

TOPIC 16: EMPLOYMENT DISCRIMINATION

Overview

Employment discrimination is a specific area of employment law. Numerous federal or state statutes provide for “protected classes” of individuals based upon innate characteristics. Employment discrimination law protects employees who fit into these classes from discrimination by their employer based upon these characteristics. This chapter defines the purpose of employment discrimination law and the role of the federal and state governments in its enforcement. It then identifies the major federal employment discrimination laws and the agencies charged with their administration. All of these laws establish rights for covered employees and place affirmative obligations upon covered employers.

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TOPIC 16: EMPLOYMENT DISCRIMINATION - QUESTIONS & ANSWERS

1. What is “employment discrimination”?

Employment discrimination is a specific area of employment law that is based upon fundamental rights granted or protections afforded under the US Constitution. Employment discrimination laws prohibit certain types of discrimination by employers against employees or prospective employees based upon their protected characteristics. Various federal and state laws prohibit employer discrimination based upon race, ethnicity, sex, religion, national origin, age, physical disability, and sexual orientation. These are known as “protected classes” of individuals. Discrimination generally includes demonstrating biases in actions or decision making in the context of hiring, firing, compensation, benefits, promotion, job details or scheduling, etc. These laws also prohibit retaliation against employees for reporting or bearing witness to any of these forms of discrimination. While the due process clauses of the 5th and 14th Amendments to the US Constitution prohibit these practices by the federal and state governments, numerous federal statutes prohibit this conduct by private employers based upon authority under the Commerce Clause. Lastly, states often pass laws that afford greater protections to employees than those afforded under federal law. This chapter focuses on the major federal statutes protecting employee rights.

- *Note:* Discrimination may result from creating conditions that are oppressive and cause an employee to leave employment. This is known “constructive discharge”.
- *Example:* Employer biases may include failing to hire someone because of her race. Less obvious examples include allowing or failing to prevent sexual harassment or the development of a hostile work environment as form of sex-based discrimination.

- **Discussion:** How do you feel about state and federal government efforts to prevent employer discrimination? What do you think are the government objectives behind these laws? Can you think of any arguments against such regulation? Should these laws be balanced against an employer’s rights with regard to carrying on its business practices?
- **Practice Question:** What major actions by an employer implicate employment discrimination laws? What reasons or justifications for an employer action are potentially prohibited by employment discrimination laws/
- **Resource Video:** <http://thebusinessprofessor.com/what-is-employment-discrimination/>

2. What are the major employment discrimination laws?

The major federal laws and regulations prohibiting employment discrimination were passed as part of several major federal acts and the subsequent amendments thereto. The primary federal acts addressing employment discrimination are as follows:

- *The Civil Rights Act of 1964 (Title VII)* - Title VII is the most developed body of employment discrimination law. This Act, along with its numerous amendments, prohibits specific types of employer discrimination based on race, sex (including pregnancy and childbirth), color, religion, and national origin. The Act, as amended in 1993,

provides for damages for those discriminated against under the Civil Rights Act of 1964, as well as the Americans with Disabilities Act and the Rehabilitation Act.

- *Civil Rights Act of 1866 (1981 Act)* - The 1981 Act was passed to prohibit discriminatory practices against individuals based upon race. The Act is commonly known as the 1981 Act, as it is found at Section 1981 of title 42 of the US Code of Statutes. The 1981 Act, as amended in 1991, provides the elements for a claim of intentional discriminatory treatment (disparate treatment) and discriminatory policies with a discriminatory impact (disparate impact). The 1981 Act also outlines the remedies available for discriminatory actions.
 - *The Age Discrimination in Employment Act (ADEA)* - The ADEA provides protection for employees over the age of 40 years from discriminatory practices by the employer based upon age. The discriminatory practices prohibited by the ADEA are similar to those prohibited by Title VII.
 - *Americans with Disabilities Act (ADA)* - The ADA prohibits discriminatory practices by employers against employees based upon an employee's mental or physical handicap. The ADA requires employers to take measures to accommodate the disabilities of certain prospective or current employees.
 - *The Rehabilitation Act* - The Rehabilitation Act is another federal law attempting to protect the rights of individuals suffering from physical and mental handicaps. The Act applies only to the Federal Government, federal contractors, and employers receiving federal financial assistance.
 - *Genetic Information Nondiscrimination Act (GINA)* - The GINA prohibits employers from discriminating against employees based upon information about genetic tests of the individual, past family members, requests for genetic service, etc.
 - *Uniformed Services Employment and Redeployment Act (USERRA)* - The USERRA prohibits employers from discriminating against employees who are also members of the military service. Specifically, it protects employees who are members of the military reserve, state national guard, or national disaster medical system are called to temporary periods of active service from suffering any negative employment consequences.
- **Discussion:** After reading the short description of the above-listed, federal statutes, what do you think about the Federal Government's effort to protect specific classes of individuals? Based upon these laws, do you see in gaps in protection or forms of discrimination that are not prohibited? Should these types of discrimination be prohibited?
 - **Practice Question:** Can you identify the major federal employment discrimination laws and the type of conduct that they prohibit?
 - **Resource Videos:** <http://thebusinessprofessor.com/major-employment-discrimination-law/>

CIVIL RIGHTS ACT OF 1964

The Civil Rights Act of 1964 is the most comprehensive statute dedicated to protecting the civil rights of individuals. For purposes of this chapter, Title VII of the Civil Rights Act (Title VII) is wholly dedicated to eliminating discriminatory employment practices. The Act has been amended numerous times since 1964 to provide additional protections.

- **Resource Video:** <http://thebusinessprofessor.com/overview-of-title-vii/>

3. What are the protections against employment discrimination provided by the “Title VII” of the Civil Rights Act of 1964?

Overview

Title VII makes it unlawful for an employer 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”. The terms of Title VII have been interpreted very broadly to include any number of adverse actions against the employee based upon race, color, religion, sex, or national origin. This includes retaliation against an employee for making a claim of discrimination or an employee bearing witness to acts of discrimination against another employee.

- *Note:* States pass civil rights statutes similar in nature to Title VII. These statutes are generally more protective of employees or provide additional prohibitions on employer practices.

Applicability - Bona Fide Occupational Qualifications

The provisions of Title VII apply to employers with 15 or more employees, labor unions, and certain other employers. The prohibitions of Title VII are limited to circumstances where an employee does not have a reasonable and justifiable reason for discriminating against an employee or prospective employee. A good faith reason for discriminating against an employee based upon a protected class is known as a “*bona fide* occupational qualification” (BFOQ). If a specific job or position has a BFOQ that has the effect of discriminating on the basis of religion, sex, or national origination, such discrimination is not illegal. The key aspect of a BFOQ is that the qualification(s) must be reasonably necessary to the normal business operations of the business and the performance of the duties of that position.

- *Note:* No BFOQ exists for intentional discrimination based upon race or color.

- **Discussion:** What was happening in 1964 that gave rise to passage of the Civil Rights Act? What do you think are the underlying objectives of Title VII? Do you think Title VII is effective in accomplishing these objectives? Are there any unintended consequences? Why do you think Title VII specifically protects individuals with these characteristics? How do you feel about the exemption of discriminatory practices if a *bone fide* occupation qualification exists? In your opinion, how necessary should the qualification be to the job for a discriminatory practice to be legal?
- **Practice Question:** Carrie owns a small business in South Carolina. She does not like to work with men and is resolute about only hiring female employees. What do you need to know to determine whether this practice is legal? *Hint:* Think about Carrie’s business, state law, and the types of job.
- **Resource Video:** <http://thebusinessprofessor.com/employment-discrimination-under-title-vii-of-the-civil-rights-act/>

4. How are employment discrimination actions under the Title VII enforced?

The Civil Rights Act of 1964 established the Equal Employment Opportunity Commission (EEOC). The EEOC is charged with interpreting and enforcing the provisions of Title VII and numerous other employment laws (including the ADA, ADEA, Equal Payment Act, and sections of the Rehabilitation Act). The EEOC's enforcement procedures are as follows:

- *Filing a Charge* - An employee alleging a violation of Title VII must file a complaint with the EEOC within 180 days of the alleged discriminatory conduct.
 - *Note:* If the employee elects to file a state-law action with the relevant state agency, the state filing may toll the statute of limitations for filing the federal discrimination action.
- *Review by Investigator* - The EEOC will notify the employer of the complaint and assign an investigator to the case to determine whether there is a reasonable belief that discrimination occurred. The alleged offender will provide a response, known as a "position statement", to the EEOC. Based upon the initial inquiry and response by the employer, the EEOC may proceed with the investigation or summarily dismiss the complaint for failing to make any showing of discriminatory conduct.
 - *Note:* The EEOC determination on this point is based largely on evidence presented by the employee and the documentation provided by the employer. Documentation supporting the employer's action may include any manager's report, counseling statements, or affidavits of witnesses to the action taken.
- *Negotiation & Mediation* - Parties (the employer and employee) are generally free to negotiate a settlement of the claim prior to disposition by the EEOC. However, a settlement between the parties does not prohibit the EEOC from continuing an inquiry or initiating an investigation of an alleged violation. In some cases, the EEOC will offer assistance with the mediation process.
 - *Note:* The EEOC will generally only continue an inquiry following a settlement when the employer practices are particularly egregious or likely to be repeated.
- *Investigation* - The EEOC investigator will collect extensive information about the situation from the employer and employee, conduct interviews, etc. This investigation will drive the EEOC's determination in disposing of the complaint.
 - *Note:* Employers are not legally compelled to comply with investigation demands; however, failure to comply with the investigation process can result in negative administrative finding against that party.
- *Determination* - Once the investigation concludes, the EEOC will make a determination of the merits of the complaint. The options for determination are as follows:
 - *Dismissal and Notice of Rights* - If the EEOC does not find reasonable cause to believe that there was discrimination, it will issue a "Dismissal and Notice of Rights" letter. This notice tells the employee the conclusions of the investigation and that the EEOC will take no action on the matter. The notice does, however, inform the employee that she can file an action against the employer in federal court within 90 days.

- *Note:* The dismissal and notice of rights generally indicates that there is little merit to the complaint. Employees who proceed to file a legal action often see the complaint summarily dismissed.
- *Letter of Determination* - If the EEOC does find reasonable cause to believe that there was discrimination, the EEOC issues a “Letter of Determination”. This letter informs employer and employee of the EEOC’s findings and invites the parties to undergo a form of mediation to resolve the issue. This mediation process is known as a “conciliation”. The conciliation is not binding on the parties, and either party may reject the results of a conciliation.
 - *Note:* Most businesses, rather than risk a civil trial on the allegations, are willing to take part in the conciliation process.
- *Notice of Right to Sue* - If conciliation is ineffective, the EEOC has authority to bring an action against the employer for the discriminatory conduct. In determining whether to sue on behalf of the employee, the EEOC will consider: the seriousness of the violation, the type of legal issues in the case, the wider impact the lawsuit could have on the agency's efforts to combat workplace discrimination, and the resources available to litigate the case effectively. If the EEOC does not sue, the employee will receive a “Notice of Right to Sue” and may file an action in federal court within 90 days of the determination.
 - *Note:* If a party cannot afford an attorney, the EEOC may appoint an attorney to represent the employee.

Per the 1991 Amendments to Title VII, an employee may recover compensatory damages suffered as a result of the discriminatory conduct. If the conduct is intentional, the employee may recover punitive damages of up to \$300,000 per individual subject to discrimination.

- **Discussion:** How do you feel about the EEOC enforcement process? Do you think that this process offers sufficient protections to employees? Why or why not? Can you think of any modifications to this process that may offer greater protections? Do you think individuals should be able to sue an employer directly without first exhausting the EEOC administrative process?
- **Practice Question:** Derek applies for a position at ABC Corp. He believes that the manager who interviewed him was biased against him because of his religion. If Derek decides to bring a legal action against ABC Corp for legal discrimination, what is the process that he must follow to do so?
- **Resource Video:** <http://thebusinessprofessor.com/enforcing-title-vii-actions-through-eeoc/>

5. What must a plaintiff demonstrate to the court to win a lawsuit under Title VII?

To make an actionable claim under Title VII, the effected employee must demonstrate that the employer is covered by Title VII and that actions taken (or inaction) by the employer likely had a discriminatory effect or result. As previously discussed, Title VII prohibits discrimination based on race, color, religion, sex or national origin. Courts interpreting these

provisions include pregnancy, childbirth or related medical conditions under the aegis of sex discrimination. The employee must then demonstrate discrimination with regard to hiring, discharging, compensating, or concerning the terms, conditions, and privileges of employment. Employer discrimination is broken down into the following three primary categories:

- *Disparate Treatment* - This involves direct discriminatory treatment of an employee by the employer (or the employer's representative). The plaintiff must convince the court that the employer intentionally discriminated against the plaintiff. The plaintiff may demonstrate intent by showing that discrimination is a "substantial or motivating factor" for the employer's action or decision. If the employee can make this showing, the employer will be liable even if other factors (such as customer preference in interacting with individuals of a specific race, gender, religion, etc.) also contributed to or motivated the conduct or decision.
 - *Note:* Remember, the defendant may still be able to show that discriminating against one protected class of individual in favor of another was done based upon a *bona fide* occupational qualification. No BFOQ exists for race-based discrimination.
 - *Discussion:* What do you think constitutes discriminatory intent with regard to an employment decision? Can you think of a situation where an employer action or decision may be influenced by the protected characteristics of an employee or applicant but does not constitute discrimination? What level of consideration of a protected characteristic constitutes a substantial motivating factor?
 - *Practice Question:* Juan is an employee of ABC Corp. He believes that his current manager treats him unfairly because of his Hispanic heritage. When a position comes open in his company for promotion, Juan applies for the position. Juan's manager hires another Caucasian employee with less seniority and fewer credentials for the position. He believes that he was discriminated against by not being selected. If Juan decides to bring a discrimination action against ABC Corp, what will he have to show in order to prevail?
 - *Resource Video:* <http://thebusinessprofessor.com/disparate-treatment/>
- *Disparate Impact* - Disparate impact is a form of discrimination that involves a policy or practice that is not primarily motivated by a discriminatory purpose but has a discriminatory impact on a protected class of individual. Restated, unlike discriminatory treatment actions, the employee does not have to demonstrate an intent to discriminate. Rather, the plaintiff must prove that the employer's practices or policies had a discriminatory effect on her due to her race, gender, religion, etc. The effect on the employee must be "substantial" and related to an identifiable disadvantage or a loss of opportunity. Employers can defend such a claim by proving that the alleged discriminatory policies are job-related and based upon a business necessity. That is, the employer must show that there was a *bona fide* occupational qualification to overcome the employer's successful demonstration of a business necessity, the plaintiff must then show that other policies would serve the employer's intended purpose without having a discriminatory effect or impact.
 - *Note:* To prove a discriminatory impact case, the employee most generally provide extensive data and demonstrate statistically that the policy had an impact on anyone belonging to the employee's protected class.

- **Discussion:** How do you feel about the possibility of facing liability for a policy that did not have a discriminatory intent? How much of an impact on protected classes of employees must a policy have to be considered substantial and thereby actionable? If an employer demonstrates that a valid business necessity for discrimination exists, should the policy be actionable if it was not the least discriminatory method available? Why or why not?
- **Practice Question:** Pete is an employee of ABC Corp. He is Jewish and frequently attends religious service on Saturdays. While the company does not mandate participation, he believes that the company policy of incentivizing employees to participate in work events on Saturdays has a discriminatory impact on Jews. If Pete wishes to bring a discrimination action against ABC Corp, what must he show in order to demonstrate disparate impact?
- **Resource Video:** <http://thebusinessprofessor.com/disperate-impact/> ; <http://thebusinessprofessor.com/disperate-impact-discrimination-examples/>

- **Retaliation** - Title VII protects employees who report or bear witness to discriminatory conduct. More specifically, employers cannot retaliate by taking disciplinary action against employees for making discrimination charges, making a statement to the EEOC or administrative agency, or giving testimony in a discrimination case. Pursuant to this prohibition, employers have an affirmative duty to create an atmosphere in which a complainant and others with relevant information about alleged discrimination feel comfortable coming forward with the complaint or information.
 - **Note:** For conduct to be actionable, the employer's adverse action against the employee must be motivated by the employee's complaint or cooperation therewith. The employer may still take adverse actions against the employee for unrelated conduct.

- **Discussion:** Why do you think Congress included anti-retaliation provisions in Title VII? Do you believe that these provisions are effective in preventing employer retaliation? Why or why not?
- **Practice Question:** Mary is an employee at ABC Corp. Her colleague, Angela files a sexual harassment complaint with the EEOC against her boss, Tom. On multiple occasions, Mary witnessed Tom making inappropriate sexual advances toward Angela. Mary is worried about providing a statement to the EEOC investigator. Should Mary be worried?
- **Resource Video:** <http://thebusinessprofessor.com/retaliation-under-title-vii/>

6. What is discrimination on the basis of race or color under Title VII?

Discrimination on the basis of race or color may be intentional or as a result of policies with a disparate impact. Failing to hire, firing, or compensating individuals differently based upon race are obvious examples of intentional discriminatory treatment. Below are some less-obvious examples of discriminatory treatment with regard to employment benefits and

characteristics:

- *Discriminatory Language* - Using or permitting employees to use racial insults in the workplace. This is similar to creating a hostile work environment for sex-based discrimination.
- *Race-Based Scheduling* - Scheduling individuals, giving individuals personal preference in work shifts, or maintaining all-black or all-white crews for no reason are examples of discrimination in employment characteristics.
- *Accommodations* - Providing better offices, workspace, housing, etc., for one race above another is discriminatory.
- *Incentives* - Providing greater compensation, employment benefits, performance or routine bonuses based upon race is discriminatory.
- *Private Affirmative Action Programs* - Private employers (not federal contractors) voluntarily adopt affirmative action programs. This often gives rise to reverse discrimination when minorities or women with lower qualifications or less seniority than white men are given preference in employment or training. To combat this issue, the EEOC issues guidelines for employers who set up affirmative action plans.
 - *Note:* Affirmative action is a federal program that applies to the Federal Government and federally contracting employers. This program puts requirements that the workforce demographic roughly represent the immediate population. There are no quotas for hiring and there is no mandate to hire any single individual. The 1991 Civil Rights Act amendments prohibit the setting of quotas in employment.

Employer conduct constituting discrimination based upon the impact upon the employee may be far less obvious than intentional forms of discrimination. Examples of discriminatory impact based upon employer policies potentially include:

- *Personnel Tests* - Using personnel tests that have no substantial relation to qualifications or duties of the job may have the effect of screening out minorities.
- *Marital Status* - Denying employment to unwed mothers may have a discriminatory impact when minorities have a statistically higher rate of single-parent births.
- *Credit Scores* - Refusing to hire individuals because of their poor credit rating may be discriminatory when minorities are disproportionately affected by poor or no credit history.
- *Nepotism* - Giving priority in hiring to relatives of present employees may be discriminatory when minorities are underrepresented in the workforce.
- *Grooming Requirements* - Some races may have different grooming practices as a result of medical conditions or physiological characteristics. If minorities are unduly affected by these standards, the policy could result in unequal and discriminatory employment conditions.
 - *Example:* African-American men often suffer from razor bumps when shaving too closely. An employer's hiring policy of no facial hair may be discriminatory

Recall that there is no *bona fide* occupational qualification for intentional discrimination based upon race. There is, however, a business necessity defense for discriminatory impact claims.

- **Discussion:** Do you agree that the above-referenced employer actions and policies result in intentional or discrimination against employees based upon race? Why or why not? Are these laws adequate, over broad, or should they go farther to protect minority rights? What are the arguments for and against such protections?
- **Practice Question:** Winston is a single father. His dream is to join the state police force. The police force has a policy against hiring single parents. The objective of the policy is to protect family members in the event an officer falls in the line of duty. Across the United States, a significantly higher percentage of African-Americans are single parents. If Winston is denied employment based solely upon this policy, does he potentially have a cause of action against the police force?
- **Resource Video:** <http://thebusinessprofessor.com/race-discrimination-under-title-vii/>

7. What is discrimination on the basis of national origin under Title VII?

National origin discrimination is any form of intentional conduct or policy that favors one or more national origins over others. National origin includes the origin or birthplace of the employee or the employee's ancestors. Examples discriminatory treatment would be failing hire, firing, creating less favorable conditions, or compensating individual differently based upon their national origin. An example of a policy with a potential disparate impact includes mandating communication in a given language or prohibitions of cultural practices without a good faith business necessity.

- **Discussion:** How do you feel about the Title VII protections afforded employees against national origin discrimination? Are these prohibitions adequate, over broad, or should they go farther to protect minorities? Can you think of any examples of conduct or policies that should be prohibited based upon national origin discrimination?
- **Practice Question:** Olga and Roman are employees of ABC Corp. They work in the loading warehouse. Olga and Roman are both from the Ukraine and speak Russian as their first languages. Their manager does not like not knowing what they are saying, so he institutes a rule prohibiting employees from speaking any language other than English while at work. Roman ignores the rule and is subsequently fired. Does Roman have a cause of action against ABC Corp?
- **Resource Video:** <http://thebusinessprofessor.com/national-origin-discrimination-under-title-vii/>

8. What is discrimination on the basis of religion under Title VII?

Religious discrimination is intentional conduct or policies that treat or affect individuals differently based upon their religious beliefs or affiliations. This includes any of the intentional discrimination, such as failing to hire, firing, or allowing different benefits. An employer's policy may have a discriminatory impact if it unduly affects certain employees' ability to observe or practice their religion in the workplace. Employers must generally make "reasonable

accommodations” for the religious needs or practices of their employees. The limitation on accommodating religious beliefs or practices is when it results in an “undue hardship” on the employer. Undue hardships generally result from a material disruption in job performance or business operations.

- *Note:* A well-founded exception to the religious accommodation rule is that religious organizations may discriminate in their employment practices on the basis of religion. This is a form of business necessity. For example, a church may refuse to hire a non-Christian based upon the difference in religious belief. This exception exists to accommodate the business purpose of religious organizations.
- *Example:* May’s religion requires her to wear a headdress. Her employer bans the wearing of any headwear during the workday. Unless the employer has a valid business necessity for limiting headdresses, the policy may violate May’s religious rights under Title VII. The court would examine whether allowing an exception for May would be an undue burden on the employer.

- **Discussion:** How do you feel about the protection of religious belief in the employment environment? What do you think about the standards for protection of employee religious needs or practices? Are you comfortable with a “reasonable accommodation” requirement? Why or why not? At what point do you believe a reasonable accommodation amounts to an undue hardship?
- **Practice Question:** Mohammad is an employee of ABC Corp and a practicing Muslim. His religious beliefs require that he take 15-minute breaks three times throughout the work day to pray. Mohammad is a retail sales employee. His prayer sessions require that he ask permission to leave the sales floor. What do you need to know to determine whether ABC Corp can limit Mohammad’s practices?
- **Resource Video:** <http://thebusinessprofessor.com/religious-discrimination-under-title-vii/>

9. What is discrimination on the basis of sex under Title VII?

Discriminatory Treatment

Discrimination based upon sex is slightly more complicated than discrimination based upon other protected classes. Understandably, Title VII prohibits intentional discrimination by an employer, such as hiring, firing, differentiating benefits of work conditions, based upon sex. In the absence of a valid business necessity for the discrimination, an employee will face liability for such actions.

- *Note:* Two important types of discriminatory treatment arises from the employer-employee agency relationship. Employees may act (or fail to act) in a manner that results in discrimination against other employees based upon sex. “Sexual harassment” and “hostile work environment” are two forms of discrimination in which the employer is held liable for the conduct of its employees. These two types of intentional sexual harassment are discussed in a section.

Other less obvious examples of intentional discrimination under Title VII include:

- *Job Classifications* - Employers cannot advertise or classify a job listing for only males or females.

- *Seniority Lists* - Employers cannot keep separate male and female seniority or promotion lists.
- *Parenthood* - Employers cannot discriminate based upon an employee's pregnancy or intention to have children.

Discriminatory Impact

Employers may also adhere to policies that have a discriminatory impact upon employees based upon sex. Like intentional discrimination, these policies are prohibited in the absence of a business necessity or *bona fide* occupational qualification. In the context of sex-based discrimination, a *bona fide* occupational qualification means a "reasonable cause to believe or a factual basis for believing that all of substantially all women would be unable to perform safely and efficiently the duties of the job involved." Examples of policies that may have a disparate impact based upon sex include the following:

- *Height and Weight Requirements* - Height and weight requirements often discriminate against women, who are statistically smaller than men. When these requirements have the effect of screening out applicants of a particular sex, it may be discriminatory. The employer must demonstrate that such requirements are validly related to the ability to perform the work in question (a business necessity).
- *Appearance Requirements* - Appearance requirements may discriminate against individuals based upon sex, race, religion, etc. Appearance requirements, such as short hair, may negatively impact women who traditionally wear longer hair.

- **Discussion:** How do you feel about the protections against sex-based discrimination afforded employees under Title VII? Can you think of examples of conduct that could constitute intentional discrimination? What about employer policies that demonstrate a discriminatory impact based on sex? Should these provisions be more or less protective?
- **Practice Question:** ABC Corp is a private security agency. It supplies security officers for events and securing business locations. As such, ABC generally hires men who are very large and intimidating. Evelyn is a 5-foot, 3-inch female. She applies for an open position at ABC Corp. ABC refuses to hire Evelyn because of her size. Does Evelyn have a cause of action for sex-based discrimination against ABC Corp?
- **Resource Video:** <http://thebusinessprofessor.com/sex-discrimination-under-title-vii-2/>

10. What is "sexual harassment" and "hostile work environment"?

Two types of intentional discriminatory conduct based upon the actions or inactions of the employer (or its agents) are "sexual harassment" and "hostile work environment".

- *Note:* These types of conduct is that they are not subject to a *bona fide* occupational qualification.
- *Sexual harassment* - Sexual harassment involves conduct by an employer (or its agents) that directs unwelcome sexual advances, requests for sexual favors, or other verbal or physical harassment that is sexual in nature toward an employee. Sexual harassment is most commonly committed by a manager or a superior of the employee being

sexually harassed. An employer will be liable for failing to make reasonable efforts to prevent such activity.

- *Note:* Conducting employee training and instituting workplace policies prohibiting such behavior will not necessarily protect the employer.
- *Example:* An example of sexual harassment is when a manager or supervisor offers favorable action (such as promotion, raise in pay, time off, etc.) in exchange for sexual favors from the employee. This type of conduct is commonly known as “quid pro quo”. Another situation constituting sexual harassment would be threatening or insinuating unfavorable action against an employee for failure to take part in sexual relations. The key element is that the employee feels compelled to undertake sexual activity with the superior.

- *Hostile Work Environment* - Hostile work environment is a form of sex-based discrimination resulting from sexually explicit or harassing communications or actions by employees that is offensive to other employees. To be actionable under Title VII, the conduct must be “so severe or pervasive as to alter the conditions of the victim’s employment” and thereby create an abusive work environment. The employer will be liable if she commits, promotes, or fails to take actions to prevent such behavior. As such, the employer will only be liable if it is aware of alleged conduct and fails to take prompt and reasonable steps to correct it. The employee must inform the employer of the conduct or the employer must otherwise be aware of the conduct. The employee cannot unreasonably fail to take advantage of any preventive or corrective opportunities provided by the employer, unless she reasonably believes that reporting the conduct would cause negative consequences. In such a situation, the employer can be liable for failing to provide a reasonable means of reporting the conduct without the employee suffering retribution. An employer charged with creating or failing to respond to a hostile work environment may defend itself by showing that it did not know (and it was not reasonable to expect them to know) of the problem. Further, an employer can protect itself by exercising reasonable care to prevent and correct promptly any sexually harassing behavior.

- *Note:* Sexually offensive comments might include allowing (or failing to eliminate) sexually-oriented language, images, expressions, etc., in the workplace.
- *Example:* Each morning when Ann arrives to the office, Bob whistles at her and tells her that she looks good. Ann originally thought Bob was just being nice, but she has grown increasingly uncomfortable with his comments and actions. She informs her manager of Bob’s conduct, but the manager does nothing. If the conduct becomes severe or pervasive to the point it interrupts Ann’s ability to do her job, it could constitute a hostile work environment.

- **Discussion:** How do you feel about the protections afforded employees against sexual harassment? What about hostile work environment? Do you agree with the defenses available to the employer? Why or why not? In a hostile work environment action, what type of conduct should be considered severe and pervasive?
- **Practice Questions:** Jean is a new employee at ABC Corp. She is very offended when she sees a calendar depicting images of naked women on a calendar in a colleague’s office. She raises the complaint to her manager, Bob. Bob explains that the calendar was a gag gift and is only displayed as a joke. Jean is not satisfied with the explanation and quits her job. She later files a complaint against ABC Corp under Title VII for sex-based discrimination. What will she have to demonstrate to prevail in the action?

- **Resource Video:** <http://thebusinessprofessor.com/sex-discrimination-under-title-vii/>

Equal Pay Act of 1963

The Equal Pay Act of 1963 (Equal Pay Act) was an amendment to the Fair Labor Standards Act and a pre-cursor to the Civil Rights Act. The Equal Pay Act works in conjunction with the Civil Rights Act to prohibit sex-based discrimination in employment compensation. Covered employers cannot compensate employees differently based upon sex. More specifically, the Act requires equal pay if workers perform equal work in jobs requiring "equal skill, effort, and responsibility . . . performed under similar working conditions...". Title VII was necessary for complete protection against sex discrimination, as the Equal Pay Act did not address other forms of discrimination based upon sex. The Equal Pay Act relies heavily upon statistical analysis of disparities in pay, benefits, and promotion across the organization.

- **Note:** The employee must file an EEOC charge within 180 or 300 days (depending on whether there is a collateral filing in her state) or lose her claim. The Lilly Ledbetter Act of 2009 makes the 180-day period for filing a claim begin to run on the date that the last discriminatory payment is received.
- **Discussion:** How do you feel about the requirement for equal compensation across sexes for similar jobs? When do two different jobs entail "equal skill, effort, and responsibility [and] . . . performed under similar working conditions." Should there be an affirmative duty on employers to make certain pay is commensurate? Should an employee's attempt or willingness to negotiate for a given salary be considered?
- **Practice Question:** Mary has been working at her firm for 10 years. There are five employees in her department that do her same job. The other four employees are male. She recently learned that she is paid approximately 10% lower than all of her colleagues. If Mary decides to sue her employer for sex-based discrimination, what information would she have to show to support a cause of action?
- **Resource Video:** <http://thebusinessprofessor.com/equal-pay-act-of-1963/>

11. What are the protections under Title VII against discrimination based upon pregnancy?

Title VII protects women against discrimination based upon pregnancy or intent to become pregnant. The Pregnancy Discrimination Act of 1978 amended title VII to provide the following specific protections:

- **Pregnancy** - An employer cannot discriminate against women employees who become pregnant or give birth. This may include intentional discrimination or policies that have the effect of discriminating
 - **Example:** Intentional discrimination may include failing to hire, firing, or denying benefits based upon her pregnancy. A discriminatory policy might include mandatory reassignment of pregnant employees to low-stress jobs.
- **Insurance Plans** - Employers sponsoring or offering health or disability plans must include coverage for pregnancy, childbirth, and related medical conditions in the same manner as other health conditions. Further, plans

that cover female employees must also cover employees' spouses.

- *Note:* This is a considerable difference between privately-purchased health plans and employer-based plans.
- *Maternity Leave* - Employers are limited in their ability to force employees to take maternity leave from work. For example, employers cannot force pregnant women to stop working until after birth. Lastly, the employer cannot mandate a specific leave of absence for pregnancy or birth.
 - *Note:* The Family Medical Leave Act may provide for rights to unpaid leave during and following birth.

- **Discussion:** How do you feel about the protections afforded women in the event of pregnancy? Do you think these protections are effective? Why or why not? Can you think of any arguments against any of the protections? Should an employer's intent in passing a policy affecting maternity leave be considered when determining discrimination? Why or why not?
- **Practice Question:** April is an employee of ABC Corp. She becomes pregnant and is scheduled to give birth in two weeks. Her manager, Eric, approaches her about maternity leave. He strongly encourages her to go ahead and take leave and states, "you should take leave because, if you do not, I am going to assign you to a desk and not give you anything to do". Eric is trying to be a helpful boss, but April is offended by his statement. Does April have a cause of action against ABC Corp?
- **Resource Video:** <http://thebusinessprofessor.com/pregnancy-discrimination-under-title-vii/>

OTHER STATUTES AND EMPLOYMENT CONSIDERATION

The Civil Rights Act of 1964 is the most commonly exercised anti-discrimination statute, but there are several other federal laws that provide important protections against discrimination.

12. What is the "Civil Rights Act of 1866"?

The Civil Rights Act of 1866, commonly known as the 1866 Act, was passed at the end of the Civil War in an effort to protect minorities against race-based discrimination. The pertinent provisions of the Act reads, "All persons shall have the same right to make and enforce contracts as enjoyed by white citizens." While the 1866 Act also protects against race-based discrimination, it provides additional protections beyond those of Title VII. It specifically protects against discrimination in hiring, retaliatory firing, and creation of a hostile work environment. It originally allowed for the recovery of damages for intentional discrimination. The Act was amended in 1991 to allow a plaintiff to recover for policies or practices with a discriminatory impact. Unlike Title VII, the 1866 Act allows a plaintiff to bring an action in federal court without filing a complaint through the EEOC. It also allows plaintiffs to recover compensatory and punitive damages in the event of intentional discrimination.

- **Discussion:** Why do you think Congress passed a separate Act (beyond Title VII) to combat race-based discrimination? Do you believe the objectives of the 1866 Act are the same as those under Title VII? Why or why

not?

- **Practice Question:** Walt is an African-American man applying for a position at a local restaurant. At the interview he noticed that the entire wait staff is Caucasian, while the entire kitchen staff is African-American. During the interview, the restaurant manager indicates that he believes Walt would be a better fit as a kitchen manager. Walt kindly refuses the kitchen manager position and reasserts that he wishes to be considered for the waiter position. The restaurant eventually hires a Caucasian female to fill the waiter position. Does Walt potentially have a cause of action against the restaurant? If so, what are his legal options and procedure for bringing the action?
- **Resource Video:** <http://thebusinessprofessor.com/civil-rights-act-of-1866-1981-action/>

13. What is the “Age Discrimination in Employment Act”?

The Age Discrimination in Employment Act of 1967 (ADEA) was passed to address discrimination in employment based upon age. The Civil Rights Act of 1964 and the Equal Employment Opportunity Act do not protect against discrimination based on age, which makes the ADEA the primary law providing this protection. The ADEA prohibits employers with 20 or more employees from discriminating against employees who are 40 years of age and older. The Act protects against disparate treatment and policies that have a disparate impact on covered employees. Unlike under Title VII, there must be some form of discriminatory intent behind discriminatory impact cases. An employer may defend an ADEA claim by demonstrating that the discriminatory action or policy was motivated by a reasonable factor other than age. The employer does not have to show a business necessity, and it does not matter if there is a less discriminatory policy or manner of achieving the employer’s objective. Plaintiffs may achieve reinstatement in their positions and recover damages for violation of the act. A willful violation may give rise to double the actual damages (including lost wages and any losses resulting from the discrimination). Lastly, the ADEA allows for an action against employers who retaliate against employees for exercising their rights under the ADEA.

- **Note:** The ADEA has numerous requirements for benefits, pension, and retirement plans that expand upon the protections of the Employee Retirement Income Security Act.
- **Example:** Discrimination may include disparate treatment, such as failing to hire, discharging, or changing benefits. An example of discriminatory impact includes the practice of establishing mandatory retirement dates for employees. A notable exception to this rule is that high-level executives with qualified retirement plans can be forced to retire.

- **Discussion:** Why do you think the Federal Government seeks to protect individuals above 40 years of age from discrimination? Why do you think the legal standard for proving a disparate impact case requires a showing of intent by the employer to discriminate? Is this change in standard fair or does it unduly benefit employers? Why?
- **Practice Question:** Arthur is in his mid-fifties. He is applying for a job at ABC Corp to be a software engineer. He meets all of the qualifications for the job. During the interview it became obvious that the interviewer was worried that his computer skills and work speed would be negatively impacted by his age. One of the questions from the interviewer queried whether Arthur finds himself at a disadvantage when working on projects with 20-year-old colleagues? Arthur did not get the job. Do you think Arthur has a legal cause of action against ABC Corp?
- **Resource Video:** <http://thebusinessprofessor.com/age-discrimination-in-employment-act/>

14. What is the “Americans with Disabilities Act”?

Overview

The Americans with Disabilities Act (ADA) is the primary law protecting individuals with disabilities from various forms of discrimination. The ADA specifically prohibits employers from discriminating against job applicants or employees based upon:

- having a disability,
- having a disability in the past, or
- being regarded as having a disability.

The ADA applies to employers with 15 or more employees. Intentional forms of discrimination include hiring, advancement, termination, compensation, training, or other terms, conditions, or privileges of employment. The ADA also prohibits employers from requiring a pre-employment medical examination or asking questions about the job applicant’s medical history. The employer can only ask job related medical questions after a job has been extended.

Covered Disability

The ADA defines a disability as “any physical or mental impairment that substantially limits one or more of an individual’s major life activities.” Individuals with an impairment that is “transitory and minor,” do not fall under the ADA protections. The employment discrimination provisions apply to individuals with a “qualified disability”. A qualified disabled is one who, with or without reasonable accommodation, can perform the essential functions of a particular job position. Covered employers must make “reasonable accommodations” to allow the qualified disabled to perform the functions of the job.

Reasonable Accommodation

Reasonable accommodation under the ADA means adjusting a job or work environment to fit the needs of a disabled employee in carrying on her duties. Common examples of a reasonable accommodation include:

- making the workplace disabled accessible;
- restructuring or adjusting the work schedule;
- purchasing or modifying necessary equipment for use by the disabled; or
- providing appropriate training materials or assistance modified to fit the needs of the disabled employees.

Undue Hardship

Employers are not required to make an accommodation that causes the employer an undue hardship. An undue hardship is an action requiring significant difficulty or expense to the employer. The cost of the accommodation, the resources of

employer, the size of the employer, and the nature of the employer's business are considered in determining what constitutes and undue hardship.

- *Note:* The ADA also requires businesses to make reasonable accommodations for customer who use the facilities. This generally includes wheelchair accessible entrances and doorways.

Remedies

The remedies for violation of the ADA are similar to those under the Civil Rights Act (Title VII). Compensatory and punitive damages are not available for disparate impact but are available for intentional discrimination.

- **Discussion:** How do you feel about the protections afforded individuals under the ADA? Why do you think Congress specifically excluded coverage of temporary disabilities? How do you feel about the definition of a qualified disabled? Do you agree that employers should always have to make reasonable accommodations for an individual deemed to be a qualified disabled? When defending allegations of failure to make a reasonable accommodation, are you comfortable with a floating standard of "undue hardship"?
- **Practice Question:** Meredith has Parkinson's disease. The disease significantly hinders her physical movements. She is applying for a marketing manager position at ABC Corp. She is highly qualified, but ABC chooses not to hire her for fear that her disease will hinder her ability to adequately perform the job duties. If Meredith seeks to sue ABC Corp, what facts about Meredith's ailment, the position, and ABC Corp will the court examine to determine if there has been discrimination prohibited by the ADA?
- **Resource Video:** <http://thebusinessprofessor.com/americans-with-disabilities-act/>

15. What is the "Rehabilitation Act"?

The Rehabilitation Act aims to "promote and expand employment opportunities in the public and private sectors for handicapped individuals." The Rehabilitation Act prohibits the Federal Government and certain federal contractors from discriminating against employees and contractors based upon a medical disability. The Rehabilitation Act does not distinguish between qualified and non-qualified disabilities, but the anti-discrimination provisions are quite similar to those under the ADA. An individual must still be able to perform the core responsibilities of the position. The federal employer must also make reasonable accommodations for the employee's disability. The Act also requires the application of affirmative action programs to disabled individuals.

- **Discussion:** Why do you think Congress failed to distinguish between qualified and non-qualified disabled individuals for purposes of federal employment? Was this wise? Why or why not?
- **Practice Question:** Bertha is applying for employment with the US Department of Agriculture. She has ocular degeneration, which severely diminishes her eyesight. She is not hired for the position out of fear that her disability will not allow her to perform the job. She is considering filing a complaint under the Rehabilitation Act for discrimination. What would a court review in determining whether a valid complaint exists?
- **Resource Video:** <http://thebusinessprofessor.com/the-rehabilitation-act/>

16. What is the “Genetic Information and Non-Discrimination Act”?

The Genetic Information Nondiscrimination Act (GINA) prohibits employers (those covered by Title VII) from discriminating (hiring, firing, refusing to hire, or otherwise discriminating) based upon an employee or perspective employee’s genetic information. Genetic information includes any information acquired through an individual’s genetic test or the test of her family members. This could include information about a disease or disorder in the family medical history. GINA also prohibits certain activities by employers that seek to identify or solicit information about an individual’s genetic information.

- *Example:* An employer is prohibited from requiring any information about genetic tests of the individual, past family members, requests for genetic service, etc. Further, an employer cannot request, require, or purchase genetic information with respect to an employee or the family member of an employee.
- *Discussion:* Why do you think Congress decided to protect individuals from discrimination based upon their genetic information? Do you agree that prohibiting employers from requesting such information is appropriate? Why or why not?
- *Practice Question:* ABC Corp provides a service of generating genetic sequence information for customers. Jane applies for a position at the company. ABC Corp requires that all new employees submit to a genetic screening. Jane is afraid that the genetic sequence will expose all sorts of private information about her family and health. She refuses to complete the screening and is not hired. Does Jane have a potential cause of action against ABC Corp?
- *Resource Video:* <http://thebusinessprofessor.com/genetic-information-nondiscrimination-act/>

17. What laws protect employees from discrimination in receiving health insurance coverage?

The Health Insurance Portability Accountability Act of 1996

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is a primary law protecting the rights of employees with regard to obtaining and continuing health insurance coverage. Specifically, HIPAA prohibits group health plans and health insurance providers from discriminating against employees based upon certain factors. A common practice when an individual applies for health insurance coverage is to examine the individual’s medical history for prior health conditions. The insurance provider will often limit coverage for pre-existing ailments and injuries. This situation becomes a major issue for someone who loses employer-provided, health insurance coverage when leaving her current employment. HIPAA seeks to remedy this situation by granting an employee who leaves one job the ability to continue her same level of health coverage under a subsequent health plan without being excluded for pre-existing conditions. The key requirement is that an individual must never have a considerable break in insurance coverage between canceling one plan and beginning another. If an individual has a break in coverage, the insurer can exclude pre-existing conditions present during the previous 12 months (18 months if a late enrollee in the new plan). For the above-stated reason, individuals losing their employer-provided health coverage must purchase interim insurance to continue coverage during the interim. Coverage is generally available pursuant to the Consolidated Omnibus Budget Reconciliation Act. If the employee maintains coverage, a subsequent insurer cannot exclude or limit coverage of an individual because of health

status, medical condition or history, genetic information, or disability.

- *Note:* The insurer can, however, charge more for the entire plan – which is paid for by the group of employees. Small businesses may be disadvantaged by insurer practices, as they will charge higher rates for the small group policy due to the increased risk of loss by one group member becoming sick.

- **Discussion:** How do you feel about Congress's regulation of insurance companies? Should insurers be required to cover employees with pre-existing conditions if they become a member of a group plan? Why or why not? Do you think these provisions offer sufficient protections to employees or are they too strenuous on insurers? Why?
- **Practice Question:** Ellen is an employee of ABC Corp. She purchases her health insurance through an employer-sponsored plan. She is considering changing jobs to work for 123 Corp. She previously had a heart attack and is worried about losing health coverage for this condition if she changes employment. Does HIPAA offer any protections for Ellen?
- **Resource Video:** <http://thebusinessprofessor.com/health-insurance-portability-and-accountability-act/>

The Affordable Care Act of 2014

- *Requirements of Individuals & Government* - The Affordable Care Act in 2014 (ACA) changes the insurance landscape considerably. The ACA requires that all US citizens purchase health insurance either privately or through their employers. Individuals who fail to purchase health insurance are fined or incur a tax penalty calculated as a percentage of their annual income. Low-income earners are eligible for federal subsidies to aid in the purchase of health insurance coverage. To make insurance available, the ACA establishes federal exchanges through which individuals may purchase coverage. It also provides subsidies for states to establish their own insurance exchanges through an expansion of the state's Medicaid program. As part of the mandatory insurance requirements, insurance companies cannot exclude applicants based upon pre-existing conditions. Collectively, these provisions make health insurance available to all US citizens.
- *Requirements of Businesses* - The ACA also places requirements on businesses to sponsor health insurance plans for employees. A business with 50 or more full-time employees (defined as working 30 hours per week during any week of work) must allow employees to purchase health insurance for themselves and their dependents through the employer-sponsored plan. Covered employers who fail to sponsor insurance plans may be subject to fine or tax penalty. The employer incurs a penalty if any employee who qualifies for a federal subsidy based upon her level of income purchases insurance through a federal or state insurance exchange.

- **Discussion:** How do you feel about federal requirements for employers to sponsor insurance plans for employees? Why do you think health insurance plans are linked to employment? Can you make an argument for any other methods of providing health insurance access to individuals?
- **Practice Question:** Mica is an employee of ABC Corp, a large employer in her state. She makes a very low hourly wage and is worried about her responsibility to purchase health insurance or face a tax penalty. What are the requirements on ABC Corp to sponsor an employer healthcare plan that Mica can purchase? If Mica cannot afford the insurance coverage, what other options are available to her?

- **Resource Video:** <http://thebusinessprofessor.com/the-affordable-care-act/>

18. What anti-discrimination protections exist for employees who are also military service members?

The Uniform Services Employment and Reemployment Rights Act (USERRA) protects the rights of service members in the military reserves or state national guards from discrimination based upon their military service obligations. Specifically, the law protects the rights of individual who voluntarily or involuntarily leave their employment to undertake military service or certain types of service in National Defense Medical System. It prohibits public and private employers from denying “initial employment, reemployment, retention in employment, promotion, or any benefit of employment based on current, past, or present obligations flowing from military service.” The general requirements for protection under USERRA are as follows:

- the individual must hold a job outside of the Armed Forces or NDMS (a civilian job);
- the employee volunteers or is called to participate in mobilization (such as training, activation, or deployment), on a temporary basis, with the Armed Forces of National Defense Medical Service;
- the employee must inform her employer that she is leaving the position pursuant to the mobilization;
- the period of service must be under “honorable conditions”; and
- the individual must report back to the civilian employer in a timely manner regarding the mobilization and, if necessary, submit a timely application for reemployment.

The USERRA not only establishes re-employment rights but also protects individuals from retaliation (such as firing, demotion, etc.) for exercising their rights under USERRA. This includes protections for those reporting (or testifying against) an employer for violating USERRA. Covered employees can also elect to continue their employer-based health insurance for up to 24 months of the mobilization. If an employee does not continue her health coverage or coverage is lost, the employee may apply to the employer health insurance program without waiting periods or exclusions and request to be reinstated upon return from deployment. As with many other employment laws, the DOL requires that certain employers display notices of USERRA rights for employees. Individuals discriminated against may bring a private action against the employer or file a complaint with the US Secretary of labor.

- **Discussion:** Why do you think the Government established USERRA? Can you think of any arguments against enforcing these provisions? Should there be any exceptions to these rules? Why or why not?
- **Practice Question:** Thomas is a member of the Georgia National Guard. His unit has been called to active duty and will be mobilized to serve as the garrison support unit for Fort Sill, Oklahoma. This will require Thomas to leave his employment for 12 consecutive months. What are Thomas’s rights in this situation?
- **Resource Video:** <http://thebusinessprofessor.com/uniform-servicemembers-employment-and-reemployment-act/>

19. What federal protections exist from discrimination based upon sexual orientation or identity?

Sexual orientation or identity discrimination in the employment context means any form of employment discrimination based upon the real or perceived sexual orientation (gay, lesbian, bisexual, or heterosexual) or identity (transgender association) of an employee. There are currently no federal statutes in place specifically affording protections to individuals based upon sexual orientation or identity. There are, however, common law decisions at the US Supreme Court and Federal Circuit Court levels that associate sexual orientation and sexual identity with sex-based discrimination. Further, in a federal administrative court case involving a federal employee in 2015, the EEOC determined that sexual orientation (and possibly identity) discrimination is a form of discrimination based upon predispositions about an individual's sex. The EEOC's opinion effectively extended sexual orientation protection to all federal employees (as well as employees of federal contractors). Federal courts have not yet extended this logic to discrimination actions against private employers.

- *Note:* Numerous states (and the District of Columbia) and a few local governments have laws or ordinances protecting employees against sexual orientation and identity discrimination by public and private employers.

- **Discussion:** How do you feel about the absence of federal statutory protections against discrimination based upon sexual orientation or identity? Are there any arguments for or against such protections? Do you see a general trend in society toward or against protection?

- **Practice Question:** Bart is an employee of ABC Corp, a large corporation located in State A. State A does not have any state laws protecting employees from discrimination based upon one's sexual orientation or identity. Bart was recently let go from his job for no apparent reason. He believes that he was fired when his employer learned that he is homosexual. What legal options exist for Bart to challenge his firing?

- **Resource Video:** <http://thebusinessprofessor.com/sexual-orientation-discrimination/>

20. What is “affirmative action”?

Affirmative action is a federal executive order prescribed to protect federal employees and employees of certain federal contractors. To be covered by this executive order, contractors must have 50 or more employees and hold federal contracts of \$50,000 or more. Affirmative action principles require covered employers to take actions to ensure that applicants are treated fairly in the application process and that employees are treated fairly during employment. This means that applicants and employees do not suffer a detriment because of their race, color, religion, sex or national origin. Affirmative actions may include result-oriented procedures used to promote equality in workforce employment and hiring practices. Affirmative action programs generally seek to establish workforces that roughly represent the percentages of qualified individuals present in the available applicant pool (such as the immediate community). Affirmative action programs that prescribe specific numbers of minority hires or provide advantages to minority applicants have been held to be unconstitutional based on grounds of reverse discrimination.

- *Note:* Private employers who voluntarily adopt affirmative action programs must be careful to avoid quota systems that run afoul of anti-discrimination laws. The Office of Federal Contract Compliance programs can terminate federal contracts with employers who do not comply with its guidelines and can make them ineligible for any future federal business.

- **Discussion:** How do you feel about affirmative action programs? What are the arguments for and against these programs?
- **Practice Question:** ABC Corp is a federal contractor. The majority of the employees at the corporation are Caucasian, and it is concerned that the demographics of its work force will disqualify it from future federal contracts. What can ABC Corp do to legally diversify its workforce?
- **Resource Video:** <http://thebusinessprofessor.com/affirmative-action-explained/>

21. What is the role of state governments with regard to anti-discrimination laws?

All states have statutes and regulations administered by state agencies to protect employees from employment discrimination. Often, these state laws will provide additional protections for employees beyond those provided by federal statutes. The EEOC generally works in conjunction with state administrative agencies in enforcing federal employment discrimination laws. In some states, the EEOC will refer any EEOC charges to the state agency handling such complaints. This is known as “deferral” or “deferral states”. Other states allow an application that the complaint be dually filed with the state administrative agency and the EEOC. If a state administrative agency begins a proceedings or a state law provides relief to a discrimination charge, the EEOC must notify the state officials and wait 60 days before continuing an action. If the state agency begins the investigation process, the EEOC will generally halt processing the claim while the state agency is investigating. If an employee first files with the state agency, the law extends the time for filing with the EEOC to 300 days.

- **Discussion:** What do you think are the benefits of a state also providing protections against employment discrimination? How do you feel about the procedure for filing both a state and federal action? Why do you think some states accept referral of all EEOC complaints, while others allow for dual processing?
- **Practice Question:** Anna feels that she has suffered discrimination in her workplace when she was recently fired. She is considering making a legal complaint. What are her options under state law and federal law?
- **Resource Video:** <http://thebusinessprofessor.com/employment-discrimination-under-state-law/>