Coverage of young adults, same-sex partners, and those changing jobs also is compelled by law. The ACA currently requires health insurance plans to make dependent coverage available until an adult child reaches the age of 26. Many parents and children who worried about a child losing health insurance after graduation from college no longer have that concern. As for same-sex partners, the federal Defense of Marriage Act defined marriage as a legal union between one man and one woman, but the Supreme Court declared that provision unconstitutional under the Due Process Clause in *United States v. Windsor* (2013). Federal employees with same-sex partners now may enroll them in the Federal Employees Health Benefits Program.[5] In the 14 months following *Windsor*, 19 federal courts ruled on the constitutionality of state bans on same-sex marriages, with 19 victories for those challenging the bans (*Brenner v. Scott*, 2014). Given this trend, it seems likely that soon no government-sponsored plan will be able to exclude same-sex partners. Coverage for those changing jobs was the subject of an older law, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). It requires employers to offer continued coverage to most former employees for 18 to 36 months, or until coverage of another plan begins, at not more than 102 percent of cost.

Health insurance laws also address what conditions must be covered and how much companies may charge. The ACA requires coverage to be *affordable* and *adequate* as defined in the statute. It forbids insurers to deny coverage because of a preexisting condition, and it prohibits annual or lifetime limits. Again, this part of the ACA has been the subject of intense debate, and could be significantly amended or repealed. Two older acts, the Health Insurance Portability and Accountability Act (HIPAA) and the Genetic Information Nondiscrimination Act (GINA), curtailed some exclusions for preexisting conditions, but they did not limit the premiums that insurers could charge, nor did they require insurers to enroll individuals. The best-known part of HIPAA is its privacy rule—employers must safeguard the privacy and security of personally identifiable health information through a panoply of measures spelled out in the act and its accompanying rules.

In addition to insurance, the **Family and Medical Leave Act of 1993 (FMLA)** requires local, state, and federal government agencies to provide eligible workers with up to 12 weeks of *unpaid* leave, during any 12-month period, for childbirth or adoption, illness of a family member, or illness of the employee. The U.S. Department of Labor has rules on many contentious issues related to this act, including the definition of a *serious health condition*, the use of unscheduled and intermittent leave, and the medical certification process. To enforce the act, an employee may file suit or request the secretary of labor to bring suit. Robust remedies are available, including back pay, liquidated damages (meaning double the back pay), and attorney's fees. In 2003, the Supreme Court held that Congress could abrogate sovereign immunity and give state employees the right to sue their state employers under the FMLA. Approximately half the states have their own family and medical leave laws. Collective bargaining about workplace safety, health, and leave is common. (Chapter 8 examines the effects of health and safety policies.)

Individual and Vicarious Liability

Urban legend has it that prolific bank robber Willie Sutton, when asked why he robbed banks, responded, "Because that's where the money is." Likewise, employees (and the lawyers who advise them) prefer to sue deep-pocketed employers, but occasionally they sue an

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the job because employers create dangerous conditions, employees are careless, someone becomes violent, or nature intervenes, among other reasons.

The Occupational Safety and Health Act of 1970 (OSHA) is the main federal statute protecting federal employees from unsafe working conditions. Twenty-three states have adopted their own OSHA laws for public and private employees, and a few states have plans that cover only public employees (the Workplace Fairness website provides a comprehensive chart of state OSH acts; www.workplacefairness.org). In general, federal and state OSH acts mandate standards and enforce them through inspections, fines, and closures. They do not give employees the right to sue.

The remedies available to injured persons generally are those in **workers' compensation** acts. In 1908, Congress passed the Federal Employees Compensation Act, and subsequently all states passed workers' compensation laws. These laws demand sacrifices from both employers and employees to ensure that all injured workers receive health care and lost wages. Employees relinquish the right to sue in civil court for on-the-job injuries, which, in some instances, means giving up large money damage awards. Employers forfeit the right to deny benefits to employees whose own negligence caused or contributed to their injuries; these plans are *no fault*. Employers must finance these systems through insurance premiums, or by being self-insured and paying claims themselves. Disputes are resolved through an administrative system. Benefits include payment of medical expenses, partial replacement income, and, if an injury is fatal, survivors' benefits. Permanently injured employees who are unable to work also may be eligible for Social Security disability benefits and early pension benefits.[3]

In the United States, health insurance is provided primarily by employers. Citizens in other industrialized countries have permanent, portable insurance, but for Americans, health insurance usually is tied to their jobs. In the public sector, governments provide wide coverage to their full-time employees and pay most of the premiums. Employed and retired federal employees have access to the well-regarded Federal Employees Health Benefits Program. In 2007, about 85 percent of those eligible were enrolled, and the federal government paid 72 percent of the average premium across all plans (U.S. Government Accountability Office, 2007). In 2016, 89 percent of state and local government employees had access to health care plans, with employers shouldering 89 percent of the premium cost for single coverage (Bureau of Labor Statistics, 2017). Most agencies offer coverage to retirees, and many subsidize the premiums, but financing benefits is a challenge, especially as large numbers of workers under age 65—and thus not yet eligible for Medicare—retire.[4]

Extending health insurance coverage was a major goal of the Obama administration. Part-timers are a large segment of the government workforce, but in 2014 just 24 percent of part-timers in state and local government had access to employer-sponsored health insurance (Bureau of Labor Statistics, 2014). Starting in 2015, the ACA requires employers with at least 50 employees to offer coverage to people who work an average of 30 hours a week. One immediate consequence was some cities, counties, public schools, and community colleges reducing the hours of part-timers to keep them under the 30-hour threshold (Maciag, 2014). Although the ACA required all Americans to maintain health insurance coverage, known as the *individual mandate*, Congress repealed that portion of the ACA as a part of the tax legislation of December 2017. In all likelihood, the ACA will continue to be a political football, largely directed by ideology.

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an urgently needed work document. The Fourth Amendment, which limits government's ability to conduct **unreasonable searches and seizures**, is the main restriction on workplace searches by government employers. In the leading case of *O'Connor v. Ortega* (1987), the Supreme Court held that whether a search violates the Fourth Amendment depends on (1) whether the area is one in which the employee has a reasonable expectation of privacy and (2) whether the search is reasonable under the circumstances.

The Court determined that Ortega, a physician, had a reasonable expectation of privacy in his desk and file cabinet because he was the only one who used the office, he stored only personal materials there, and his hospital-employer had never discouraged him from keeping personal items at work. Next, the Court asked whether the search was reasonable under the circumstances. A reasonable search must balance the governmental interest in the efficient and proper operation of the workplace with the employee's privacy interests. It does not require an employer to obtain a warrant or even to give an employee prior notice. In *Ortega*, the hospital's need to retrieve job-relevant material overrode the doctor's privacy rights, so the search was permissible. Managers may wish for a brighter line, but the reasonableness of an employee's privacy expectations and the reasonableness of a search are determined by the discrete facts of each situation.

Agencies can take steps to increase the likelihood of searches being lawful. They can reduce expectations of privacy by eliminating personal work spaces and adopting policies authorizing searches. (Paradoxically, these measures may erode employee–supervisor trust and impede managing.) Most employers have policies allowing searches of employees' texts, e-mails, and Internet use on the employers' devices and networks. As a result, employees have no expectation of privacy in these domains and searches are permissible. Agencies also may conduct video and telephone surveillance if these policies are communicated in advance. In sum, there are few restrictions on the rights of organizations to monitor personnel at work, especially if employees are told about their lack of privacy up front (Bowman & West, 2016).[6]

Testing for Alcohol or Drug Use

Urinalysis, the most common drug-testing method, is a search and seizure under the Fourth Amendment (*National Treasury Employees Union v. Von Raab*, 1989). The privacy invasions are considerable. Urinalysis permits an employer to surveil several days of off-duty behavior, forces a person to disclose confidential information about medications being taken (e.g., HIV drugs, antidepressants, Viagra), and compels a person to perform an intimate bodily function with a stranger listening or watching. As with other searches, whether it is lawful depends on whether it is reasonable under the circumstances.

In 1986, President Reagan issued Executive Order 12,564, requiring executive agencies to test approximately 2 million federal employees in *sensitive positions* for illegal drug use. The order authorizes drug testing (1) where there is a reasonable suspicion of illegal drug use, (2) in a post-accident investigation, (3) as part of counseling or rehabilitation for drug use through an employee assistance program, and (4) in the screening of any job applicant. Congress also passed two laws affecting large numbers of private sector employees. The Drug-Free Workplace Act of 1988 covers federal government contractors and grant recipients, and the Omnibus Transportation Employee Testing Act of 1991 requires drug and alcohol testing of 6 million workers in transportation industries. Numerous states

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official in his or her *individual capacity*, seeking to hold the official personally responsible for money damages. **Official immunity** is a common-law doctrine that shields government employees from individual liability. It is based on the belief that government actors should not be made hesitant in carrying out their responsibilities by threats of lawsuits and should not be diverted from their duties by litigation. A few kinds of officials, such as judges and legislators, have *absolute immunity* for actions performed in furtherance of their judicial or legislative functions. Most officials, however, have *qualified immunity*. They are immune from liability for discretionary acts in the scope of their duties if they act in good faith (without malice) and reasonably under the circumstances. To act reasonably, they must not violate clearly established rights that a reasonable person would have known about, which generally means not acting egregiously. Consider the example of a school nurse and administrative assistant who strip-searched a 13-year-old girl because they found prescription-strength ibuprofen pills in her notebook. The girl's mother sued the searchers individually, but the court concluded that the student's rights were unclear and the searchers had immunity.

In reality, public employees are shielded from most lawsuits. The Federal Employees Liability Reform and Tort Compensation Act of 1988 gives federal personnel the right to request that suits against them individually be converted into suits against the government. Many states have similar laws. The ability to avoid civil liability does not make officials unaccountable, as they still may be disciplined by their agencies for misconduct, but it relieves them of the anxiety that a wrong decision will imperil their personal savings.

On the flip side, leaders worry about an agency being responsible for the misdeeds of a rogue employee, which raises this question: Under what circumstances is an employer responsible for an employee's acts? *Vicarious liability* is a common-law doctrine that makes one person (or entity) liable for the acts or omissions of another because of a legal relationship between the two. ***Respondeat superior*** (Latin for "let the master answer") is a type of vicarious liability that holds an employer liable for the acts or omissions of an employee committed in the course of employment. It is based on the theory that because the employer controls the employee's behavior, the employer must assume some responsibility for the employee's actions. Whether an act was *in the course of employment* depends on the particular facts. A court may consider the employee's job description or assigned duties; the time, place, and purpose of the employee's act; the extent to which the employee's actions conformed to what he or she was hired to do; and whether such an occurrence could reasonably have been expected. Generally, an employer will not be held liable for an employee's assault or battery, unless the use of force bears some relationship to the work, such as in the case of a police officer. The city of Sacramento, for example, was not vicariously liable for the sexual assault of a woman by several on- and off-duty firefighters, who drove a fire truck to a party, invited the woman onto the truck, and assaulted her.

PRIVACY ISSUES

Searches

Conflicts arise when people feel that managers invade their private affairs or private work spaces. These invisible barriers may be breached unconsciously in the regular course of business, such as when a supervisor calls a subordinate at home or searches her desk for

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and localities followed the federal government's lead and passed drug-testing laws. Court challenges ensued.

In determining whether a test is reasonable, the timing of the test (pre-employment, preplacement, periodic, post-accident, promotion, random) is important. Testing is liberally allowed at the pre-employment and pre-placement stages because applicants and new hires have little right to expect privacy. Return-to-work testing after an accident, periodic testing with advance notice, and testing upon promotion also are likely to be approved because employees expect these tests. At the other extreme, *random testing* of current employees without any articulable suspicion is the most intrusive, and therefore the least permissible.

The nature of the job also matters. For *safety-sensitive* and *security-sensitive* positions, random testing is allowed. Applying this principle, one court allowed the suspicionless testing of the U.S. Army's civilian air traffic controllers, mechanics, police, guards, and drug counselors. Police officers and firefighters may be tested randomly. More surprisingly, a court applied this rationale to allow random testing of a broad group of school staff (principals, assistant principals, teachers, aides, substitute teachers, secretaries, and bus drivers). On the other hand, a court refused to allow random testing of all Forest Service Job Corps Center employees. Current employees in positions that do not affect safety or security may be randomly tested only with *reasonable suspicion*, which means information that would lead a reasonable person to suspect on-the-job drug use, possession, or impairment.

Grooming and Dress Codes

One cannot help but pity the poor manager forced to grapple with **dress and grooming codes** in today's workplace (Exhibit 2.4). The landscape is fascinating—bejeweled faces, exposed undergarments, colorful tattoos, plunging necklines, artful hair constructions, and stubbly cheeks pervade the scene. But legal and interpersonal land mines await. People consider their clothes and bodies to reflect their individuality and are sensitive to criticism of them. In the legal arena, grooming and dress codes may be unconstitutional or violate anti-discrimination statutes. This is an area where an administrator almost always should ask a human resource professional for help.

Exhibit 2.4 Dress and Grooming Regulations in the Public Service

Clothes make the man. Naked people have little or no influence in society.

—Mark Twain

Written and unwritten dress and grooming codes are common in the private and public sectors because a suitably attired and groomed workforce is an integral part of a professional, productive organization. As vital mediators in social relations, clothing and hairstyle choices can reflect complex feelings about power, money, autonomy, and gender, feelings that often have significant interpersonal consequences. Although few would deny the

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obvious superiority of character and values as bases for judgment, too much credence may be given to glib assertions that images are without moment; empirical evidence demonstrates that people readily form opinions—right or wrong—about the social and professional desirability of individuals based largely on their appearance.

The government is a highly visible employer; its employment relations practices are observed and emulated. One reason dress and grooming practices matter to public employers is that they have subtle and obvious implications for management philosophies (e.g., participative management), task organization (employee teams), personnel functions (selection, placement, evaluation), quality of work life (self-confidence, mutual respect), and constitutional issues (freedom of speech, equal treatment, sex discrimination). In government, dress and grooming can also represent the mantle of state authority.

Managers also should be aware of the instrumental role played by dress and grooming in communicating personal and organizational credibility and responsibility. In one national sample of state managers, a majority of respondents thought "well-dressed and groomed people are often perceived as more intelligent, hardworking, and socially acceptable than those with a more casual appearance." They rejected the contention that "an employee's appearance is unimportant to the organization." Given this consensus, it is not surprising that an Oklahoma agency dress code codifies these attitudes and affirms that "all employees ... are representatives of the State ... and shall dress accordingly, in a manner that presents a good image."

These data suggest that certain norms, or formal and informal dress rules, are part of the fabric of most agency cultures. Ignoring commonly held standards of neatness, demonstrating an inability to adapt to the work environment, and showing insensitivity to one's milieu could affect job performance. For example, an employee of the Equal Employment Opportunity Commission would likely encounter difficulties in rendering service to the public if he or she wore Nazi or Ku Klux Klan insignia to work.

A current social trend is body art and ornamentation. According to a Pew Research Center study in 2014, 40 percent of Americans between the ages of 18 and 29 have at least one tattoo, and a survey performed by Statista in 2017 reported that 40 percent of all Americans between the ages of 18 to 69 have at least one tattoo, compared with only 1 percent a generation ago. As with dress and grooming standards, employers have wide latitude in developing appearance regulations to address skin decoration, but the rules must be justifiable, consistently enforced, nondiscriminatory, and flexible enough to allow for reasonable accommodation of religious beliefs and disabilities. (These legal requirements are discussed in the *Grooming and Dress Codes* section of this chapter.) To illustrate, the state has a right to promote a disciplined, identifiable, and professional police force by maintaining its uniform as a symbol of impartiality; accordingly, the state can require police officers to cover tattoos that are offensive or disruptive. What may or may not be *offensive* or *disruptive*, however, can be debated.

A clear, one-size-fits-all standard of dress and grooming is not recommended here. Given wide variations of occupations and agencies, not only would such a code be difficult to promulgate, but it also would be contrary to the agency-initiated, participative management approach needed to develop useful standards. A contingency approach seems warranted.

Sources: American Academy of Dermatology (2008); Bowman (1992), pp. 35–51.

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Constitutional Law

The First Amendment (free expression, free exercise of religion) and the Fourteenth Amendment (equal protection, due process) afford employees some rights in grooming and attire choices, but courts generally uphold an employer's rule against a constitutional challenge if it is *rationally related* to a legitimate interest. In *Kelley v. Johnson* (1976), the Supreme Court's principal decision about grooming, a police officer challenged a county policy limiting the length of male officers' hair. The court concluded that the regulation was rationally related to safety because it provided a disciplined and easily recognizable police force and upheld it. Bans on mustaches, goatees, and beards for police also have been upheld because they promote esprit de corps. Prohibitions on beards for firefighters and on mustaches and beards for emergency medical technicians have been upheld for safety reasons.

Agencies should be extra cautious about grooming regulations that may limit the free exercise of religion. The U.S. Fourth Circuit Court of Appeals upheld a rule preventing correctional officers from wearing dreadlocks due to safety concerns, even though the hairstyle was required by an employee's religion. But the Third Circuit struck down a rule prohibiting police officers from wearing beards because the policy prevented a Muslim man from observing his beliefs. The rule allowed an exemption for a medical need and the court reasoned that, by allowing an exemption for a secular but not a religious purpose, the county unlawfully discriminated against those with religious motivations. Because of the exemption, the court applied the *strict scrutiny* standard, which requires a measure to be narrowly tailored and to further a compelling governmental interest.

Dress codes raise similar constitutional issues. The leading dress code case is *Goldman v. Weinberger* (1986), involving the First Amendment's guarantee of free exercise of religion. The U.S. Air Force's dress code prevented an Orthodox Jew from wearing a skullcap while on duty. The Supreme Court determined the policy was lawful because it served the legitimate purpose of encouraging "the subordination of personal preferences and identities in favor of the overall group mission." In 2003, the Third Circuit upheld a county's requirement that all van drivers wear pants against an employee's claim that her religious beliefs required her to wear a skirt. The court applied a rational basis standard and accepted the county's explanation that skirts posed a risk to safety. On the other hand, in 2005 a district court in Kentucky held that a public library violated an employee's free exercise rights by prohibiting her from wearing a necklace with a cross on it.

Anti-discrimination Statutes

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers from discriminating in *terms and conditions of employment* based on race, color, religion, sex, or national origin.[7] Grooming policies and dress codes are terms and conditions of employment. The grooming policies attacked as gender discrimination primarily have involved different hair length requirements for men and women. Courts routinely uphold such standards if they reflect cultural norms and do not treat one sex more harshly than the other. The grooming rules challenged as race discrimination mainly have been no-beard rules. About 25 percent of black men (compared with less than 1 percent of white men) suffer from a skin disorder caused by clean shaving, so no-beard rules have a disparate negative impact on black men. Some courts have upheld no-beard rules while others have pronounced them unlawful. (Disparate impact is discussed further in the *Discrimination* section later in this chapter.)

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Dress codes that treat the sexes differently, such as rules that require men to wear ties, are lawful if they do not favor one gender over the other. On the other hand, rules that require only women to wear revealing or physically uncomfortable uniforms, facial makeup, or contact lenses instead of glasses have been invalidated as discriminatory. (Casinos and restaurants mandated these *sexually appealing* uniforms.) Policies that limit an individual's ability to observe religious customs have been attacked as religious discrimination. In 1990, a court upheld a state statute that prohibited a Muslim public school teacher from wearing a head covering. Likewise, in 2007 the city of Philadelphia's rule prohibiting a Muslim police officer from wearing a head covering was upheld. In both cases, the courts concluded that requiring employers to accommodate these exceptions would impose undue hardship. (Under Title VII, employers must accommodate employees' religious beliefs unless doing so would impose undue hardship, as discussed below.) But in 2008, the New York State Department of Corrections settled a high-profile Title VII case by agreeing to determine on a case-by-case basis whether to grant religious exemptions from uniform and grooming regulations. It also agreed to allow personnel to wear close-fitting, solid dark-blue or black religious skullcaps, provided no undue hardship was posed. (Exhibit 2.5 considers the need for dress and grooming codes in the government workplace.) In 2015, a unanimous Supreme Court invalidated the no-headwear policy of a clothing retailer when its implementation violated a Muslim applicant's request for a religious accommodation (*EEOC v. Abercrombie & Fitch Stores, Inc.*, 2015).

PRE-EMPLOYMENT INVESTIGATIONS: TRUTH, PERSONALITY, HEALTH, CREDIT, AND CRIMINAL RECORDS

The cardinal rule for **pre-employment investigations**, including interviews, questionnaires, and record checks, is that they must be job related. Employers should not inquire about personal matters, such as marital status, the willingness of a working spouse to relocate, or if the person has children, because those questions are not germane to the candidate's ability to perform the job. Instead, the interviewer should ask, for example, whether there are any barriers to relocation, and whether adequate child care is available (if the applicant discloses having children). These questions solicit the information the organization actually needs to know. (Chapter 4 reviews the hiring process in detail.)

Once the hiring committee crafts its questions, how can it ascertain if an applicant answers them truthfully? *Scientific* tests are alluring, but the Employee Polygraph Protection Act of 1988 restricts the use of polygraph tests due to concerns about the technology's accuracy. Private businesses rarely are authorized to use such tests. Public agencies are exempt from the act, but the law does not preempt state or local regulation, and about half the states have enacted anti-polygraph statutes. Even when testing is not prohibited, it has been challenged in court with success. The Texas Supreme Court held that a state agency's use of mandatory polygraph testing violated the state constitution's right to privacy. And, the Montana Supreme Court determined that a state law allowing polygraph testing of law enforcement personnel but not other government employees violated the state constitution's equal protection clause (the Washington Supreme Court reached a contrary result). If polygraph testing is used, questions about characteristics protected by anti-discrimination laws should be avoided because they suggest that hiring decisions will be based on those factors.

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Some organizations seek to refine the hiring process by using personality and psychological tests, such as the Myers-Briggs Type Indicator (which provides information about decision-making styles and interpersonal interactions) and the Minnesota Multiphasic Personality Inventory (MMPI) (which tests for some adult psychopathologies). Not surprisingly, given the controversial nature of psychological testing, there are legal restraints on the use of such tests. If a test is a *medical exam* under the Americans with Disabilities Act (ADA), which some courts have found the MMPI to be, it may not be administered until after a *conditional offer* of employment has been made. And if a disability is then revealed, such as a tendency toward alcoholism, ADA requirements must be followed. Some states—for example, Massachusetts—prohibit the use of any written exam to assess honesty, which includes the MMPI. In general, psychological and personality exams should be used for public sector applicants *only* when state laws allow it and when the tests are job related, such as when public safety is involved. Employers should ensure that tests are given at the right point in time, instruments are valid, results are interpreted and used lawfully, and confidentiality is maintained. Agencies may be required to give individuals access to their own test results under state laws mandating disclosure of medical records.

Medical testing of public sector applicants is usually done to detect drug and alcohol use or the presence of communicable diseases. This testing is subject to legal restrictions as well. Under the ADA, applicants may not be required to answer medical questionnaires or to take medical tests prior to an offer. Post-offer but pre-placement medical exams are permissible and need not be job related. Medical testing of current employees must be job related. For example, an AIDS test may be administered if transmission of HIV is a demonstrable risk. Return-to-work medical exams after disability leave are lawful. The results of such tests must be kept confidential and used in a non-discriminatory way.

An emerging concern is the use of genetic testing for illnesses that might affect job performance, such as Alzheimer's disease. The Genetic Information Nondiscrimination Act of 2008 (GINA) (covered in greater detail in Chapter 4) prohibits employers from discriminating on the basis of genetic information. It bars employers from requesting or requiring genetic testing and from purchasing genetic information about employees, applicants, or their family members. At least 35 states also have laws against genetic discrimination in employment. (A list of state laws and analysis of their coverage is available from the National Conference of State Legislatures.) Although these laws aim to prevent employers from acquiring *genetic information*, employers may still receive it, for example, in a family health history provided as part of a pre-employment health exam, or in documentation supporting a leave request (e.g., a prophylactic mastectomy). If genetic information is revealed, agencies must be careful how they use and maintain it.

Does an applicant's financial history reveal whether the person will be a dependable, trustworthy employee? Perhaps, but Congress enacted the Fair Credit Reporting Act of 1970, as amended in 2003, in part to prevent employers from using inaccurate or arbitrary financial information. To obtain a credit report on an applicant, the prospective employer must ask the applicant to authorize one. Before taking adverse action based on a credit report, the employer must provide the applicant with a copy and advise her of her legal rights. About one-third of the states also have laws regulating the use of credit reports, but the Fair Credit Reporting Act may preempt them. Other laws regulate this area as well. The federal Bankruptcy Act prohibits public and private organizations from denying or terminating employment because an individual has declared bankruptcy.

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Garnishment of wages for child support or other reasons places administrative burdens on employers, but many states forbid adverse action due to garnishment, and if the adverse action has a disparate impact, it may violate Title VII.

Applicants' criminal history records are of great moment to government employers. According to the U.S. Department of Justice, in 2016, over 110 million Americans had a criminal record, which represented a 4 percent increase from two years earlier. (Bureau of Justice Statistics, Survey of State Criminal Information Systems, 2016; U.S Dept. of Justice, 2016). Three types of laws address the necessity/permissibility of criminal background checks. In the first category are laws that mandate pre-employment criminal record reviews. These laws cover applicants seeking positions with access to vulnerable persons (e.g., children, the elderly, patients, and prisoners) and positions of great trust (e.g., with the lottery, in nuclear power facilities, and in law enforcement). Common-law doctrines also may oblige an agency to take this step. For example, an employer may be liable for negligent hiring if it fails to perform a check and, as a result, unreasonably exposes coworkers or others to a dangerous person who harms them. A second group of laws allow but do not require checks. Lastly, a third group of laws restrict access to or use of criminal records or allow applicants to withhold them.

Deciding what to do about criminal records revealed is a separate policy choice. Governments may disqualify persons convicted of certain offenses (e.g., felonies) for certain jobs, either permanently or for a set period, or they may consider each applicant's situation individually. A few states prohibit discrimination against applicants with criminal records. Even in states without laws of this type, constitutions and Title VII provide some protection. For example, a state law prohibiting the hiring of all convicted felons for civil service positions was held to violate the federal Equal Protection Clause, and an agency's refusal to hire individuals with arrest records violated the state constitution. In another case, the blanket rejection of all convicted felons was held to be disparate impact race discrimination under Title VII. Criminal record checks are necessary for many positions, but managers should pay attention to applicable laws, the relationship between the crime and the position, and the time elapsed since the conviction. They also should base restrictions on convictions, not arrests. The EEOC publishes helpful guidance on this topic.

Post-Employment References

Should a former employer be able to limit a person's job prospects by providing a negative reference? There is a striking paradox here between the needs of employers and those of employees. Open communication about employees in the job market promotes efficient hiring, but protecting individuals from **defamation** is essential. A job reference is defamatory if it contains a false statement that injures an individual's work reputation. Written defamation is libel; spoken defamation is slander. References with *unfounded* allegations of misconduct, incompetence, poor performance, criminal or other illegal conduct, dishonesty, or falsification of records are defamatory because they impugn the employee's ability or fitness for a job. Employers who provide job references have a common-law *privilege* that broadly protects them from liability for defamation, but they lose that protection if they provide information they know is false, act with reckless disregard for the truth or falsity of the information, communicate the information to persons who are not within the purpose of the privilege, or excessively publish it. In addition to this common-law shield,

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approximately 36 states have enacted legislation protecting employers who provide job-related information in good faith. Still, some organizations believe the safer approach is to provide abbreviated references, usually job title, dates of employment, and salary history (Cooper, 2001). If an agency allows its supervisors to give references, it should provide them with training on how to compose lawful ones.

DISCRIMINATION

Antidiscrimination Laws

The *big three* federal antidiscrimination statutes—Title VII of the **Civil Rights Act of 1964**, the **Age Discrimination in Employment Act of 1967 (ADEA)**, and the **Americans with Disabilities Act of 1990 (ADA)**—are discussed below. The cumulative effect of these laws is that employers may not discriminate against employees on the basis of race, color, national origin, religion, sex (gender), age (40 years and older), or disability. A host of other federal laws and myriad state and local laws forbid discrimination based on additional criteria, such as sexual orientation, gender identity, marital status, familial status, medical condition, political affiliation, military discharge status, weight, height, and physical appearance.[8]

In public employment, an oft-cited goal of anti-discrimination laws and affirmative action initiatives is a representative bureaucracy. Has this objective been accomplished? A study using data from 2000 found that the federal government employed a higher proportion of African Americans, Asian Americans, and persons categorized as *Native Americans and others* and a lower proportion of Hispanics than would be expected based on the labor pool, leading the authors to conclude that affirmative action programs have increased the overall representation of minorities but benefited certain groups at the expense of others (Kogut & Short, 2007). Other scholars have noted that, as of 2000, women were still grossly underrepresented in high-level positions (Hsieh & Winslow, 2006). More generally, critics contend that current anti-discrimination law is out-of-date because it addresses only conscious prejudice, not unconscious bias, which persists (Cunningham, Preacher, & Banaji, 2001). The demographic changes in America's workforce, the legal erosions of affirmative action, and new understandings derived from psychological and sociological research pose ongoing challenges to those devising future *diversity* efforts, a topic covered in Chapters 3 and 4. (Exhibit 2.5 explains how antidiscrimination laws are enforced in the public sector.)

Intentional Discrimination

Title VII, the ADEA, and the ADA make it unlawful for an employer to make an adverse employment decision *because of* an individual's race, color, religion, sex, national origin, age, or disability. The most straightforward claim is one alleging **disparate treatment discrimination**, also known as intentional discrimination. Under this theory of liability, proving the motivation of the employer is key. But proving a person's state of mind is difficult; a manager's thought process cannot be observed, so her motivation must be inferred from statements and actions. One way a plaintiff may prove discriminatory motivation is with **direct evidence**—a written or oral statement revealing bias—for example,

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Exhibit 2.5 It's Good to Be the Government

An employee seeking to enforce Title VII against a private company initially must file a complaint with the Equal Employment Opportunity Commission (EEOC) or a comparable state agency. These agencies are charged with investigating discrimination and retaliation claims, determining whether they have merit, trying to conciliate disputes, and sometimes prosecuting cases themselves. In most cases, Plaintiffs eventually may file civil suits in courts and, if successful, may receive awards of damages, including lost pay, attorneys' fees, compensation for mental anguish, and punitive damages.

Both Title VII and the Rehabilitation Act add an extra layer of procedure for federal workers. Every federal agency has an equal employment opportunity counselor who initially must review a complaint. If the counselor cannot resolve it, the agency investigates, holds a hearing if requested, and issues a decision. Only then may an unsatisfied employee file a complaint with the EEOC. If the employee eventually succeeds in court, the government's financial exposure is less; no punitive damages are available against governments.

Congress likewise benefits from unique enforcement provisions. The Congressional Accountability Act of 1995 applied the protections of 11 employment laws to employees of Congress but created special procedures and remedies for them. Following suit, the Judicial Conference of the United States recommended that employees in the federal court system have rights comparable to those in the legislative branch.

Title VII covers state and local governments if they have 15 or more employees, but personal staff, legal advisers, and policy-making assistants have special procedures and minimal remedies. Due to sovereign immunity, employees cannot use the Age Discrimination in Employment Act or the Americans with Disabilities Act to sue state governments.

a supervisor calling an employee a *black radical* while firing him. The timing and context of a statement are important. For example, a supervisor's remark that all Italians are *mobsters and goombahs*, uttered to a coworker several months before the employee's discharge, was not adequate to prove anti-Italian bias toward the plaintiff at the time of his discharge.

The civil rights laws are decades old, and few supervisors, even if they harbor strong prejudices, are unwise enough to vent them. A more common and more complicated way an employee may prove intentional discrimination is through **indirect or circumstantial evidence.** Here, the plaintiff relies on the employer's actions to support an inference of an unlawful motive. First, the plaintiff must present evidence that he or she was treated differently based on a forbidden criterion. (In a hiring case alleging race discrimination, the Supreme Court said the plaintiff could do this by proving that the complainant belongs to a racial minority; that the complainant applied for and was qualified for a job for which the employer was seeking applicants; that, despite the complainant's qualifications, he or she was rejected; and that, after the rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications. These elements can be adapted to fit promotion, discharge, and other adverse action claims.) Second, the employer can defeat the plaintiff's claim by presenting evidence that it had a *legitimate business reason* for its action. Third, the plaintiff can introduce evidence to show that the

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employer's stated business reason was a *pretext* to hide its real discriminatory motive. This analytical approach, known as the **McDonnell Douglas burden-shifting framework**, was announced by the Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), and it is used in the vast majority of discrimination cases.

Employers have many defenses available. Typically, an agency argues that the adverse action was prompted by a legitimate business reason and the supervisor had no discriminatory intent. But, sometimes the evidence shows that the supervisor had a *mixed motive*, meaning that he or she was motivated by a legitimate business reason *and* an unlawful criterion. Imagine, for example, a boss who fires a prison guard for arriving late and for speaking Spanish to coworkers on breaks. Under Title VII, if an employer proves it would have made the same decision without considering the illegal factor, the victim's remedies are limited to a declaration that the conduct was unlawful, reinstatement, and attorney's fees. Under the ADEA and ADA, a mixed motive is an absolute defense; the plaintiff receives nothing.

Title VII and the ADEA prevent employers from segregating workers in positions on the basis of a proscribed dimension. For example, employers may not limit job applicants for a position to those under 40 years of age. But, these acts allow segregation in the rare circumstances where it is an essential requirement of the position, known as a *bona fide occupational qualification* (BFOQ). An example would be auditioning only female actors for a female role. Race is never a BFOQ. Today, BFOQs are seldom utilized because they are difficult to defend. Thus, a men's prison may not make *being male* a job qualification for guards unless it can show that, for job-related reasons, females must be excluded. (Exhibit 2.6 discusses the need to prohibit employers from making decisions based on sexual orientation and gender identity.)

Exhibit 2.6 Inclusive Nondiscrimination Policies: Sexual Orientation and Gender Identity and Expression

Kristin M. Brown, MSW, MPA

The manner in which employment discrimination laws affect gay, lesbian, bisexual, and transgender people is evolving. On the federal level, several federal circuits are at odds with whether Title VII applies to discrimination on the basis of gender identity or sexual orientation. Several cases each year seek Supreme Court review, but none to date has been accepted by the Court. In states and local jurisdictions, several laws and ordinances have been passed, which afford protection from discrimination in these areas; while other jurisdictions have chosen not to protect such characteristics.

Federal statutes prohibit job-related discrimination on the basis of race, color, religion, sex, national origin, age, or disability for companies with more than 15 employees. In 1998, Executive Order 13087 outlawed discrimination related to *sexual orientation* in federal civilian employment, except for the Central Intelligence Agency, the National Security Agency, and the Federal Bureau of Investigation; in 2014, President Obama issued Executive Order 11478, which added *gender identity* as a protected category. This order also amended Executive Order 11246 to prohibit discrimination by federal contractors. The Don't Ask, Don't Tell Repeal Act of 2010 sought to improve

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conditions for gay, lesbian, and bisexual people in the military, but it does not apply to transgender people.

Currently, 21 states and Washington, D.C., prohibit discrimination based on *sexual orientation* (Human Rights Campaign [HRC], 2014c). Of these, 18 states and Washington, D.C., also prohibit discrimination based on *gender identity*. So far, 190 local governments prohibit discrimination based on *gender identity* as well as *sexual orientation* throughout their areas (HRC, 2014a). At the time of this writing, 2,211 private sector companies, 175 nonprofit organizations, and 577 universities and colleges include *sexual orientation* as a protected category in their nondiscrimination policies (HRC, 2014b). At least 790 of the private sector companies, 35 of the nonprofit organizations, and 104 of the universities and colleges also include *gender identity* as a protected category (HRC, 2014b). Some of the policies also include *gender expression* as a protected category.

Efforts have been made since 1974 to pass legislation in Congress such as the Employment Non-Discrimination Act (H.R. 1755; S. 815), which includes protections for transgender people; it passed in the Senate in 2013, but not in the House. Policies that prohibit discrimination based on anatomical *sex* and *sexual orientation* do not adequately protect all people from discrimination (Sellers, 2014). *Sexual orientation* refers to attraction, while *gender identity* and *gender expression* refer to individuals' sense of their gender. A transgender person's inner sense of gender identity differs from the gender that individual was assigned at birth. To protect all people from discrimination related to actual or perceived gender and sexual orientation, nondiscrimination policies need to include reference to *gender identity* and *gender expression*.

Simply having inclusive nondiscrimination policies is not adequate; such policies must be implemented. In addition to revising their nondiscrimination statements, employers should update other employment policies (Sellers, 2014). The Affordable Care Act prohibits discrimination on the basis of sexual orientation and gender identity for plans provided through state and federal health insurance marketplaces. Lifetime limits and denial of coverage due to preexisting conditions, such as HIV, also are prohibited. Many health insurance policies specifically exclude medical procedures and prescriptions for transgender persons' health care. Since May 2014, Medicare claims for transgender health care have been processed like other claims and are no longer specifically excluded (National Center for Transgender Equality, 2014). The state of Massachusetts provides health care coverage for low-income and disabled transgender people, and such coverage is provided through Medicaid in California and Vermont. The Human Rights Campaign's website (www.hrc.org) is a good source of information on how employers can put inclusive nondiscrimination policies into action for improvement in the workplace.

Retaliation

The anti-discrimination statutes not only prohibit discrimination but also prohibit reprisal. Title VII, the ADEA, and the ADA, as well as nearly every other federal law listed above, make it unlawful to discriminate against an individual because of *opposition* to a prohibited employment practice or because of *participation* in an investigation, proceeding, or hearing. An employee who reports being sexually harassed and is fired as a consequence is a victim of **retaliation.** To prevail on a retaliation claim, a plaintiff must prove that she engaged in a protected activity, that adverse action was taken against her, and that there was a causal

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connection between the two. As with discrimination claims, the employer's motive may be proven with direct or indirect evidence.

In 2017, retaliation claims accounted for approximately just under 50 percent of all charges filed with the EEOC. To put that into context, in 2005, retaliation claims only comprised 29 percent of all claims. Strategically, such claims offer plaintiffs an advantage: Causation is often easier to prove than in discrimination claims. The time sequence alone—protected activity followed by discipline—may be enough to suggest a cause-and-effect relationship, especially if the events occurred close together. In general, however, if an adverse action occurs more than six months after protected activity, there is no causation between the two absent other evidence. From the employer's perspective, these claims are a disincentive to discipline or otherwise take action against an individual who recently engaged in protected activity. This is primarily because *adverse action* in the retaliation context is broader and easier for the employee to establish. Recall that in a discrimination claim, adverse action means a serious and material adverse change to the employee's terms and conditions of employment. In 2006, the Supreme Court clarified that in the retaliation context, adverse employment action means action which might *dissuade a reasonable worker from* engaging in protected activity (*Burlington Northern & Santa Fe Railway Co. v. White*, 2006).

Harassment

Title VII makes it unlawful for an employee to be subjected, on the basis of a proscribed criterion, to unwelcome **harassment** that is severe or pervasive enough to create an objectively hostile or abusive work environment. Many people associate harassment claims with gender discrimination (i.e., sexual harassment), but a claim is viable if an employee is harassed due to any characteristic listed in Title VII, the ADEA, or the ADA. Typically, it is the behavior of supervisors, coworkers, and others who interact regularly with the employee that creates a **hostile environment**. Indeed, harassment claims can be based on the statements or conduct of vendors, customers, or even elected officials.

Whether objectionable conduct is severe or pervasive enough to be unlawful is often the pivotal question. These laws are not *general civility codes*, and they do not provide redress for behavior that is boorish, rude, abrasive, unkind, or insensitive. Courts look at the gravity, frequency, duration, character, and threatening nature of the conduct. Occasional racial or ethnic slurs are seldom enough to create a hostile environment, but a 6-month period of being called *ayatollah* and *camel jockey* was sufficient to support an Iraqi employee's claim. In another case, a female employee who acquiesced to her supervisor's ongoing unwelcome sexual conduct established a claim. And, non-English-speaking workers forced to abide by an employer's English-only rules were successful.

In 1998, the Supreme Court decided two companion cases, and established a a defense for an employer facing a hostile environment claim. Known as the **Ellerth/Faragher affirmative defense**, an employer can avoid liability for harassment if it can show it exercised reasonable care to prevent and correct the harassment, and the employee unreasonably failed to use the remedial procedures. An organization can reasonably prevent harassment by adopting adequate policies and procedures, ensuring that all staff members receive the policies, and training supervisors to handle complaints promptly and thoroughly. The Virginia Department of Corrections is a good example of an employer that avoided liability by quickly correcting harassment. A supervisor distributed a memo

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to prison personnel about dress codes and identified the plaintiff as someone who wore attire that was too revealing. After the memo was distributed, coworkers made crude jokes. Managers at the prison prevented public posting of the memo, counseled the supervisor who wrote and distributed it, admonished the employees who made the offensive remarks, and stopped the harassment. When nonsupervisory coworkers or nonemployees (such as customers, contractors, or others sharing the work site) create a hostile work environment, the agency is responsible if it was negligent, meaning if it knew or should have known about the harassment and failed to take prompt and appropriate corrective action.

One of the toughest hostile environment claims to defend against is one that involves **tangible employment action**—a significant change in employment status, such as hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a significant change in benefits. An example would be an administrative assistant who resists a boss's sexual demands and is given less desirable work assignments. If a supervisor takes tangible employment action against a victim based on unwelcome sexual conduct, the employer faces a tough legal battle because the *Ellerth/Faragher* affirmative defense is not available. In 2013, however, the Supreme Court clarified that for purposes of determining employer liability for harassment cases, a *supervisor* is limited to those who are empowered by the employer to take tangible employment actions against the employee. (*Vance v. Ball State Univ.*, 2013). For managers, the lesson is that all personnel actions should be scanned for improper motivation.

Affirmative Action

Beginning in the early 1960s, many government employers voluntarily adopted **affirmative action** plans to increase the numbers of employees from groups historically excluded from their workplaces. They also adopted rules requiring vendors seeking contracts from the government to adopt such plans. These plans used various means to achieve a more representative workforce, including targeted recruitment and training programs, numerical goals and timetables, and special preferences in hiring and promotion. In the 1980s and 1990s, court decisions raised doubts about the lawfulness of these plans under both Title VII and the Equal Protection Clause, and most were modified or suspended. Even when affirmative action programs are legal, they are contentious because they contain a conspicuous paradox: They use race-based decision making to remedy harm caused by race-based decision making. Understandably, critics ask: If race was an unfair criterion to use in the past, how can it be a fair criterion to use now? (Such programs do include women and other minorities, but the debate over affirmative action usually is couched in terms of race.)

Title VII protects all groups, including majority groups, from discrimination. As a result, a white employee, for example, who has been treated disparately on the basis of race due to an affirmative action plan may use Title VII to bring an action for *reverse discrimination.* Additionally, Title VII requires any affirmative action program to be described in a formally adopted plan. The plan must remedy conspicuous racial imbalances in traditionally segregated job categories, it must be temporary, its purpose must be to remedy underrepresentation (not to maintain gender or racial balances indefinitely), and it must not unduly trammel the rights of the majority.

Under the Equal Protection Clause, a government affirmative action program based on race or ethnicity is reviewed using the exacting strict scrutiny standard. It is

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constitutional only if it is narrowly tailored to further a compelling governmental interest. To date, only the goal of remedying past discrimination has been compelling enough for the Supreme Court to approve a plan. Furthermore, the government adopting the plan must provide convincing proof of its own past discrimination.[9] If an affirmative action program is based on gender rather than on race or ethnicity, it receives less rigorous intermediate judicial scrutiny; it will be approved if it has a substantial relationship to an important governmental interest.

The most prominent case in this area in the recent past did not involve employment. In 2003, the Supreme Court decided in *Grutter v. Bollinger* that the University of Michigan Law School could constitutionally use a race-conscious admissions policy because the law school had a compelling interest in attaining a diverse student body. In 2016, the Supreme Court handed down its decision in *Fisher v. University of Texas*, which upheld an affirmative action program geared towards admissions. The impact of these decisions in the public employment context is still unclear. Prior to *Grutter*, it was widely accepted that attaining workforce diversity was not a sufficiently compelling reason for a race-based program. But after *Grutter*, the Seventh Circuit approved a plan by the city of Chicago to increase diversity among its police sergeants. The city's compelling reason was its desire to set the proper tone in the department and to earn the trust of the community, which in turn would increase police effectiveness. This is an area where caution and expert advice are necessary. A plan that seeks cultural diversity runs the risk of being denounced as unlawful racial or ethnic balancing.

In rare cases, affirmative action plans may be involuntarily imposed on employers by courts to remedy past discrimination. In 1987, for example, after years of litigation, a federal court ordered the Alabama Department of Public Safety to use quotas to increase the number of minority state troopers. The Supreme Court approved the plan because of the department's history of overt and defiant racism.

Unintentional Discrimination

In addition to intentional discrimination, Title VII, the ADA, and the ADEA prohibit neutral practices that inadvertently produce a disproportionate or disparate impact on a protected group. The Supreme Court first accepted the theory in *Griggs v. Duke Power Co.* (1971), and it was codified in the Civil Rights Act of 1991. **Disparate impact discrimination** claims most frequently challenge hiring and promotion devices, but the theory can be used for layoffs (sometimes referred to as Reductions in Force [or RIFs]) and other employment practices. To aid enforcement, the EEOC requires employers to maintain records of all hiring, promotion, and firing by race, sex, and national origin. Hiring and promotion test scores also must be kept.

To prove disparate impact, an employee must show that a specific selection device had an exclusionary effect. In *Griggs*, a high school graduation requirement and a battery of aptitude tests disproportionately excluded blacks from being hired. There is no *bright line* rule stating how much disparity is unlawful, but the EEOC uses an 80 percent, or four-fifths, *rule of thumb*. If the qualification rates of protected groups are less than 80 percent of the rate of the highest group, then the selection device is suspect. The Supreme Court has disparaged the EEOC's *80 percent rule* and has stated that a *case-by-case* approach is necessary because "statistics come in a variety and their usefulness depends on all the

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surrounding facts and circumstances" (*Watson v. Fort Worth Bank & Trust*, 1988). Still, since the EEOC investigates and determines the merit of claims, and sometimes prosecutes them, agencies should use the 80 percent rule as a guide.

An employer can defend against a disparate impact claim by showing that a challenged practice is job related and a business necessity. This defense can be used for subjective procedures, such as interviews, and objective procedures, such as tests. To defend tests as job related, agencies must prove their validity. The EEOC adopted the *Uniform Guidelines on Employee Selection Procedures* to assist organizations with this endeavor. If a test is proven to have predictive validity, content validity, or construct validity under these guidelines, then it is job related and its use is justified even if it has a disparate impact. (Chapter 4 explains these validation methods in detail.)

Rather than validating tests, some employers have sought to avoid disparate impact claims by using scores creatively. For example, one agency adopted a cutoff score above which test performance was irrelevant; the court, however, ruled that the cutoff score had to be validated. Another minimized the relative weight of the exam in the selection process; here, the court found the practice to be an unlawful affirmative action plan. Others took the top scores in each racial and gender group, a practice known as **race norming**, now prohibited by the Civil Rights Act of 1991. Still others used **banding**, meaning they treated applicants within a certain range as having identical scores. So far, this process has not been found unlawful, but certain aspects (such as bandwidth) may need to be validated. Finally, the city of New Haven invalidated test results altogether because none of the minority firefighters who passed the exam scored high enough to be considered for the vacant positions, and the city did not want to risk being found guilty of disparate impact discrimination. The Supreme Court held that New Haven's decision to ignore test results violated Title VII.

Age

The ADEA is the primary federal statute prohibiting age discrimination. Perhaps a product of views when it was passed, the act forbids discrimination in the terms and conditions of employment on the basis of age, which means against those at least 40 years old. There is no claim for reverse discrimination by the young. Unlike Title VII, the ADEA does not allow an employee to prevail based on a mixed motive; instead the employee must show that *but for* her age the employer would not have discriminated against her. Involuntary retirement generally may not be required, but mandatory retirement is permissible in public safety and executive policy-making positions. Voluntary early retirement incentives are permitted. The act provides a defense for an employer that uses a bona fide seniority system, and in rare instances age may be a bona fide occupational qualification. But, employers cannot rely on stereotyped assumptions about older workers' strength, endurance, or speed. Courts have struck down rules that limited the position of flight engineer to those under age 60 and that of bus driver to those under 65.

Disability

The ADA prohibits discrimination against any qualified person with a physical or mental impairment that substantially limits a major life activity. It also protects those with records of impairment, those regarded as impaired, and those who associate with impaired persons.

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Employers must provide qualified disabled persons with **reasonable accommodation**. The terms *qualified person*, *substantially limits*, and *major life activity* have spawned considerable litigation. When it was enacted, the ADA was hailed as a major step toward eradicating disability discrimination, but the Supreme Court issued several decisions that sharply limited the scope of the statute (Selmi, 2008). In response, Congress amended the ADA in 2008. The ADA Amendments Act (ADAAA) rejected numerous Supreme Court decisions and EEOC regulations narrowing the act's coverage, and emphasized that the definition of *disability* should be interpreted broadly. One change is that the determination of whether a person has an impairment that qualifies for coverage now is made without any consideration of the impact of mitigating measures, such as medication or prosthetics (the impact of ordinary eyeglasses and contact lenses is considered). Still, even after the amendments, the line between minor conditions that are not covered by the act and substantially limiting impairments that are covered is often muddied. In an attempt to provide more clarity, the EEOC issued regulations with examples of impairments that easily should be concluded to be disabilities, including epilepsy, diabetes, cancer, HIV infection, and bipolar disorder.

To be covered by the ADA, a disabled person must be able to perform essential job functions. This means managers should identify essential job functions in a written job description and ask applicants if they can do them. When an employee requests to be accommodated, managers should make an individualized assessment, with the assistance of the human resource and legal experts, to determine if the person meets threshold conditions to be covered by the act. (Of course, an employer may voluntarily provide accommodation even when it is not legally required.) For qualified persons, accommodations likewise should be determined through individualized assessments. These might include, for example, reserved parking, special equipment, personal aides, part-time or flextime work schedules, and building renovations. Accommodations that cause an *undue hardship* to employers are not required, but it is incumbent on the employer to prove that the requested accommodation is an undue hardship.

Religion

Religious employees may request time off for sacred holidays, schedules omitting work on the Sabbath, breaks during the workday to pray and a place to do so, and exceptions to dress and grooming codes. Title VII does more than simply prohibit religious discrimination. Similar to the ADA, it requires employers to make reasonable accommodation for religious beliefs and practices that do not impose undue hardship. *Reasonable accommodation* means that which is minimally necessary for the individual to fulfill his or her religious obligation or conscience. Organizations are not required to compensate workers for time off the job fulfilling religious duties, or to alter work schedules or duty assignments. According to the EEOC (2008), the most common forms of accommodation are (1) flexible scheduling, (2) *voluntary* substitutes or swaps of shifts and assignments, (3) lateral transfer or change of job assignment, and (4) modification of workplace practices, policies, or procedures. The Free Exercise Clause of the First Amendment (as balanced by the Establishment Clause) may expand a public employer's duty to accommodate religiously motivated requests, but the law is unclear. The impact of the Religious Freedom Restoration Act of 1993 on the duty to accommodate also is uncertain. Managers need not accept an employee's suggestion for accommodation, but if the employee offers one, it should be considered.

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The *Religious Discrimination* section of the *EEOC Compliance Manual* is available online and is a helpful resource for managers responding to accommodation requests (EEOC, 2008).

Preventing and Responding to Discrimination Claims

How can managers prevent discrimination and retaliation claims from occurring and successfully defend those that do arise? Agencies should *have* and be able to *prove* legitimate business reasons for the actions they take. Some basic strategies enable managers to do this. First, agency leaders should not act rashly, but should carefully gather and review all the facts before making personnel decisions. They should consciously articulate and use job-related criteria. By deliberating with other professionals, managers can make sounder and more defensible decisions, as such collective decisions are less likely to have been influenced by any one individual's bad motives. Communication with employees also is essential. Open, two-way communication eliminates surprises, reduces the likelihood of suit, and increases the agency's odds of winning. This should include regular, timely performance evaluations (i.e., not necessarily annual), with positive and negative feedback, and articulation of organizational expectations. When problems arise, supervisors should promptly discuss them with staff members and immediately write summaries of the conferences. Documenting such communication not only underscores management's seriousness but also provides credible evidence. Judges and juries consider contemporaneous business records eminently more reliable than the self-serving testimony of individuals. Organizations should have policies in place prohibiting discrimination, should update them regularly, and should ensure that supervisors and employees receive them. Finally, supervisors and managers should treat all complaints of discrimination and retaliation seriously, regardless of whether complaints are made formally or informally.

SUMMARY AND CONCLUSION

Workplace laws reflect a balance among three competing objectives: managerial efficiency, employee rights, and social aspirations of the law. This balance is not fixed. Rather, it changes to reflect lawmaking and decision making over time, as well as cultural norms. At present, a trend exists to interpret laws in favor of managerial efficiency. Employee rights are becoming ever more narrowly defined.

For example, staff members have few privacy rights at work. *Reasonable* searches of their offices, computers, phones, and excretory fluids are permitted, as is surveillance of their movements. Workers may be required to alter their dress and grooming habits. Applicants for certain jobs may be investigated extensively. Employees must be careful what they say at work. They may be punished for disruptive speech, or for pointing out agency problems they notice as they carry out their duties. Greater numbers of government jobs are being made *at will*, so that the people in them can be fired without cause, notice, or explanation.

Still, certain rights remain intact. If an employee has a property interest in employment, he or she cannot be discharged except for cause, and the person must be provided with due process before adverse action can be taken. Certain reasons for taking adverse action remain prohibited: An employer may not discipline an employee for speaking about a matter of public concern in a non-disruptive way (if the comments were not pursuant

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to the job), for *blowing the whistle* in a manner protected by a whistleblower statute, or for being a member of the *wrong* political party after an election (unless party membership is necessary for the job). An employer cannot retaliate against an individual for participating in a proceeding to enforce a law or for opposing violation of a law. Antidiscrimination laws forbid an employer to intentionally or unintentionally make an employment decision based on a proscribed dimension (and in some areas of the country the list of proscribed dimensions is expanding). Employees must be paid at least a minimum wage and time and a half for overtime (unless they are exempt), must be paid the same as members of the other gender, and must be awarded pensions they already have earned. OSH acts require work sites to meet safety standards, and workers' compensation, health insurance, and FMLA leave provisions provide a safety net for those who become hurt or sick. Public employees rarely are held individually responsible for violating a law.

Of course each *law* described above has conditions, exceptions, and gray areas. Managers who expect the law to provide an exhaustive, well-defined set of prohibited behaviors will be disappointed. Statutes are broad and vague, and court decisions analyze specific conduct under specific conditions. What are administrators to do when the law and their own employers fail to provide definitive guidance? They must form their own judgments. The basis for such judgments is the intent of the law—the values that underlie the cases and statutes discussed in this chapter. For example, if supervisors must respect employees' privacy, then it follows that they should ask permission when they think privacy expectations might be violated, even if they are unsure whether a *right* exists. If employees refuse to cooperate, resolution should be attempted through collaboration, perhaps with assistance from other managers. Cases and laws seldom provide clear-cut answers, but they do provide guideposts that managers can use to ensure that their actions are consistent with the spirit and aims of legislation and court decisions. Exhibit 2.7 provides a practical illustration of how various topics in this chapter come together in a real-life scenario.

Directions: This case seemingly relates only to the disabled, but it raises legal and ethical issues with broader implications.

1. Brainstorm the ethical and legal implications of wearables in the workplace. Do you agree that the EEOC should put limits on the types of information gleaned from data mining by employers? Why or why not?
2. Beyond the 20 percent of disabled potentially excluded from such programs, what of the *temporarily abled* (the other 80 percent) who may be affected?
3. Principles like privacy, trust, fairness, security, and personal autonomy are mentioned in the case. How is each principle important when considering employer-sponsored wearable initiatives?
4. Zack intends to contact five stakeholder groups about his misgivings; how do you think each will respond? Why?
5. What kinds of legal concerns might arise under each of the four laws mentioned in the case? Be specific in your response.

Exhibit 2.7 Case Study: Warables, Law, Ethics, and Disabilities

Zachary Delman is a Gulf War veteran who graduated from law school after his military service. He is now working as a budget analyst at the national headquarters of a large nonprofit organization. Zach has been confined to a wheelchair since his diagnosis with ALS (amyotrophic lateral sclerosis) or Lou Gehrig's disease. His condition resulted in progressive neuromuscular deterioration. Zach has been able to work, but his mobility is limited.

Recently his nonprofit initiated, as part of its wellness program, a competitive exercise

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