

Content for Course on Employment Discrimination

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Employment Discrimination

Employers routinely discriminate for or against employees and candidates for employment. They decide to hire one person over another, because of skill or experience. They promote one person over another, because of initiative or ability. That's fine.

But employers aren't free to discriminate for or against employees because of their race or religion, their age or national origin. A variety of federal, state, and local laws prohibit certain types of discrimination in employment. Running afoul of any of those laws can cost an employer dearly.

Quote – Equal employment opportunity is the law.

You are a department manager with the Acme Widget Supply Company. You have authority to hire, supervise, and fire employees in your department. Now, consider these three scenarios:

Scenario 1: You want to hire an assistant manager, someone who can assume some of your responsibilities and manage the department when you're not there. One candidate who seems well qualified shows up for an interview, and you're shocked to see the candidate is much older than his résumé suggested. You decide not to consider the candidate because you don't want someone more experienced than you, and 20 years older than you, reporting to you.

Scenario 2: One of your newest employees – an attractive young woman – comes to you with a problem. She says that another one of your employees – a middle-aged man who's been working for you for years and is one of your most highly valued employees – has been making unwelcome comments of a sexual nature. To resolve the situation, you reassign her to a position where she won't have contact with him.

Scenario 3: Your least favorite employee asks you for some time off to care for his mother, who is being treated for cancer. You've never been happy with this employee, you've thought of firing him many times, and you decide you might as well do it now. So, you fire him.

Have you exposed your company to legal liability in any of these situations? Could the man you didn't hire, or the woman you reassigned, or the employee you fired bring a lawsuit against you or your company for your actions?

Quote – When a manager or supervisor disregards equal employment opportunity, the employer could be exposed to a very costly employment discrimination lawsuit.

Overview

Most employees are at-will employees. They are free to quit their jobs at any time and for any reason. Likewise, employers can fire at-will employees "for good cause, or bad cause, or no cause at all." But there are exceptions.

A variety of federal laws (as well as state and local laws) prohibit employers from terminating employees for certain reasons. Not only that, these laws also prohibit employers from not hiring certain job candidates, or not training or promoting employees or not paying some employees the same wage as others, or not giving them the same opportunities for advancement.

Running afoul of any of these laws could lead to very costly litigation.

Avoiding Liability

Employment discrimination lawsuits are plentiful (nearly 100,000 are filed in one year) and they can be incredibly expensive. In addition to awards for damages and punitive awards, companies faced with these lawsuits can find their reputations severely damaged.

The following sections discuss ways to help avoid liability for illegal employment discrimination.

During the Hiring Process

Advertising an open position – an employment ad can provoke an employment discrimination lawsuit, or action by the EEOC or state agencies responsible for enforcing employment laws. Consider the following statements from employment ads:

Wanted – attractive, young female to assist busy executive.

This statement provides evidence that the employer is violating a number of employment laws, including Title VII and the ADEA. It suggests men should not apply, and neither should anyone over 40 years old.

Supplement your retirement income.

This statement might suggest the employer is violating the ADEA by preferring candidates who have reached retirement age.

This job is perfect for a recent college graduate.

This ad targets younger workers, suggesting the employer might be practicing age discrimination.

Position requires 10 or more years of experience.

In this case, it's obvious that younger workers, those with less than 10 years of experience, are not eligible. Employers often set minimum standards for their employees. If those standards are reasonable and applied to all, they're (usually) not considered discriminatory.

Must speak both Mandarin and English fluently.

If the job requires fluency in both languages, the statement is not discriminatory. It simply states an objective requirement for the job. However, if a person who knows little or know Mandarin could do the job as well as someone who is fluent in that language, it could be evidence of illegal (national origin) discrimination.

Not posting an ad for an open position could also result in a discrimination lawsuit. Not making the opening known to all could be evidence that you don't want to attract certain candidates – including those who belong to certain protected classes (see the section titled Protected Classes).

Quote – an employment ad can discriminate against men or against women, but only when sex is a bona fide qualification for the job.

Selecting candidates to interview – you should consider experience, education, and skills as they relate to the open position. Don't decide **not** to interview a candidate because he or she has an unusual name, seems to have grown up in a foreign country, or appears to have too much experience.

Conducting interviews – no matter how careful you are, a disgruntled candidate who didn't get the job might see discrimination even where there is none. Hence, you should avoid any of the following during interviews:

- Asking a candidate about his or her age.

- Remarking on a candidate's appearance.

- Asking a candidate where he or she is from.

- Telling a joke that could be considered racist, sexist, or disparaging.

- Asking about, or commenting on, a candidate's ethnic background or religion.

The basic rule of thumb is this – during the interview, stick to topics directly related to the position, including the qualifications for it. Don't worry if a candidate volunteers information concerning some protected characteristic. Go ahead and listen to what the candidate has to say, and then move on to your next question. For instance, suppose you're conducting an interview and the candidate volunteers that he or she is from Nicaragua, or is Jewish, or has diabetes, or is really older than you might suppose. Don't ask the candidate to elaborate, else you run the risk of being accused of illegal employment discrimination.

Pre-employment tests – the use of tests to measure aptitude, honesty, intelligence, personality, physical capabilities, or skills should be done with care. These tests could get you in hot water if they disadvantage members of a protected class. If you use a pre-employment test, then make sure:

- All candidates take the same test.

- You accommodate people with disabilities.

- The test has been shown to actually measure skills/abilities required for the position.

Even if you use a test that seems perfectly fair, beware. If members of a protected class don't do as well on the test as members of other groups, you could be charged with disparate impact discrimination.

Once you hire an employee, you should make him or her aware of your company's policies, which means, of course, that your company should have policies, including policies on sexual or racial harassment.

Quote – When you interview a candidate, stick to matters directly related to the position.

During Employment

There are so many things that a supervisor or manager could do that would expose the employer to liability for employment discrimination. These include:

Encouraging or tolerating a work environment that allows sexual or racial harassment.

Treating members of a protected class differently than others (e.g., prohibiting women from wearing pants to work, or from doing things that "you think" only men should do).

Retaliating against an employee for complaining about harassment or discrimination, for filing a workers' compensation claim, for contacting a government agency, or for consulting a lawyer.

Prohibiting employees from ever using their native languages.

Harassing employees with HIV/AIDS (e.g., prohibiting them from using the lunchroom, or making them work in a separate area so they can't "infect" other employees).

Failing to make reasonable accommodations for 1) the religious beliefs and practices of employees or 2), employees with disabilities.

Failing to take action when an employee reports that he or she is being harassed by other employees.

Managers and supervisors need to be aware of what their employees are doing, and must take steps to prevent employees from doing those things that could expose the employer to a charge of employment discrimination.

In addition, employees look to their managers and supervisors for cues as to what's allowed in the workplace, and what's prohibited. That makes it imperative for those managers and supervisors to set a good example.

It's also very important for managers and supervisors to take action when employees complain that they're being harassed at work. If an employee tells you that another worker is making unwelcome comments or sexual advances, you need to take prompt action, whether you believe the employee or not.

There are other things companies can do to reduce the potential for employment discrimination lawsuits. For instance, they should maintain accurate personnel records. If a particular employee has been tardy too often, or has made too many job-related errors, or has behaved improperly, that should be documented in the employee's record. If the employee is terminated, and then files an employment discrimination lawsuit, that record could be worth millions.

At Termination

Employers need to take special care when it comes to terminating employees. While an employer might feel fully justified in terminating an employee, that isn't going to matter much if the EEOC decides to launch an investigation. What's going to matter much more is documentation – accurate, detailed records that show the termination was done for legitimate business reasons.

When you fire an employee, he or she might feel that you're being unfair, or too harsh, even if you've given that employee every benefit of doubt. The employee could try to find an instance of illegal employment discrimination even where there is none.

Quote – when it comes to employment discrimination lawsuits, accurate records could be worth millions.

Affirmative Action

Nearly one out of every four employees works for a company that – because the company provides goods or services to the federal government – is required to have an affirmative action plan. If a company employs more than 50 people and does more than \$50,000 worth of business with the federal government in one year, then that company must establish and maintain an affirmative action plan. It must keep detailed records on the demographics of its employees, and it must monitor the percentage of women and minorities that compose its workforce.

In some cases, courts have ordered companies to implement affirmative action plans to correct the effects of their “egregious and longstanding” discriminatory employment policies. Other employers – while not required to – have implemented voluntary affirmative action plans to increase the number of women and minorities they employ. Courts have ruled that these plans:

Must be narrowly tailored to remedy the effects of past discrimination.

Must be temporary and then eliminated when goals are met.

Must not “unnecessarily trammel” the “legitimate expectations” for advancement of men and non-minorities.

It might seem as if Title VII prohibits affirmative action plans, since they tend to favor certain people according to race, national origin, etc. But the federal regulation that interprets the meaning of Title VII says:

“Congress enacted title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place.”

“Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII.”

So it is legal, in certain cases, to prefer women and minorities for employment.

Disparate Impact Discrimination

At times, even seemingly neutral employment policies have the effect of discriminating against a protected class. Those policies have an adverse, or disparate, impact on the class, and such policies can be used as evidence of illegal employment discrimination if they violate the four-fifths rule.

Consider a written test given to job candidates. The test could be considered discriminatory if fewer than 80% (four-fifths) of a protected class pass the test compared to the group with the highest rate of passage. Suppose 60% of white men who take the test pass it, and they have the highest rate of passage. And suppose that 50% of the Asian women who take the test pass it. Then the test passes the four-fifths rule, since 50% is greater than four-fifths of 60%, which is 48%. Now, suppose only 40% of the Asian women who take the test pass it. Since that’s less than 48%, the test could be evidence of disparate impact discrimination – something which negatively affects a protected class even though it wasn’t intended to.

Quote – seemingly objective employment tests could be discriminatory if one group tends to do better on them than another.

Side Bar – protected classes

Federal law prohibits employment discrimination based on:

Race or Color – this includes blacks, whites, and everyone in between. Title VII prohibits employers from treating employees differently because of their race or skin color. It also prohibits employers from segregating employees according to race. For instance, it prohibits assigning primarily African-Americans to predominantly African-American establishments or geographic areas.

Ancestry and National Origin – this refers not only to the country in which an individual was born, but where his or her ancestors were born. Courts have said that employers can demand that their employees speak only English, but only if it is job related. According to the EEOC, requiring employees to only speak English at work is a “burdensome term and condition of employment” that presumably violates Title VII. Also, discrimination based on national origin violates Title VII unless national origin is a bona fide occupational qualification (BFOQ) for the job in question.

Sex – this includes both men and women and their status as single, married, or divorced. Employers generally may not treat men and women differently, not only in their work, but also in terms of benefits and opportunities for advancement. Pregnant women may not be treated differently than others. Title VII prohibits sexual harassment, which includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Discrimination based on sex violates Title VII unless sex is a bona fide occupational qualification (BFOQ) for the job in question. Federal law does not specifically protect homosexuals, bisexuals, or transgender people from employment discrimination, but many state and local laws do.

Creed and Religion – this includes “all aspects of religious observance and practice, as well as belief.” According to the EEOC, protected religious practices “include moral or ethical beliefs as to what is right and wrong.” Employers must make reasonable accommodations for an employee’s sincerely held religious practices, unless doing so would impose an undue hardship on the employer.

Quote – an employer can demand that employees speak only English, but only if the requirement is job related.

Age – it is unlawful to discriminate against a person because of his or her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. Federal law specifically prohibits employment discrimination against people because they are 40 years old, or older.

Disability – it is unlawful to discriminate against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. Employers are required to make reasonable accommodations for those with disabilities except where that would impose an undue hardship on the employer. Also, employers may not ask job applicants about the existence, nature, or severity of a disability. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all applicants for similar jobs.

Retaliation – it is unlawful to discriminate against those who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability. Individuals who have a close association with someone who has engaged in such protected activity are also protected.

Criminal Record – studies show that some employers make selection decisions based on arrest and conviction records, which could have a disparate impact on certain minorities. An employer may reject an applicant or fire an employee for a conviction that is substantially related to his or her job. For instance, a school could deny employment to a teacher who has been convicted of molesting children, but not one who has been convicted of embezzlement.

Veteran Status – while not addressed by federal law, many states have laws that prohibit employment discrimination against veterans.

Quote – it is against the law to retaliate against an employee for complaining about sexual harassment or other unfair employment practices.

Federal Employment Anti-Discrimination Laws

The first federal law dealing employment discrimination (albeit, indirectly) was the Civil Rights Act of 1866. Section 1981 of the act declared that all persons born in the United States are U.S. citizens, and that all citizens enjoy certain rights, such as the right to own property and to "make and enforce contracts," including employment contracts. However, it was not until 1976 that the U.S. Supreme Court ruled that the 1866 act applied to employment contracts.

The Equal Pay Act of 1963 made it illegal to base an employee's wages on the employee's sex. The intent of the act was to bring an end to the longstanding practice of employers paying women less than men for doing essentially the same work. While the act covered only blue-collar workers, Congress passed another law in 1972 requiring equal pay for white-collar workers.

A year after the Equal Pay Act was passed, Congress passed the landmark Civil Rights Act of 1964. Title VII of the act "prohibits employment discrimination based on race, color, religion, sex and national origin." Courts have ruled that Title VII also prohibits sexual harassment at work, since it's a form of sex discrimination. Title VII has been revised over the years, by the passage of other laws mentioned below, to prohibit employment discrimination based on age, pregnancy, or disability. It also prohibits employers from retaliating against employees who oppose unlawful employment discrimination. The law is enforced by the Equal Employment Opportunity Commission (EEOC).

Next came the Age Discrimination in Employment Act of 1967 (ADEA), which made it illegal "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." The act protects older workers (those over 40) from employment discrimination.

The Equal Employment Opportunity Act of 1972 made important changes to Title VII. It gave the EEOC the power to bring suits in federal courts to enforce the provisions of Title VII. It also outlawed discriminatory employment ads, as well as employment practices that had the effect of violating the provisions of Title VII, even when that was not their intent.

The Pregnancy Discrimination Act of 1978 prohibits employment discrimination against women who are pregnant. It requires that they be treated like all other employees for employment-related purposes, including employment benefits.

Quote – The Equal Employment Opportunity Commission (EEOC) enforces federal employment laws.

The Americans with Disabilities Act (ADA), passed in 1990, prohibits "discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment." The act also requires employers to make reasonable accommodations for employees with disabilities, so long as such accommodations do not impose an "undue hardship" on the employer's business.

The Civil Rights Act of 1991 was a response to a number of court decisions, such as the Supreme Court's decision in *Patterson v. McLean Credit Union*. In that case, the court ruled that an employee could not sue her employer for on-the-job racial discrimination since section 1981 of the Civil Rights Act of 1866 dealt with contracts, not with "conduct which occurs after the formation of a contract." The 1991 act replaced the phrase "make and enforce contracts" with another about "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

There is a federal regulation (29 CFR 1607) known as the Uniform Guidelines on Employee Selection Procedures (UGESP), which was added to the Code of Federal Regulations in 1978. These guidelines "are designed to aid in the achievement of our nation's goal of equal employment opportunity without discrimination on the grounds of race, color, sex, religion or national origin." They provide employers with guidance on procedures "used in making employment decisions, such as hiring, retention, promotion, transfer, demotion, dismissal or referral."

Finally, there is a federal regulation (29 CFR 1608) covering affirmative action plans intended to insure equal employment opportunities for women and minorities. It describes what employers who implement voluntary affirmative action programs may or may not do.

State and Local Laws

In addition to the federal laws mentioned above, many states and cities have laws concerning employment discrimination. For instance, California's Fair Housing and Employment Act prohibits employment discrimination against people because of their "sexual orientation." Wisconsin's Fair Employment Law also prohibits employment discrimination because of sexual orientation, and it prohibits discrimination against those who have been convicted of felonies. Wisconsin, as well as a number of other states, prohibits employment discrimination against those who smoke or drink. Michigan has a law that prohibits employment discrimination against obese employees, and a growing number of cities and states have laws that require employers to make reasonable accommodations for their employees' religious beliefs and practices. New York has a law "to prohibit discrimination against employees for displaying the American flag," and New York City has a law that prohibits discrimination based on an employee's "appearance, behavior or expression."

Quote – In addition to federal employment laws, employers need to follow state and local employment laws.

Side Bar – some employment discrimination cases

Chuck E. Cheese runs a chain of pizza restaurants that's very popular with the families of young children. Don Perkl – who is mentally retarded and unable to speak – was a janitor at one of its stores. One day, a regional manager visited the store where Perkl worked. He criticized the store manager for hiring one of "those people," and told her to fire Perkl. Instead of firing Perkl, the store manager contacted the chain's human resource department, which did nothing. On a subsequent visit to the store, the regional manager once again told the store manager to fire Perkl; she refused, and then the regional manager fired Perkl.

Following unsuccessful efforts to get Perkl reinstated, the EEOC brought suit against the chain under the ADA. During the trial, Chuck E. Cheese claimed it was "highly unlikely," given Perkl's disability, that he suffered any emotional distress as a result of being fired. And that, apparently, did not sit well with the jury, which heard Perkl's foster mother testify that he "literally jumped for joy" when he learned he'd been hired. After only brief deliberation, the jury awarded Perkl \$70,000 for emotional distress, and \$13 million in punitive damages. After the verdict, EEOC chairwoman Ida Castro said, "We applaud both the jury and the court for the loud, clear, message that discrimination against people with disabilities will not be tolerated."

In 2002, the EEOC brought suit against BCI Coca-Cola, based in Los Angeles, on behalf of Stephen Peters, an African American employee, who was fired for not working on a scheduled day off. Peters' supervisor, Cesar Grado, who is Hispanic, wanted Peters to work on a Sunday. Peters said he couldn't work that Sunday, because he had other plans. Grado called the human resources department, asked if he could demand that Peters work on Sunday (yes, he could), and said he expected Peters might call in sick. Saturday evening, Peters went to a medical clinic where he was diagnosed with a sinus infection and advised not to work on Sunday.

On Monday, Grado called the human resources department and said Peters did not show up for work on Sunday. They pulled Peter's personnel file and found that, just a few years earlier, he had been suspended for two days for a very similar incident – failing to work on a scheduled day off. What the file did not show was that he was a pallbearer at a funeral for a close friend, and that's why he refused to work that day.

A human resources manager made the decision to fire Peters. She'd never met him, and had no idea he was African American. Nor did she know that Grado had a reputation for making disparaging remarks to and about African American employees. Peters filed a complaint with the EEOC. After investigating the incident, the EEOC decided to file suit for racial discrimination. Coca-Cola said that Peters' race couldn't possibly have been a factor in the decision to fire him, since the person who made the decision to fire him had no idea as to his race, but the EEOC didn't buy it. The case has yet to be decided.

Abercrombie & Fitch advertises "The highest quality, casual, All-American lifestyle clothing for aspirational men and women," and its marketing makes it clear that it's targeting affluent white people – yuppies. But the retailer is under court order to change its image as well as to hire and promote more "people of color."

To promote a certain image, the retailer long made sure that its sales people were good looking young, white adults. Its practice was to recruit sales people from predominantly white fraternities and sororities. Employees who didn't project the right image – mostly Asian Americans, Latinos, and African Americans – were given lower paying, back-room positions. But then two students at Stanford University – one a Filipino and one a Latino – began what turned out to be a large, class action lawsuit against the retailer.

Anthony Ocampo applied to work as a salesman at an A&F store, but was rejected, he was told, "because there's already too many Filipinos working here." A few years later, Ocampo's friend, Eduardo Gonzalez, applied to work as a salesman at another A&F store, but he was offered a position working in the stockroom instead. During a group interview, he realized why – he didn't have the right look; he wasn't white.

Then came the employment discrimination lawsuits, including one filed by the EEOC, which had received numerous complaints about A&F's hiring policies. Less than a week after the EEOC suit was filed, A&F agreed to a consent decree, which not only required it to end to its discriminatory hiring practices, but to change its marketing practices to "reflect diversity, as reflected by the major racial/ethnic minority populations of the United States"

Despite the consent decree, the company denied any wrongdoing. "We have, and always have had, no tolerance for discrimination," said Mike Jeffries, the company's CEO. "We can now focus on achieving even greater representation of diversity among our associates and management." Robert Singer, president of the firm said, "Diversity and inclusion are core values for Abercrombie & Fitch. We will continue to demonstrate our commitment to diversity by implementing the elements of the consent decree."

Glossary

Affirmative Action – refers to employment practices that remedy the effects of past discrimination, or eliminate current discrimination.

At-Will Employment – based on common law, it holds that either the employee or the employer can end the employment relationship at any time, and for any reason, or for no reason at all.

Business Necessity – a legitimate business purpose that justifies an employment practice that might otherwise be prohibited by law.

Bona Fide Occupational Qualification – refers to a qualification required to perform a job that would otherwise be considered discriminatory.

Constructive Discharge – occurs when an employer imposes intolerable working conditions that cause an employee to quit his or her job.

Disparate Impact – occurs when an employment practice has the effect of discriminating against a protected class.

Hostile Work Environment – a work environment that a reasonable person would find offensive, intimidating, or oppressive.

Protected Class – refers to a group identified by race, creed, color, national origin, sex, age, marital status, veteran status, or physical or mental disability.

Reasonable Accommodation – a change that enables an individual with a disability to enjoy equal employment opportunity, and which does not impose an undue hardship on an employer.

Undue Hardship – an accommodation that would provide equal employment opportunity to an individual with a disability, but which would place a severe burden on an employer.

Wrap Up

Let's reconsider the three scenarios presented at the beginning of this article. In each of them, you are a manager with the authority to hire, supervise, or fire employees.

In the first scenario, you decided not to hire someone because you thought he was too old and had too much experience. Because of that, you've put your company in jeopardy. If that candidate can show that he wasn't considered for the position because of his age and experience, your company could be confronted with an age discrimination lawsuit.

In the second scenario, one of your employees complained to you about sexual harassment. Rather than investigate her complaint, you decided to alter her condition of employment. Once again, you've put your company in jeopardy, since could be confronted with a sexual harassment lawsuit.

In the third scenario, you fired an employee after he asked for time off in accordance with the Family Medical Leave Act. Whether he deserved to be fired or not, you choose the wrong time to do it. You've put your company in jeopardy. It could be faced with a very expensive lawsuit.