

staffing may have resulted in a predominantly white male workforce. A change to a nondiscriminatory external staffing system may increase the presence of women and minorities within an organization, but they will still have less seniority than the white males. If eligibility for promotion is based on seniority and/or if seniority is an actual factor considered in promotion decisions, those with less seniority will have a lower incidence of promotion. Thus, the seniority system will have an adverse impact on women and minorities, even though there is no current intention to discriminate. Is such a seniority system bona fide?

Two points are relevant here. First, the law does not define "seniority system." Generally, however, any established system that uses length of employment as a basis for making decisions (such as promotion decisions) is interpreted as a seniority system. Promotions based on ad hoc judgments about which candidates are "more experienced," however, would not likely be considered a bona fide seniority system.<sup>19</sup> Seniority systems can and do occur outside the context of a collective bargaining agreement.

Second, current interpretation is that, in the absence of a discriminatory intent, virtually any seniority system is likely to be bona fide, even if it causes adverse impact.<sup>20</sup> This interpretation incentivizes the organization not to change its current seniority-based practices or systems. Other pressures, such as the Affirmative Action Program Regulations or a voluntary AAP, create an incentive to change in order to eliminate the occurrence of adverse impact in promotion. The organization thus must carefully consider exactly what its posture will be toward seniority practices and systems within the context of its overall AAP.

Under the Americans With Disabilities Act (ADA) there is potential conflict between needing to provide reasonable accommodation to an employee (such as job reassignment) and provisions of the organization's seniority system (such as bidding for jobs based on seniority). According to the Supreme Court, it will ordinarily be unreasonable (undue hardship) for a reassignment request to prevail over the seniority system unless the employee can show some special circumstances that warrant an exception.

## The Glass Ceiling

The "glass ceiling" is a term used to characterize strong but invisible barriers to promotion in the organization, particularly to the highest levels, for women and minorities. Evidence demonstrating the existence of a glass ceiling is substantial. The overall labor force is 74% white and 54% male. At the very top in large corporations, senior-level managers are overwhelmingly white males. As one goes down the hierarchy and across industries, a more mixed pattern of data emerges. Equal Employment Opportunity Commission (EEOC) data show that nationwide the percentage of women who are officials and managers has increased to over 36.4%. In some industries, particularly health care, retail, legal services, and banking, the percentage of women managers is substantially higher. Women account