Chapter Two:
Civil Rights Laws

"Being an American is about having the right to be who you are. Sometimes that doesn't happen."

— Herb Ritts

Chapter Two

CIVIL RIGHTS LAWS

Chapter Objectives

After reading this chapter, you should be able to:

- know what equal employment laws are and how the EEOC works to enforce them.
- understand the civil rights laws.
- know who the protected classes are.
- understand who the age discrimination laws protect.
- explain how the workforce can protect the rights of protected classes.
- clarify what it means to abide by Title VII of the Civil Rights Act of 1964 in the workplace.

Levels of the Law

When it comes to the law there are various levels of the law that apply to discrimination. Title VII of the Civil Rights Act of 1964 provides federal protection to individuals from discrimination and these laws apply to the entire country. Along with the federal law, there are state laws that cover each state and provide protection from discrimination. Each state has the right to include protected classes not covered by the federal laws. For instance, there are currently many states that protect individuals from discrimination on the basis of sexual orientation. Lastly, there are local laws that govern particular districts. There are many local laws that protect against discrimination on the basis of both sexual orientation and gender identity, two entities that are currently not covered by federal discrimination laws.

Equal Employment Laws Say We Should Value Diversity

The foundation for Equal Employment Opportunity (EEO) Laws can be traced back to the U.S. Constitution. However, significant progress in shaping current laws was made between 1941 and 1991. Executive Orders barring discrimination, passage of the Title VII of the Civil Rights Act of 1964 and the Equal Employment Act of 1972 are often cited as the cornerstones for eliminating employment discrimination on the federal level.

The above laws are enforced by the Equal Employment Opportunity Commission (EEOC). The Commission is composed of five Commissioners and a General Counsel appointed by the U.S. President and confirmed by the Senate. Commissioners are appointed for five-year staggered terms; the General Counsel's term is four years.[1] The President designates a Chair and a Vice-Chair and the Chair is the chief executive officer of the Commission.[2] The Commission has authority to establish equal employment policy and to approve litigation. The General Counsel is responsible for conducting litigation.

The EEOC carries out its enforcement, education and technical assistance activities through 50 field offices serving every part of the nation. The EEOC is an independent federal agency originally created by Congress in 1964 to enforce Title VII of the Civil Rights Act of 1964.[3] In addition, the EEOC enforces the following federal statutes prohibiting employment discrimination, including: the Age Discrimination in Employment Act of 1967, Title I of the Americans with Disabilities Act of 1990, and the Equal Pay Act of 1963.[4] The descriptions following provide a brief summary of these laws.

EEO Laws

Source: EEO Laws and Regulations found at http://www.eeolaw.org/law.html[5]

Title VII of the Civil Rights Act of 1964

Prohibits employment discrimination because of race, color, sex, national origin, and religion. Prohibits retaliation for opposing discrimination, filing a complaint, or participating in a related proceeding.

Age Discrimination in Employment Act of 1967

Prohibits employment discrimination because of age against persons age 40 and older. Prohibits retaliation for opposing age discrimination, filing a complaint, or participating in a related proceeding. This law was amended by the Older Workers Benefit Protection Act which sets minimum criteria that must be satisfied before a waiver of any ADEA right is considered a "knowing and voluntary" waiver.

Americans With Disabilities Act of 1990, Titles I and V

Prohibits employment discrimination because of: mental and physical disabilities that substantially limit a major life activity; or having a record of a disability; or being regarded as having a disability. Requires reasonable accommodation of mental and physical disabilities.

Equal Pay Act of 1963

Prohibits wage differentials based on sex for jobs that require equal skill, effort, and responsibility, and are performed under similar working conditions in the same establishment ("equal pay for equal work").

The following information: Title VII of the Civil Rights Act of 1964 is reprinted with permission from the U.S. Equal Employment Opportunity Commission and clearly explains what constitutes discrimination according to the previous discussed laws.

Title VII of the Civil Rights Act of 1964*[6]

Race & Color Discrimination

As this Act relates to racial/ethnic groups (White/Caucasian, Black/African American, Asian American, Hispanic/Latino and Native American), it is unlawful to discriminate against any employee or applicant for employment because of his/her race or color in regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. It also prohibits discrimination on the basis of an immutable characteristic associated with race, such as skin color, hair texture, or certain facial features. Even though not all members of the race share the same characteristic, there would still be a violation of Title VII based on the previous elements.

Title VII also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups. Title VII prohibits both intentional discrimination and neutral job policies that disproportionately exclude minorities and that are not job related. Equal Employment opportunity cannot be denied because of marriage to or association with an individual of a different race; membership in or association with ethnic based organizations or groups; or attendance/participation in schools or places of worship generally associated with certain minority groups. Title VII also prohibits discrimination on the basis of a condition, which predominantly affects one race, unless the practice is job related and consistent with business necessity.

Furthermore, harassment on the basis of race and/or color such as ethnic slurs, racial "jokes," offensive or derogatory comments, or other verbal or physical conduct based on an individual's race or color constitutes unlawful harassment if the conduct creates an intimidating, hostile, or offensive working environment, or interferes with the individual's work performance. Title VII also states that when you isolate employees on the basis of race or color from other employees or from customer contact this is a violation. It also prohibits assigning mostly people of color to predominantly minority establishments or geographic areas. It is also illegal to exclude minorities from certain positions or to group or categorize

employees or jobs so that minorities generally hold certain jobs. Coding applications/resumes to designate an applicant's race, by either an employer or employment agency, constitutes evidence of discrimination where minorities are excluded from employment or from certain positions.

As it relates to color discrimination this discrimination while categorized with race is slightly different. This slowly emerging form of workplace discrimination is based on color or skin tone. The unlawful conduct is predicated not on a person's specific race or nationality, but on the shade of his or her skin, often involving disputes between people of the same race and among individuals who act on cultural biases based on whether a person's skin tone is lighter or darker.

Vice-Chair Naomi Earp of the Equal Employment Opportunity Commission told a meeting of the American Bar Association that "colorism" represents a potential emerging trend in workplace discrimination claims. Color claims over the past year have risen from 1,400 in fiscal year 2002 to 1,555 in fiscal year 2003, Ms. Earp reported. She noted the increase may signal a trend attributable, in part, to the changing demographics of the American workplace, as more claims of colorism are included along with charges of race discrimination – the most prevalent charge year after year -- under Title VII of the 1964 Civil Rights Act.

Complaints of color discrimination go both ways, although more complaints are brought by individuals with darker skin than those with lighter skin. Ms. Earp reported the majority of charges alleging color discrimination were brought in the EEOC district offices in the cities of New York, Boston, Miami, Chicago, and Houston. She observed that color discrimination is inherent in some cultures, such as in India, Pakistan, and South America. As the United States becomes more culturally and ethnically diverse, awareness of colorism issues grow in importance, Ms. Earp emphasized.

Skin tone bias is not unique among people of color; whites also can equate darker skin with a "negative cultural stereotype." Yet, there is a great deal of uncertainty over whether discrimination based on skin tone is even illegal, although the EEOC clearly takes the position it is. In August, 2003, the EEOC's Atlanta district office announced a $40,000 settlement in a "black on black" discrimination case against a franchisee of a large restaurant chain. The plaintiff was a dark skinned male waiter at the restaurant in Georgia when a light skinned black man began working as the general manager. The manager almost immediately began harassing the plaintiff, continuously

making offensive and embarrassing comments about the dark color of his skin, the EEOC said in its complaint. Co-workers and some customers witnessed the harassment, the EEOC said. Despite the plaintiff's protests, the harassment continued, and the plaintiff eventually threatened to call corporate headquarters. Shortly thereafter, he received the first of four written reprimands for "minor" offenses, EEOC said, followed by his firing. Although the plaintiff did call the restaurant chain's hotline to complain about his treatment before being terminated, allegedly he got no response to his call.

Beyond the monetary settlement in which the employer admitted no wrongdoing, the restaurant agreed to provide anti-discrimination training to its employees and to report any complaints at its Georgia restaurants directly to the EEOC. The restaurant also added a written policy prohibiting discrimination based on color.

Shortly after the restaurant case settlement, a federal judge in New York ruled that an African American employee (who was fired after a darker skinned supervisor allegedly branded her a white "wannabe,") can pursue a race discrimination law suit against her employer. However, despite these and other cases in recent years, claims of color discrimination still represent a very small amount of total employment complaints.

The EEOC received 1,382 charges of color bias in 2002, representing just 2% of all agency claims. Back in 1987, the EEOC received only 459 complaints of color discrimination. By 1999, color bias charges were up to 1,304, and they have held steady ever since. Although the most typical scenario of color discrimination involves lighter skinned African Americans discriminating against darker skinned African Americans, color bias cases also have been brought within other groups, including Native Americans and Arabs.

National Origin Discrimination

No one can be denied equal employment opportunity because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group. Equal employment cannot be denied because of marriage or association with persons of a national origin group; membership or association with specific ethnic groups, attendance or participation in schools, churches, temples or mosques generally associated with a national origin group; or a surname associated with a national origin group.

A rule requiring employees to speak only English at all times on the job may violate Title VII, unless an employer shows it is necessary for conducting business. If an employer believes the English-only rule is critical for business purposes, employees have to be told when they must speak English and the consequences for violating the rule. Any negative employment decision based on breaking the English-only rule will be considered evidence of discrimination if the employer did not tell employees of the rule.

Furthermore, an employer must show a legitimate nondiscriminatory reason for the denial of employment opportunity because of an individual's accent or manner of speaking. Investigations will focus on the qualifications of the person and whether his or her accent or manner of speaking had a detrimental effect on job performance. Requiring employees or applicants to be fluent in English may violate Title VII if the rule is adopted to exclude individuals of a particular national origin and is not related to job performance. In addition, an ethnic slur or other verbal or physical conduct because of an individual's nationality constitute harassment if they create an intimidating, hostile or offensive working environment that unreasonably interferes with work performance or negatively affects an individual's employment opportunities.

Title VII also covers immigration-related practices that may be discriminatory. The Immigration Reform and Control Act of 1986 (IRCA) requires employers to prove all employees hired after November 6, 1986, are legally authorized to work in the United States. IRCA also prohibits discrimination based on national origin or citizenship. An employer who singles out individuals of a particular national origin or individuals who appear to be foreign to provide employment verification may have violated both IRCA and Title VII. Employers who impose citizenship requirements or give preference to U.S. citizens in hiring or employment opportunities may have violated IRCA, unless these are legal or contractual requirements for particular jobs. Employers also may have violated Title VII if a requirement or preference has the purpose or effect of discriminating against individuals of a particular national origin.

Sex Discrimination

Sex discrimination is discrimination based on the birth sex of male or female. Therefore, protection is provided to being born and identifying with your birth sex. As modern society has made clear and you will read further in the text, women have the ability to perform with equal skill and success in every endeavor engaged in by men -- including employment, athletics, academics and politics. Yet

discrimination on the basis of sex used against women has a long history in the United States, and its enduring effects still function to keep women's salaries lower and opportunities fewer in the employment realm. Although less common, men too can be subjected to unlawful sex discrimination. No matter what form sexual discrimination takes -- unequal pay, discriminatory job standards, or failure to promote -- federal law prohibits discrimination on the basis of sex.

But what about protections for those people, who don't identify with their birth sex, are they too protected under sex discrimination? The appropriate term for this is gender identity. Gender identity is when you don't identify with your birth sex and as of the writing of this text gender identity is not a federally protected class like race and sex. However, the Equal Employment Opportunity Commission (EEOC) takes the position that it will entertain charges of discrimination asserting gender identity discrimination and retaliation claims on the basis that such complaints are cognizable under the sex discrimination prohibition of Title VII of the Civil Rights Act of 1964.

Relying on the Supreme Court's decision in *Price Waterhouse v. Hopkins (1989)*, the EEOC has reasoned that the term "sex" in Title VII encompasses both the biological differences between men and women, and gender. Thus, Title VII's prohibition on sex discrimination also proscribes gender discrimination or sex stereotyping, which can be defined as any time an employer treats an employee differently for failing to conform to any gender-based expectations.

For instance, in *Veretto v. U.S. Postal Service (2011)*, the charging party alleged that a coworker continuously made derogatory remarks about his sexual orientation and attacked him after learning that he intended to marry his male partner. The Postal Service ("the Agency") dismissed the complaint on the ground that sexual orientation discrimination is not prohibited by Title VII. However, this decision was reversed, ruling that the EEOC has jurisdiction under a sexual stereotyping theory to investigate whether the claim has merit. The EEOC found that the charging party had sufficiently alleged a plausible sex stereotyping case where the coworker's attack was motivated by the sexual stereotyping that a man should marry a woman.

The EEOC will also consider discrimination against an individual because that person is transgender (a term referring to when one's gender and sex are not always or ever equivalent and often used as a referrant to the person themselves) due to sex which is in violation of Title VII. This is also known as gender identity discrimination. In addition, lesbian, gay, and bisexual individuals may bring sex discrimination claims. These may include, for example, allegations of sexual harassment or other kinds of sex discrimination, such as adverse actions taken because of the person's non-conformance with sex-stereotypes. Title VII's broad prohibitions against sex discrimination specifically cover:

- Sexual Harassment which includes practices ranging from direct requests for sexual favors to workplace conditions that, create a hostile environment for persons of either gender.

- Pregnancy Based Discrimination which includes pregnancy, childbirth, and related medical conditions and must be treated in the same way as other temporary illnesses or conditions.

Sexual Harassment

There are basically two requirements for sexual harassment to be prevalent, unwelcome conduct and incidents of a sexual nature.

Unwelcome Conduct

This conduct is unsolicited meaning the victim has done nothing to incite it and the victim views the conduct as undesirable or offensive. By undesirable, the courts have declared that there is a clear distinction between conduct that is voluntary and that which is unwelcome. A central inquiry of investigations should be whether the alleged harassing activity was unwelcome rather than involuntary and how the parties should have known that. A party may voluntarily be involved in sexual acts even though they don't want to be, solely out of fear of losing their job. This would be an example of unwelcome behavior.

Sexual Nature

Some common examples of sexually harassing conduct that's of a sexual nature are:

- Sexual propositions
- Comments on the sexual areas of a body
- Dirty pictures or jokes of nude or sexually suggestive individuals
- Sexually oriented cartoons
- Other physical or verbal conduct

The requirement can also be fulfilled through nonsexual verbal and physical behavior caused by the gender of the individual being harassed. An example of this is in the case of *Hall v. Leus Construction Company (1993),* here three female plaintiffs were subjected to conduct designed to make their work life difficult and to let them know that women were not welcome on the job site. A few of these acts were as follows: the men involved in the suit urinated in the gas tank of one of the plaintiffs car, they had locked the door of the restroom at the job site and had refused to stop on the road so the plaintiff could go to the

bathroom letting a dangerous condition persist in the plaintiff's truck until a male employee needed to stop to use the restroom. While these acts were not sexual comments or nude displays, they were still sexual in nature because they were based upon the sex of the victim.

When someone has a potential sexual harassment case, there are two ways to make the claim:

1) Quid Pro Quo
2) Hostile Environment

Quid Pro Quo

This claim requires showing of unwelcome activity of a sexual nature in exchange for tangible job benefits ("this for that") or it is also the loss of tangible job benefits owing to the rejection of such activity. This is fundamentally, an abuse of supervisory power.

To establish quid pro quo sexual harassment it is necessary to prove:

1. The person was a member of a protected class (group named in a law as protected from discrimination.) Some protected classes include race, gender, age and religion.
2. The person was subjected to unwelcome harassment.
3. The harassment was based on sex.
4. The person's reaction to the harassment affected tangible aspects of her or his compensation, terms, conditions, or privileges of employment.

Hostile Environment

This claim requires showing of frequent, nontrivial acts of a sexual nature that have created the effect of a hostile, offensive or intimidating working atmosphere. No money damages are required to be shown. To prove this, it is necessary to show the following:

1. The harassment was unwelcome.
2. The harassment was based on membership in a protected class.
3. The harassment was sufficiently severe or pervasive to create an abusive working environment.

4. The employer had actual knowledge or constructive knowledge of the environment but took no prompt and remedial action.

The Supreme Court has set two conditions as the standard for evaluating whether or not a working environment is "hostile":

1. A reasonable person* would find the environment hostile or abusive.
2. The victim subjectively perceives the environment to be abusive.

*In its decision on hostile environment sexual harassment cases, the Supreme Court has not directly addressed the question of whose viewpoint should be used in assessing the work environment. The Court has not ruled that decisions should be made from the perspective of the victim or the accused. Instead, they have the used the reasonable person viewpoint.

Men & Sexual Harassment

According to Julie Crane, a California Attorney at Law, more men are suing for sexual harassment. Based on cases taken to trial there have been situations where male employees cite sexual harassment because their male co-workers use vulgar language constantly, make lewd jokes and sometimes teasingly grab at their genitals. While this may sound like the kind of horseplay that goes on in a typical high school locker room, as a manager be assured that you can not just chose to ignore it. This employee who is the victim of this behavior could (as some have done) file a claim for sexual harassment with the Equal Employment Opportunity Commission (EEOC), and if he is as successful as the claimants in one recent case, he could receive a settlement of $500,000.

The EEOC in the year 2000 stated that men filed 13.5 percent of all the sexual harassment claims, twice as many as they filed in 1992. The majority of these charges involve harassment by other men.

Pregnancy Discrimination

The Pregnancy Discrimination Act is an amendment to Title VII of the Civil Rights Act of 1964. It states that women affected by pregnancy or related conditions

must be treated in the same manner as other applicants or employees with similar abilities or limitations.

An employer cannot refuse to hire a woman because of her pregnancy related condition as long as she is able to perform the major functions of her job. An employer cannot refuse to hire her because of its prejudices against pregnant workers or the prejudices of co-workers, clients or customers.

An employer may not also single out pregnancy related conditions for special procedures to determine an employee's ability to work. However, an employer may use any procedure used to screen other employees' ability to work. In addition, pregnant employees must be permitted to work as long as they are able to perform their jobs. Employers must hold open a job for the same length of time for a pregnancy related absence as jobs are held open for employees on sick or disability leave.

Religious Discrimination

Title VII prohibits employers from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment. The Act also requires employers to reasonably accommodate the religious practices of an employee or prospective employee, unless to do so would create an undue hardship upon the employer. Flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfer are examples of accommodating an employee's religious beliefs.

Employers cannot schedule examinations or other selection activities in conflict with a current or prospective employee's religious needs, inquire about an applicant's future availability at certain times, maintain a restrictive dress code, or refuse to allow observance of a Sabbath or religious holiday, unless the employer can prove that not doing so would cause an undue hardship.

An employer can claim undue hardship when accommodating an employee's religious practices if allowing such practices requires more than ordinary administrative costs. Undue hardship also may be shown if changing a bona fide seniority system to accommodate one employee's religious practices denies another employee the job or shift preference guaranteed by the seniority system. An employee whose religious practices prohibit payment of union dues to a labor organization cannot be required to pay the dues, but may pay an equal

sum to a charitable organization. Mandatory "new age" training programs, designed to improve employee motivation, cooperation or productivity through meditation, yoga, biofeedback or other practices, may conflict with the non-discriminatory provisions of Title VII. Employers must accommodate any employee who gives notice that these programs are inconsistent with the employee's religious beliefs, whether or not the employer believes there is a religious basis for the employee's objection.

As you have seen Title VII guarantees protection against discrimination in employment on the basis of race and ethnicity, color, religion, sex and national origin. It then was later amended to include disability. When the first civil rights bill to follow the U.S. civil war was debated in Congress, it was criticized for granting "special rights" to African Americans despite African Americans not seen as "human" but only as property during the slave era. When the Civil Rights Act was debated in 1964, it was criticized on the basis that it would destroy the economic viability of companies and attack individual freedom of choice in hiring. These laws really create more competition in the workplace and seeks to eliminate entitlement that was provided to certain groups in society. Yet, despite these objections it passed anyway and applies to companies with more than 15 employees.

The Age Discrimination in Employment Act of 1967 (ADEA)

Age Discrimination

ADEA protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment -- including, but not limited to, hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.

The ADEA applies to employers with 20 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

APPRENTICESHIP PROGRAMS

It is generally unlawful for apprenticeship programs, including joint labor-management apprenticeship programs, to discriminate on the basis of an individual's age. Age limitations in apprenticeship programs are valid only if they fall within certain specific exceptions under the ADEA or if the EEOC grants a specific exemption.

JOB NOTICES AND ADVERTISEMENTS

The ADEA makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. As a narrow exception to that general rule, a job notice or advertisement may specify an age limit in the rare circumstances where age is shown to be a "bona fide occupational qualification" (BFOQ) reasonably necessary to the essence of the business.

PRE-EMPLOYMENT INQUIRIES

The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA.

BENEFITS

The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to specifically prohibit employers from denying benefits to older employees. An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

WAIVERS OF ADEA RIGHTS

At an employer's request, an individual may agree to waive his/her rights or claims under the ADEA. However, the ADEA, as amended by OWBPA, sets out specific minimum standards that must be met in order for a waiver to be considered

knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver:

(1) must be in writing and be understandable;
(2) must specifically refer to ADEA rights or claims;
(3) may not waive rights or claims that may arise in the future;
(4) must be in exchange for valuable consideration;
(5) must advise the individual in writing to consult an attorney before signing the waiver; and
(6) must provide the individual at least 21 days to consider the agreement and at least 7 days to revoke the agreement after signing it. In addition, if an employer requests an ADEA waiver in connection with an exit incentive program or other employment termination program, the minimum requirements for a valid waiver are more extensive.

Titles I and V of the Americans with Disabilities Act (ADA)

Disabled Discrimination

The ADA prohibits discrimination on the basis of disability in all employment practices. It is necessary to understand several important ADA definitions to know who is protected by the law and what constitutes illegal discrimination:

Individual with a Disability

An individual with a disability under the ADA is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Major life activities are activities that an average person can perform with little or no difficulty such as walking, breathing, seeing, hearing, speaking, learning, and working.

Qualified Individual with a Disability

A qualified employee or applicant with a disability is someone who satisfies skill, experience, education, and other job-related requirements of the position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of that position.

Reasonable Accommodation

Reasonable accommodation may include, but is not limited to, making existing facilities used by employees readily accessible to and usable by persons with disabilities; job restructuring; modification of work schedules;

providing additional unpaid leave; reassignment to a vacant position; acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials, or policies; and providing qualified readers or interpreters. Reasonable accommodation may be necessary to apply for a job, to perform job functions, or to enjoy the benefits and privileges of employment that are enjoyed by people without disabilities. An employer is not required to lower production standards to make an accommodation. An employer generally is not obligated to provide personal use items such as eyeglasses or hearing aids.

Undue Hardship
An employer is required to make a reasonable accommodation to a qualified individual with a disability unless doing so would impose an undue hardship on the operation of the employer's business. Undue hardship means an action that requires significant difficulty or expense when considered in relation to factors such as a business' size, financial resources, and the nature and structure of its operation.

Prohibited Inquiries and Examinations
Before making an offer of employment, an employer may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in the same job category. Medical examinations of employees must be job-related and consistent with business necessity.

Drug and Alcohol Use
Employees and applicants currently engaging in the illegal use of drugs are not protected by the ADA when an employer acts on the basis of such use. Tests for illegal use of drugs are not considered medical examinations and, therefore, are not subject to the ADA's restrictions on medical examinations. Employers may hold individuals who are illegally using drugs and individuals with alcoholism to the same standards of performance as other employees.

Equal Pay Act of 1963 (EPA)

Unequal Pay
Nearly fifty years ago, President Kennedy signed the Equal Pay Act (EPA) into law, making it illegal for employers to pay unequal wages to men and women who perform substantially equal work. At the time of the EPA's passage in 1963, women earned merely 59 cents to every dollar earned by men. While

improvement has been made, women still are paid 78 cents to the dollar for what men earn doing the same or comparable work.

The Equal Pay Act requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. Specifically, the EPA provides: Employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment. Each of these factors is summarized below (taken from *The U.S. Equal Employment Opportunity Commission Website*):

Skill - Measured by factors such as the experience, ability, education, and training required to perform the job. The key issue is what skills are required for the job, not what skills the individual employees may have. For example, two bookkeeping jobs could be considered equal under the EPA even if one of the job holders has a master's degree in physics, since that degree would not be required for the job.

Effort - The amount of physical or mental exertion needed to perform the job. For example, suppose that men and women work side by side on a line assembling machine parts. The person at the end of the line must also lift the assembled product as he or she completes the work and place it on a board. That job requires more effort than the other assembly line jobs if the extra effort of lifting the assembled product off the line is substantial and is a regular part of the job. As a result, it would not be a violation to pay that person more, regardless of whether the job is held by a man or a woman.

Responsibility - The degree of accountability required in performing the job. For example, a salesperson who is delegated the duty of determining whether to accept customers' personal checks has more responsibility than other salespeople. On the other hand, a minor difference in responsibility, such as turning out the lights at the end of the day, would not justify a pay differential.

Working Conditions - This encompasses two factors:
(1) physical surroundings like temperature, fumes, and ventilation; and
(2) hazards.

Establishment - The prohibition against compensation discrimination under the EPA applies only to jobs within an establishment. An establishment is

a distinct physical place of business rather than an entire business or enterprise consisting of several places of business. However, in some circumstances, physically separate places of business should be treated as one establishment. For example, if a central administrative unit hires employees, sets their compensation, and assigns them to work locations, the separate work sites can be considered part of one establishment.

Pay differentials are permitted when they are based on seniority, merit, quantity or quality of production, or a factor other than sex. These are known as "affirmative defenses" and it is the employer's burden to prove that they apply. Furthermore, in correcting a pay differential, no employee's pay may be reduced. Instead, the pay of the lower paid employee(s) must be increased.

In addition to the EPA, on January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009. The Act overturned the Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.(2007),* which had severely limited workers' ability to vindicate their rights under federal anti-discrimination laws that prohibit pay discrimination. In Ledbetter, the Court held that employers could not be sued for pay discrimination under Title VII of the Civil Rights Act of 1964 if the employer's original discriminatory pay decision occurred more than 180 days before the employee initiated her claim. With the privacy of wage of information which makes it hard to (quickly) determine if pay inequality exists, the laws have seemed to favor the employer.

Since January 2009, courts around the country have applied the Lilly Ledbetter Fair Pay Act as Congress intended for straightforward pay discrimination cases. In cases involving pay discrimination based on sex, race, disability, and age, courts have recognized that the period during which a worker may file a discrimination claim is renewed by each paycheck marred by discrimination. But, not all courts have interpreted the Act the same. If further progress is to be made toward equal pay many feel it will not happen unless the Paycheck Fairness Act is adopted.

The Paycheck Fairness Act, introduced in both the House (H.R. 377) and the Senate (S. 84) many proponents feel will update and strengthen the EPA in important ways, including:

- Toughens the remedy provisions of the EPA by allowing prevailing plaintiffs to recover compensatory and punitive damages. The EPA currently provides only for liquidated damages and back pay awards, which tend to be insubstantial. The change would put

gender based wage discrimination on an equal footing with discrimination based on race or ethnicity.

- Prohibits employers from punishing employees for sharing salary information with their coworkers as it stands employers can prevent employees from sharing wage/salary information. This change would greatly enhance employees' ability to learn about wage disparities.

- Eliminates an employer's loophole where under the EPA. Currently, when an employer is found to be paying female employees less than male employees for equal work, the employer may use the defense that the pay differential is due to something other than sex.

- The EPA which was adopted prior to the current federal class action rule requires plaintiffs to opt in to a suit. Otherwise, if other parties have been damaged unknowingly if they are not part of the suit it cannot be a class action. This new law would allow for class action suits.

The Paycheck Fairness Act has been introduced twice to Congress in 2010 and 2012 and has failed twice.

Sexual Orientation and Gender Identity Discrimination

Neither the civil rights act nor the federal EEO law provides protection on the basis of sexual orientation (who a person loves). However, Executive Order 11478, as amended; Department Administration Order 215-11; and the Department's non- discrimination policy prohibit such discrimination. It is also a prohibited personnel practice under the Civil Service Reform Act of 1978. The Department of Commerce has a complaint process for sexual orientation discrimination.

Furthermore, a bill was introduced into the U.S. congress in the mid 1970's, which would do for gays and lesbians what various civil rights bills had done for African-Americans, women and others. It went nowhere. In 1994, a stripped down version of the bill was introduced to Congress; it had limited range, guaranteeing only freedom from discrimination in employment. It was called the

Employment Non-Discrimination Act or ENDA. President Clinton supported this bill in 1995. He said, "If the bill were passed, it would guarantee that all Americans, regardless of their sexual orientation, can find and keep their jobs based on their ability to work and the quality of their work." It was also supported by: the Leadership Conference on Civil Rights, by many large corporations (AT&T, Eastman Kodak, Microsoft, RJR Nabisco, Quaker Oats, and Xerox), and by many religious organizations, including the National Council of Churches, National Catholic Conference for Interracial Justice, Southern Christian Leadership Conference, and the Union of American Hebrew Congregations. Yet, despite the obvious support this bill still has not passed.

As the workforce becomes more and more diverse, sexual orientation (who you love) and gender identity (the sex you identify with) have become very hot topics in discussions regarding employee rights despite neither being a federally protected class. At last count (as of the writing of this text), however, 32 states, including the District of Columbia, have passed laws prohibiting employment discrimination based on sexual orientation and/or gender identity. While federal government employees and contractors enjoy similar protections, Congress has yet to expand the statutorily protected classes of race, color, sex, religion, national origin, age, disability, and genetic information to include sexual orientation and gender identity for the millions of private sector employees in the United States.

The ENDA is again before the United States Congress proposing legislation that would prohibit private employers with more than 15 employees from discriminating on the basis of sexual orientation or gender identity. ENDA would exempt religious organizations and non-profit, membership-only clubs — except labor unions — from coverage. Since its inception in 1994, a number of versions of ENDA have been introduced in Congress. The latest version of the bill was introduced in the 113th Congress on April 25, 2013, but it failed to pass the House of Representatives Subcommittee.

While Congress has been slow and reluctant to include sexual orientation and gender identity as protected classes in employment discrimination, the executive branch has spurred ahead in providing protection from such employment discrimination to federal employees and contractors.

Concluding Thoughts

After reviewing the laws surrounding equal opportunity one should realize that the protected classes mentioned above have rights that must be adhered to in the workplace. Every manager is responsible for abiding by these laws whether

trained in EEO laws or not. When someone in a protected class workplace rights have been violated due to discrimination there is the possibility that the worker may not only take the issue to upper management, but could also sue the organization if not resolved.

It takes time to be a walking expert when it comes to abiding by the laws. However, if you have an open mind, accurate cultural knowledge, and few prejudices then it becomes easier to treat people as expected in accordance with these laws. When you have biases (conscious and unconscious), along with stereotypes that flood your viewpoints and are not open minded it can make it difficult to provide equal opportunity in the workplace despite what the laws say to do.

End of Chapter Questions

1. What is the difference between race and color discrimination?
2. What races are protected classes under Title VII of the Civil Rights Act of 1964?
3. What is sex discrimination? Under what circumstances can a transgender or gay, lesbian or homosexual use this protection?
4. As it relates to sexual harassment, what is the difference between quid pro quo and hostile environment?
5. What is the difference between gender identity and sexual orientation and are these federally protected classes? Could these groups be protected by state or local laws?
6. Jim is telling racial and religious jokes to his lunch buddy Jason and Mike over hears him. If Mike tells the boss about these inappropriate jokes wanting them to stop and the boss does basically nothing to stop it, would this be considered a hostile environment? If yes, why. If no, why not.
7. What age group of employees is covered under the ADEA? Why in your opinion would this age group need protecting from discrimination?
8. ADA stands for what? What protections does the ADA provide to the disabled?
9. As it relates to Disability, define the terms: undue hardship and individual with disability?

Internet Exercise

Part A: Using the Internet or www.google.com find three companies that have settled discrimination lawsuits **in the last two years** and indicate the following for each company:

1. Company Name
2. Year Lawsuit was settled
3. Who were the plaintiffs (people bringing the complaint)
4. Why the company was sued
5. How much they settled for

Part B: Now answer the following questions:
(1) Why is the burden of proof on the plaintiff?
(2) How easy do you think it is for an individual to win a discrimination case against a corporation?
(3) What does the individual bringing the case stand to lose?

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End of Chapter Exercise

For each of the following examples (a-f) state WHAT federal discrimination law is violated if any and why you felt it was or was not considered discrimination according to the laws.

a. A disabled employee asks for days off for doctor visits and is denied this request, without any reason given.
b. Woman is demoted from management after her supervisor finds out she is pregnant.
c. White male is harassed at work for being married to an Asian woman.
d. A female flight attendant who is Arab must wear a hijab, religious head covering, this is not part of the uniform and she is fired.
e. A man is a crossdresser and comes to work in a dress and is fired and asked not to return.
f. A woman is interviewing at a trendy clothing store and she is told she is not the appropriate weight for the position of sales staff but could be hired to do the inventory.
g. An advertising agency has a pattern of only hiring "lighter" skinned African Americans, a darker skinned African American applied who was clearly qualified yet was denied employment.