

the "reasonably necessary" standard. Exactly how have BFOQ claims by employers fared? When are BFOQ claims upheld as legitimate? Several points are relevant to understanding the BFOQ issue.

The burden of proof is on the employer to justify any BFOQ claim, and it is clear that the BFOQ exception is to be narrowly construed. Thus, it does not apply to the following:⁶⁵

- Refusing to hire women because of a presumed difference in comparative HR outcomes (e.g., women are lower performers, have higher turnover rates)
- Refusing to hire women because of personal characteristic stereotypes (e.g., women are less aggressive than men)
- Refusing to hire women because of the preferences of others (customers or fellow workers)

To amplify on the above points, an analysis of BFOQ claims involving sex reveals four types of justifications usually presented by the employer: (1) inability to perform the work, (2) personal contact with others that requires the same sex, (3) customers' preference for dealing with one sex, and (4) pregnancy or fertility protection concerns.⁶⁶

Inability to Perform

The general employer claim here is that one gender (usually women) is unable to perform the job due to job requirements such as lifting heavy weights, being of minimum height, or working long hours. The employer must be able to show that the inability holds for most, if not all, members of the gender. Moreover, if it is possible to test the required abilities for each person, then that must be done rather than having a blanket exclusion from the job based on sex.

Same-Sex Personal Contact

Due to a job requirement of close personal contact with other people, the employer may claim that employees must be the same sex as those people with whom they have contact. This claim has often been made, but not always successfully defended, for the job of prison guard. Much will depend on an analysis of just how inhospitable and dangerous the work environment is (e.g., minimum security versus maximum security prisons). Same-sex personal conflict claims have been successfully made for situations involving personal hygiene, health care, and rape victims. In short, the permissibility of these claims depends on a very specific analysis of the job requirements matrix (including the job context portion).

Customer Preference

Organizations may argue that customers prefer members of one sex, and this preference must be honored in order to serve and maintain the continued patronage