA also protects veterans who were discharged or released with other than a dishonorable discharge, if any part of the active duty service occurred during the Vietnam era and the veteran served on active duty for at least 180 days. The statute has been amended to extend protection to any veteran who served on active duty during a war or in a campaign or expedition for which a campaign badge was authorized.

In addition to prohibiting discrimination in employment against members of the protected class, VEVRAA also imposes affirmative action requirements upon federal contractors with 50 or more employees and federal government contracts worth over $50,000 ($100,000 if the contracts were entered into after December 1, 2003).

B. Uniformed Services Employment And Reemployment Rights Act

Passed in 1994, the Uniformed Services Employment and Reemployment Rights Act (USERRA) provides uniformed service members several employment-related rights and benefits. In addition to imposing an affirmative obligation on all public and private employers to provide their employees with leave for the purpose of military service, USERRA also contains anti-discrimination provisions.

1. Reinstatement Obligation

Employers generally have an obligation under USERRA to re-employ promptly non-temporary employees who are returning

from service obligations. For persons returning from service of one to 90 days, the individual must be re-employed in the following priority of jobs: 1) the position the employee would have attained if employed continuously; 2) the position the employee held prior to military service; or 3) a position of lesser status and pay that the employee is qualified to fill, with no loss of seniority. If the employee is returning from service lasting more than 90 days, the following priority of positions applies: 1) the job the individual would have attained if employed continuously, or a position of equivalent seniority, status, and pay; 2) the position the employee held prior to military service, or a position of equivalent seniority, status, and pay; and 3) a position of lesser status and pay that the employee is qualified to fill, with no loss of seniority.

Since the statute does not define "prompt re-employment," the contours of that standard will be shaped on a case-by-case basis. For instance, for the person serving a weekend of reserve duty, re-employment will likely be "prompt" if he or she is scheduled for the next work day. However, reinstatement following several years of military leave might call for a longer period before reinstatement so that the person currently in the job can be given adequate notice.

2. Service-Related Disabilities

Under USERRA, all employers, regardless of size, have an affirmative obligation to accommodate employees returning from military leave with service-related disabilities. The employer's duty is to reasonably accommodate the employee's disability so that the employee can perform the position he or she would have held but for military service.

If no reasonable accommodation exists for that position, the employee must be re-employed in a position of equivalent seniority, status, and pay for which he or she is qualified or could become qualified to perform. If that is not possible, the employee must be re-employed in a position which is the nearest approximation in terms of seniority, status, and pay.

3. Protection Against Discrimination

Finally, USERRA contains an unusual provision providing that an employee who is re-employed after military service of 181 days or more *may not be discharged without cause* for one year after the date of re-employment. Those employees who are re-employed after military service lasting between 30 and 180 days may not be discharged without cause for six months after the date of re-employment. "Cause" requires that termination be a reasonable punishment for the employee's conduct, and that the employee had actual or implied knowledge that discharge was a possible penalty for the conduct in question.

In addition to these specific protections from discharge without cause, USERRA provides protection from discrimination and retaliation because of past, current, or future military obligations. For instance, you could not refuse to hire someone because they are in the reserves; nor could you refuse to promote someone solely because that person might possibly be called to military duty.

To proceed on a USERRA claim, an employee must show that "but for" the military obligation, the employer would not have taken adverse employment action. To avoid liability, an employer would have to prove that the same action would have been taken regardless of the employee's military obligations.

RETALIATION AND WHISTLE-BLOWER PROTECTION

Many statutes, including Title VII, the ADEA, and the ADA, prohibit discrimination against a current employee, an applicant for employment, or a former employee because the individual filed a charge, assisted, or participated in any manner in a discrimination suit or investigation, or because he or she has opposed a discriminatory employment practice. Generally, "retaliation" usually refers to discrimination against an employee for filing his or her own charge; the term

"whistleblower" usually refers to one who has complained on behalf of others about a company's practices.

A. Participation Discrimination

You cannot discriminate against a person on the basis of that person's participation in a discrimination suit or investigation. This provision has been interpreted broadly and covers not only filing a formal charge, but also expressing an intent to file a charge, private gathering of non-confidential information for the investigating agency's use in addressing a charge, being a witness for a plaintiff, testifying for a co-worker, or refusing to be a cooperative witness for an employer. You also cannot refuse to hire someone because that person filed a discrimination suit against a prior employer.

In these situations, protection is extended even if the employee is wrong on the merits of the charge and even if you consider the contents of the charge defamatory, so long as the words or actions are confined to the context of the discrimination litigation.

B. Opposition Discrimination

Sometimes an employee may not actually file a discrimination charge, but may refuse an order, or tell another employee to refuse to do something, because he or she believes the order violates a discrimination statute. In many, but not all, cases, this conduct is also protected. For instance, one employee may tell a co-worker that the employer's pregnancy disability policy is illegal under Title VII. That employee may be protected by Title VII's retaliation provision so long as the employee had a "reasonable belief" that the practice in question was illegal.

Not all forms of opposition are protected, however. The way in which an employee expresses his or her opposition to an allegedly discriminatory employment practice must be

reasonable. For instance, picketing that disrupts workers' ability to get in and out of the worksite would be unprotected. However, peaceful picketing that does not significantly interfere with the employer's business pursuits would probably be protected not only under discrimination laws, but under the National Labor Relations Act, as well. (This complex law is the subject of two booklets in this series).

An employee who neglects work duties in protest may lose whistleblower protection; however, an employee who takes reasonably small amounts of office time to complain will likely be protected. For example, a worker who takes work time to draft an e-mail to a supervisor documenting allegedly discriminatory practices would probably be protected.

STATE AND LOCAL EMPLOYMENT DISCRIMINATION LAWS

The federal government is not alone in addressing employment discrimination: state and local governments have also passed a variety of statutes in this area. In some locales, the anti-discrimination laws simply mirror their federal counterparts; however, some states and cities have broadly expanded the protection from employment discrimination.

For instance, a number of states and municipalities ban discrimination based on factors such as smoking history, genetic information, arrest record, public assistance status, sexual orientation, marital status, and political views. A number of state whistleblower statutes also protect employees who report an employer's illegal activity of various kinds. Because the level of protection varies drastically between states, it is always best to check with competent counsel before taking any adverse action against an employee who might be protected.

PREVENTIVE MEASURES

Virtually all employees are potentially in some protected class, and since the courts have generally made it easy for a plaintiff to assert a discrimination claim, it is essential that employers proceed cautiously when making all employment decisions. Here are some practical steps you can take to minimize your company's liability from these suits.

A. Performance Evaluations

It is quite common for employers to terminate an employee for "poor performance," even though the employee had repeatedly received "satisfactory" or "good" performance evaluations. Frequently, "satisfactory" is the worst rating a business gives. If the employee is eventually terminated because of performance deficiencies and then files a discrimination suit, you could be placed in the difficult position of having to convince a judge or jury that a "good" evaluation actually means "bad." To avoid this problem, candid and accurate evaluations are essential. If someone is not performing satisfactorily, he or she should be clearly informed of the deficiencies. To the extent written forms are used, it is better if they are filled out in narrative form rather than relying on an arbitrary numbering system.

B. Supervisor Training

As noted earlier, the sheer volume of anti-discrimination statutes makes it difficult for even the most well-intentioned employer or supervisor to avoid discrimination claims. Because supervisors may simply not be aware of their statutory obligations, one way to minimize the potential for claims of discrimination is to provide them with regular training and information on new developments in anti-discrimination laws. Regular supervisory training on general management practices is also a wise investment.

C. Procedure for Handling Complaints

A company can help immunize itself from liability for most

harassment claims by instituting a complaint procedure for its employees. Such a policy is a good idea for complaints of all kinds. To be effective, the policy should include, at a minimum, a strongly-worded prohibition of harassment, a clear description of the reporting steps an employee is to take when harassment occurs, and a mechanism for prompt, remedial action.

Once you become aware of an employee complaint, it is imperative that an investigation be conducted, and, where appropriate, remedial action be taken quickly. The severity of the company's action should mirror the severity of the harassment or other concern. For instance, if an employee is repeatedly touching fellow workers in an inappropriate and offensive manner, the company would not likely immunize itself from liability by merely transferring the offending employee to a new department. In such an extreme situation, immediate suspension or dismissal may be the only appropriate action

It is a good idea not only to include the policy in any employee handbook, but to post it separately, as well, on bulletin boards. The policy should be discussed in detail during new hire employee orientation. Requiring employees and supervisors to sign acknowledgments that they have received a copy of the policy or training concerning its provision is also advisable. In addition, re-distribution of the policy on an annual basis (such as including it with the first paycheck of every year) is also a good way to demonstrate the importance of this policy.

D. Employment Policies

Because many of the anti-discrimination statutes allow adverse impact challenges, it is important for you to reevaluate the standards used when making hiring, promotion, or discharge decisions. Make certain that your current requirements are job-related, and eliminate those that are only marginally related to important functions of the job or that do a poor job of predicting a person's ability to accomplish defined essential tasks.

E. Hiring and Firing

Hiring and firing top the list of employment actions most likely to result in a discrimination claim. Clear and consistent procedures for screening, interviewing, and hiring can reduce your risk significantly. Exercising care in the termination process is even more important.

Your policies should be flexible enough to allow for immediate termination in unusual or egregious cases, but in more typical discharges such as those involving unsatisfactory performance or poor attendance you should follow a progressive approach to discipline, documenting problems along the way. Employees who are shocked and surprised at being discharged are far more likely to react with anger and file a claim than those who have received advance counseling and warning.

Even where serious misconduct appears to warrant immediate termination, try never to fire an employee "on-the-spot" or in anger. Investigate carefully, identifying and securing key documents and interviewing both the accused and others who may have pertinent information. Where the facts, if true, would likely result in termination, it is often wise to suspend the employee without pay pending completion of your investigation. Allowing an individual to continue working after being accused of serious misconduct raises questions about whether the company really considers the conduct a sufficient basis for discharge.

The discharge interview should be conducted in private, with dignity, and with an extra management representative present. Assume that your conduct and statements in the interview will eventually be related in court. All of this is, of course, a kind of "due process." These approaches will certainly reduce the likelihood of litigation, and if you should nevertheless get sued, any legalities in the case will be far less important to the outcome than whether, in the minds of the jurors, you treated the employee fairly.

F. Arbitration

Because of the explosion of lawsuits and the tendency in our society to sue over even trivial matters, the most cautious employer will still be faced with a lawsuit from time to time. Even meritless actions can be expensive and time consuming to defend, and many a victorious company has left the courthouse feeling beaten and drained.

More and more companies are turning away from costly and emotionally exhausting trials as a method of dispute resolution and are turning instead to company sponsored arbitration. Such a program, if properly initiated, generally offers a quicker and less expensive way to resolve disputes that might otherwise end up in court.

Although the particulars of such a program are beyond the scope of this booklet, a detailed outline and analysis is available from Fisher & Phillips LLP.

CONCLUSION

While complying with the myriad of federal and state laws extending protection to employees may appear daunting and incredibly restrictive, that need not be the case. Companies are still free to use common sense and good business judgment in making hiring and promotion decisions.

Even in those states where the employment at will doctrine has been severely eroded, you may still terminate employees who are poor performers or discipline problems. It merely takes a bit of care and caution.

For further information about this topic, contact any office of Fisher & Phillips LLP or visit our website at www.laborlawyers.com.

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