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Chapter

3

The Legal Context

Outline

LEARNING OBJECTIVES

After studying this chapter, you should be able to:

- Explain why complying with staffing laws can be strategic.
- Discuss different types of employment relationships.
- Describe different types of staffing-related lawsuits.
- Discuss the role affirmative action and equal employment opportunity play in a firm's staffing processes.
- Describe various barriers to legally defensible staffing.

Recruiting and Hiring to Promote a Brand Image

To appeal to its target market of 18 to 22-year-old college students, clothing retailer Abercrombie & Fitch wanted to project an all-American, collegiate image and make its store employees part of its marketing strategy. Paralleling the predominantly white, youthful, and attractive models used in Abercrombie's marketing materials, the company's salespeople, also called "brand representatives," were also mostly good-looking, white, young adults.[1]

Abercrombie & Fitch's CEO Mike Jeffries wants to hire only attractive people as store employees to complement its marketing strategy targeting attractive, popular customers.[2] To the company, this meant limiting its recruiting to certain fraternities and sororities known for their attractive, predominantly white members.[3] One former Abercrombie manager said that a poster with images of the ideal Abercrombie white male and female hung in her office containing bullet points of the qualities an Abercrombie employee should possess. Qualities for a male included being a fraternity member who likes sports, partying, and girls. A female should like to have fun, shop, and be a sorority member.[4]

The company asks your opinion about the legality of the recruiting and staffing practices it has adopted to reinforce its brand image and marketing strategy featuring predominantly white, attractive, young people. After reading this chapter, you should have some good insights to tell Abercrombie & Fitch.

Complying with staffing laws is obviously a good idea from a moral, ethical, and legal perspective, but as you learned in the last chapter, doing so can also be strategic. In addition to avoiding the expense of lawsuits and the negative public relations that comes with litigation, legal compliance allows companies to capitalize on the strengths of diversity. This allows them to perform better because they focus more on performance and merit, and are better able to hire quality people from all segments of the labor force. In fact, in one survey 63 percent of firms identified "access to top talent" as the main driver of their diversity and inclusion programs, ahead of "fair treatment" (60 percent) and "public pressure" (21 percent).[5] Diverse employees also help organizations to access broader ideas, better reflect their customers and communities, and be less likely to collectively follow a bad course of action. Proactive and strategic firms often go beyond legal compliance in recruiting and retaining diverse employees.

Employment laws and regulations exist for several reasons. Because the employer decides the structure of the employment relationship and the principles that will guide employees' pay, promotions, and so forth, the firm usually has more power than employees do. Laws and regulations help to limit the employer's power as well as prohibit unfair discrimination and provide equal employment opportunities for everyone. Unfair discrimination happens when employment decisions are not based on job-relevant knowledge, skills, abilities, and so forth, but on factors such as age, sex, race, religion, ethnicity, or a person's disabilities (or lack of them). **Unlawful (discriminatory) employment practices** are those that unfairly discriminate against people with characteristics protected by law. The legal foundation for workplace diversity recognizes that workforce barriers exist based on people's characteristics including their race, gender, age, ethnicity, and religion. However, because the law alone does not provide the tools to recognize and break down these barriers, proactively managing diversity is important.

UNLAWFUL OR DISCRIMINATORY EMPLOYMENT PRACTICES

employment practices that unfairly discriminate against people with characteristics protected by law

Because employment laws and the courts' interpretations of them identify what is expected and required of every employer, they clarify what is permissible. They also help employers hire strategically by promoting the hiring of the most qualified people. This enhances the quality of the firm's hiring decisions and, thus, the performance of the organization. Avoiding unfair discrimination helps companies better execute their strategies and reach their goals. In short, complying with employment laws helps companies achieve their goals in the following ways:

- Enhances the quality of the firm's hiring decisions.
- Enhances the company's reputation and image as an employer.
- Promotes the perception of fairness among job candidates.
- Reduces the negative public relations firms experience when people feel they were discriminated against and tell others about their experience.
- Reinforces an ethical culture.
- Enhances an organization's performance by ensuring that people are hired or not hired based on their qualifications, not biases.
- Promotes diversity, which can enhance an organization's ability to appeal to a broader customer base.

Given that entire books have been written on employment law, this chapter's coverage of the major government regulations and legal issues involving staffing cannot cover every detail. This book is not intended as a legal reference, and it does not constitute legal advice. The purpose of this chapter is to provide an overview of some of the key laws and legal issues surrounding staffing and to identify resources for additional information. The chapter will also give you a good understanding of how to prevent discriminatory or illegal staffing practices. Laws change and differ from state to state, and they evolve over time, so you should always consult legal counsel to ensure compliance with current local, state, and federal regulations.

In this chapter, we first discuss various types of employment relationships, their legal implications, and the influence of labor unions. Next, we cover some of the primary laws and regulations regarding staffing, different enforcement agencies, and different types of staffing-related lawsuits. Finally, we discuss barriers to legal recruitment and hiring. After reading this chapter, you should have a good understanding of how to create a legal staffing system.

THE TYPES OF EMPLOYMENT RELATIONSHIPS

Employers use different types of employment relationships to strategically manage their workforce and ensure that they have the number of workers with the skills they need ready to work when they need them. Let's look at these different employment relationships and their legal implications.

Types of Employees

EMPLOYEE
someone hired by another person or business for a wage or fixed payment in exchange for personal services, and who does not provide the services as part of an independent business

EXPLICIT EMPLOYMENT CONTRACT
specific written or verbal employment contract

IMPLICIT EMPLOYMENT CONTRACT
an understanding that is not part of a written or verbal contract

EMPLOYEES An **employee** is someone hired by another person or business for a wage or fixed payment in exchange for personal services, and who does not provide the services as part of an independent business. A job offer is made that must be accepted as presented, or the employer and employee negotiate the terms and conditions of their relationship and create an employment contract. Every employee has an employment contract. If a written agreement does not exist, there is often an oral contract in place that in most instances is just as enforceable as a formal written agreement. Even if a written or verbal **explicit employment contract** does not exist, there is an **implicit employment contract** reflecting a common understanding between the employer and employee.[6] We discuss employment contracts in more detail in Chapter 11.

The employer must withhold employee payroll taxes (income taxes and Social Security taxes) from the paychecks of employees and pay certain taxes (unemployment insurance and the employer's share of Medicare and Social Security). In addition, employers must abide by the many laws and regulations that govern the employment relationship, and they are liable for the acts of their employees during their time of employment.

AT-WILL EMPLOYMENT
an employment relationship in which either party can terminate the employment relationship at any time for just cause, no cause, or any cause that is not illegal with no liability as long as there is no contract for a definite term of employment

AT-WILL EMPLOYEES **At-will employment** is an employment relationship in which either party can terminate the employment relationship at any time for a just cause, no cause, or even a cause that is morally wrong as long as it is not illegal with no liability as long as there is no contract for a definite term of employment. At-will employment allows an employee to quit for any reason. Firms call upon it most often when they want to fire an employee for any legal reason or for no reason at all. In most states (except Montana), if a formal contract does not govern a company's employment relationships, these relationships are governed by the "employment-at-will" doctrine.

Although the courts generally have upheld the right to terminate at will, this does not mean that employers should casually terminate employees without giving a reason or without following normal policies and procedures. Companies should follow their formal discipline and termination procedures whenever possible to help avoid discrimination and wrongful termination claims. The at-will clause is best used as a legal defense by organizations when they feel it's not in their interests to follow their own policies inflexibly.[7] For example, at-will employment allows an employer to immediately dismiss an employee who is behaving dangerously. Case law establishing when or if firms can rely on the at-will nature of the relationship varies from state to state.

It is important to note that employment-at-will does not offer blanket protection to employers for all employee discharges. Existing contracts, of course, create exceptions to employment-at-will provisions. These contracts include tenure systems, such as those that exist between universities and tenured professors, formalized (written) employment contracts, and union contracts. "Just cause" clauses in union contracts protect most unionized workers from arbitrary firings and prohibit employers from firing workers unless they can show that a person should reasonably (due to "a just cause") be terminated. Federal laws, such as equal employment legislation and the National Labor Relations Act (NLRA), protect employees from being retaliated against—fired or punished, for example—for engaging in a protected activity, such as filing a discrimination charge, opposing unlawful employer practices, or filing a valid worker's compensation claim, regardless of an employee's at-will status.

Certain state laws also limit employment-at-will provisions. Most states recognize that an implied employment contract exists between employers and employees that creates an exception to at-will employment. An implied employment contract occurs when an employer's personnel policies, handbooks, or other materials indicate that it will only fire an employee for good cause or specify a procedural process for firing. If an employee is fired in violation of an implied employment contract, the employer may be found liable for breach of contract.

A few states have also recognized that a breach of an implied covenant of good faith and fair dealing is an exception to at-will employment. This covenant presumes that employers are generally obligated to deal fairly and in good faith with all of their employees. For example, firing an employee solely to deny the employee an earned bonus that has not yet been received, or to prevent him or her from soon vesting in the firm's pension plan is unlawful in some states. Like the federal government, all U.S. states also recognize that a retaliatory discharge is an exception to at-will employment.

The best way to ensure that an employment-at-will message has been adequately communicated to employees is by publishing the policy on something employees sign. Signing an employment application or to acknowledge reading an employee handbook produces a written record that an employee has read and understood the policy. Table 3-1 describes how to develop an at-will employment statement.

CONTINGENT WORKERS In 1989 the Bureau of Labor Statistics defined **contingent work** as "any job in which an individual does not have an explicit or implicit contract for long-term employment."[8] In other words, a contingent worker is anyone who has a job of limited duration.

CONTINGENT WORK

any job in which an individual does not have a contract for long-term employment

TABLE 3-1 Developing an At-Will Statement

Most courts will find an employment-at-will relationship if the following criteria are met:[9]

- The at-will statement is written in clear, understandable language and thoroughly explains what the at-will relationship means.
- The at-will statement clearly states that no company representative may change the at-will relationship through oral or written promises.
- The at-will statement explains that the organization's policies and practices are not intended to create a contract.
- The at-will statement is prominently displayed, such as in bold type, a separate introductory policy, or set apart in other policies.
- The at-will statement is repeated where appropriate in other policies and handbooks, particularly those outlining work rules and disciplinary procedures.
- The at-will statement is contained in other employment documents, such as application forms and offer letters.

Contingent workers are outside of a company's core workforce. In 2012, more than one in four employees were contingent workers.[10]

A company can engage a contingent worker in two ways. It can hire the worker directly, or it can contract with another employer that has hired the worker. One of the primary benefits of contingent workers is that they can be quickly brought on board by placing a request with a temporary staffing firm or an employee-leasing firm. This allows a firm to adjust its staffing levels quickly without having to fire or lay off employees, which can increase a firm's unemployment insurance premiums and hurt morale. Next, we will discuss several types of contingent workers.

TEMPORARY WORKERS

nonpermanent workers who can be supplied by staffing agencies or directly hired by the company

TEMPORARY WORKERS As we discussed in the last chapter, **temporary workers** are contingent workers supplied by staffing agencies or directly hired by the company in which they work. Contract workers are a type of temporary worker who provide more specific, advanced, technical, and professional skills than do temporary workers. These people tend to have assignments lasting several months to a year or more. Temporary and contract workers are paid by the hour and are only paid for hours actually on the job. Temporary workers often do not receive the health and other benefits given to full-time employees, and, unlike employees, they do not raise a firm's unemployment insurance if they are dismissed. Because of the lower cost and nonpermanent nature of their relationship with the firm, it can be strategic for the firm to utilize temporary workers until it is clear that the additional talent will be needed for the long term. Microsoft, Delphi, and FedEx make extensive use of temporary workers.

When using a staffing agency, the agency can be considered the temporary worker's employer of record rather than the company's. But this is only the case if the company using the agency has the right to control or direct *only the result of the work* done by the worker, and *not the means and methods of accomplishing the result.* This can shield a company using an agency from charges of age, race, or sex discrimination for the staffing agency's workers. The agency must also provide performance feedback and scheduling functions or else both the company and the agency may be determined to be *co-employers*, both subject to the employment laws governing the employer–employee relationship.

It is important to note that firms cannot always legally exclude temporary workers from benefits, such as health insurance. In *Burrey v. Pacific Gas & Electric*[11] the court concluded that employees of temporary agencies working at an unrelated company's place of business, *unless specifically excluded* from the firm's employee benefit plan coverage, are to be treated as the company's common-law employees for employee benefit plan purposes. Therefore, employers need to have a clearly written benefits policy that specifically excludes temporary workers if that is their intention.

LEASED WORKERS

employees of a company (also called a professional employer organization) who take on the operation of certain functions, or staff an entire location on a contractual basis for a client company

LEASED WORKERS **Leased workers** are employees of a company who take on the operation of certain functions, or staff an entire office or factory on a contractual basis for a client company. The workers are employees of the contractor and are considered leased workers by the company for which they perform the work. Because the employee-leasing company and the client company are co-employers, both are liable for payment of payroll taxes and workers' compensation premiums, and compliance with government regulations.[12]

Leased workers are typically assigned to projects lasting at least a year that require professional and technical expertise. Many smaller firms use employee-leasing companies as a human resource partner. The firm recruits, screens, and hires its own workers, then puts them on the leasing company's payroll. The agency then "leases" the workers back to the company for a fee. This allows smaller businesses with limited resources to transfer the responsibility for administering payroll and benefits from themselves to the leasing company. Because the employee-leasing agency employs more workers, it can offer better health insurance and retirement benefits at lower cost than small businesses with only a few employees.

PART-TIME AND SEASONAL WORKERS Part-time workers work less than a full workweek and can be contingent workers, but do not have to be. Seasonal employees are employees hired to work only during a particular part of the year. For example, when UPS hires more workers during the busy holiday season, and when growers hire laborers to harvest fruit, they are hiring seasonal workers.

UNIONIZED WORKERS In the United States, **labor unions** legally represent workers, organizing employees and negotiating the terms and conditions of their employment. In addition to wages and benefits, labor unions bargain over virtually all aspects of the staffing process, including working conditions, facility locations, staffing levels, job descriptions and classifications, promotion and transfer policies, layoff and termination policies, hiring pools, employment discrimination protections, grievance procedures, and seniority provisions. The terms and conditions of employment are contained in a contract called a *collective bargaining agreement* or a *collective employment agreement*. The inability of management and the union to reach an agreement may culminate in either a labor strike or a management lockout.

LABOR UNIONS

legally represent workers, organize employees, and negotiate the terms and conditions of union members' employment

Congress approved the NLRA[13] in 1935 to encourage a healthy relationship between private-sector workers and their employers. The NLRA was designed to curtail work stoppages, strikes, and general labor strife. It extends many rights to workers who wish to form, join, or support unions or labor organizations; to workers who are already represented by unions; and to workers who join as a group of two or more nonunionized employees seeking to modify their wages or working conditions. Employers also may not discriminate against pro-union applicants.

U.S. companies that employ workers with a union operate on several different models:

- A *closed shop* exclusively employs people who are already union members. An example is a compulsory hiring hall, where the employer must recruit directly from the union. In 1947, the Taft-Hartley Labor Act declared the closed shop illegal. Although the NLRA permits construction employers to enter into prehire agreements to draw their workforces exclusively from a pool of employees dispatched by the union, construction employers are under no legal obligation to enter into such agreements.
- A *union shop* employs both union and nonunion workers, but new employees must join the union or begin paying dues to the union within a specified time limit.
- An *agency shop* requires nonunion workers to pay a fee to the union for its services in negotiating their contracts.
- An *open shop* does not discriminate based on union membership in employing or keeping workers. Some workers benefit from a union or the collective bargaining process despite not contributing to the union.

A collective bargaining agreement specifying that promotions will be based on seniority rather than merit influences the types of competencies the firm should hire. Seniority-based promotions make leadership competencies important hiring criteria even for lower-level positions because these lower-level hires are likely to become the company's future leaders. Even in nonunion companies, the effects from competitors' union agreements can occur as the nonunion companies adjust their pay, benefits, and terms and conditions of employment to successfully compete for new hires and prevent current employees from leaving to work for a competitor.

Although the influence of labor unions has declined significantly in some sectors of the U.S. economy, this is not the case abroad. In many countries, collective labor enjoys a strong presence. In some countries, collective representation differs radically from the United States in that collective agreements often legally apply to an entire industry sector, making even nonunion workers covered by the agreements, and effectively "unionized." For example, in Brazil, all workers have to be in unions. Europe and Indonesia require employee representative bodies, called works councils, to offer workers a second level of representatives beyond unions.

Independent Contractors

An **independent contractor** performs services wherein the employer controls or directs only the *result* of the work. Anyone who performs services for a company is legally an employee if the company controls *what is done and how it is done*. Independent contractors must make their own Social Security contributions, pay various employment taxes, and report their income to state and federal authorities. From a legal perspective, whether a worker is an employee or an independent contractor with respect to the company determines the obligations the company has to the worker. If an employee is incorrectly classified as an independent contractor instead of an employee, the company can be liable for employment taxes for that worker, plus a penalty.[14]

INDEPENDENT CONTRACTOR

performs services wherein the employer controls or directs only the result of the work

The Internal Revenue Service (IRS) gives the example of Vera Elm, an electrician, who submits a job estimate to a housing complex for 400 hours of electrical work at $16 per hour. Elm is to receive $1,280 every two weeks for the next 10 weeks, which is not an hourly payment. No matter how long it takes her to complete the work, Vera will receive $6,400. She also performs additional electrical installations for other companies under contracts that she obtained through advertisements. The IRS classifies Vera as an independent contractor.[15]

Companies can strategically use independent contractors to help control costs, temporarily increase capabilities, and bring in needed talents quickly. They can thus be particularly useful for companies competing through innovation or low-cost strategies. Independent contractors often receive a higher salary than do regular employees but do not receive benefits, which can make them cost-effective. Because independent contractors are often highly skilled, they may prefer to work on a project basis for many firms rather than be a single company's employee. Independent contractors also have greater control over the work they take on and the hours they work, which can enable people to work despite responsibilities preventing them from working traditional hours.

Some companies have tried to reduce costs by wrongly classifying regular employees as independent contractors, and workers have become more reluctant to challenge these practices in the tough job market. But federal and state officials, many facing record budget deficits exacerbated by the lost unemployment insurance and workers' compensation insurance revenue resulting from this misclassification, are starting to aggressively pursue companies trying to claim that regular employees are independent contractors.[16] In 2009, the Illinois Department of Labor imposted $328,500 in penalties on a home improvement company for misclassifying 18 workers by pressing them to incorporate as separate business entities.[17]

Outsourcing

An alternative to contingent work is *outsourcing* the work to another firm. This typically involves contracting with an outside firm that has a particular expertise to assume complete responsibility for a specific contracted service—not just to supply workers. Firms often outsource their non-core functions, such as their payroll, landscaping, and food service activities.

Offshore outsourcing by opening a location in another country or outsourcing work to an existing company abroad has become increasingly popular for many organizations seeking productivity gains. Half of all Fortune 500 companies are expected to have an outsourcing center in India by 2015.[18] Some companies have saved over 70 percent in labor costs by offshoring.[19] Offshore outsourcing can be successful if the work is relatively minor or intermittent; for example, if the firm is updating a software module or developing new Web pages. The risks involved with outsourcing are primarily the result of conducting work in two countries having different cultures, different intellectual property laws, and conflicting legal systems. A company must consider the nature of the other country's judicial system, local laws, and what would happen if the offshore company goes bankrupt. In addition, the company should ensure that an accepted dispute resolution procedure is in the outsourcing contract, including where the case would be filed if a conflict arises.[20]

LAWS AND REGULATIONS

Social pressures often lead to legislation, such as wage and hour laws and equal employment opportunity legislation, with which employers must comply. Common law, or court-made law, is the body of case-by-case decisions made by the courts that over time determines what is legal and what remedies are appropriate. Each state develops its own common law in response to federal and state legislation and the nature of the specific cases brought before its courts. Over time, these decisions establish the permissibility of various staffing practices as well as appropriate remedies for impermissible practices. For example, workplace tort cases, or civil wrongs in which an employer violates a duty owed to its customers or employees, and employment-at-will cases are treated at the state level. Because case law differs across states, it is necessary to be familiar with the case law in the states in which an organization is operating.

Although most employment discrimination lawsuits are brought under federal statutes, state laws can sometimes be even more restrictive. (A state's Attorney General's office can provide you with information about that state's fair employment practice laws.[21]) Some laws extend similar protection as provided by the federal acts to employers who are not covered by those statutes. Other statutes provide protection to groups not covered by the federal acts and protection for individuals who are performing civil or family duties outside of their normal employment. The District of Columbia protects workers from family responsibilities discrimination. In Alaska, workers are protected from discrimination based on parental status, and a similar executive order covers federal workers and contractors.[22]

Local, state, and federal legislative bodies pass statutory laws as well as create agencies, such as the Department of Labor and the Equal Employment Opportunity Commission, to interpret, administer, and enforce specific laws. Constitutional law supersedes all other sources of laws and regulations, and applies particularly to the due process rights of public employees.

The Laws Relevant to Staffing

There are several major federal laws that broadly apply to employers. Whether or not an employer is covered by a particular law depends on its number of employees and whether the company is a federal contractor. Table 3-2 summarizes some of the federal antidiscrimination laws that allow individuals to sue an employer for failure to hire, and we will discuss each of these laws next.

TABLE 3-2 Summary of Federal Laws Relevant to Staffing

Law or Executive Order	Who Is Covered	General Provisions	Further Information
Title VII of the Civil Rights Act of 1964 (Amended in 1991)	Private employers with at least 15 employees Labor unions, employment agencies, and educational institutions Local, state, and federal governments	Prohibits discrimination on the basis of race, color, religion, sex (both women and men), or national origin	http://www.eeoc.gov/policy/ http://www.eeoc.gov/facts/qanda.html http://www.dol.gov/oasam/regs/statutes/2000e-16.htm http://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html http://www.eeoc.gov/facts/qanda.html
Executive Order 11246 of 1965 and Executive Order 11375 of 1967	Federal contractors with contracts exceeding $10,000	Prohibits discrimination and establishes affirmative action to promote diversity in race, color, religion, sex, or national origin	http://www.dol.gov/compliance/laws/comp-eeo.htm http://www.dotcr.ost.dot.gov/documents/ycr/eo11246.htm http://www.dotcr.ost.dot.gov/documents/ycr/eo11375.htm
Pregnancy Discrimination Act of 1978	Private employers with at least 15 employees Labor unions, employment agencies, and educational institutions Local, state, and federal governments	Pregnancy, childbirth, or related medical conditions (Defines pregnancy as a temporary disability that requires accommodation)	www.eeoc.gov/facts/fs-preg.html
Americans with Disabilities Act (ADA) of 1990	Private employers with at least 15 employees Local, state, and federal governments	Qualified individual with or perceived as having a disability	http://www.eeoc.gov/policy/ http://www.eeoc.gov/laws/types/disability.cfm www.usdoj.gov/crt/ada/ www.eeoc.gov/ada/amendments_notice.html

(Continued)

TABLE 3-2 (Continued)

Law or Executive Order	Who Is Covered	General Provisions	Further Information
ADA Amendments Act of 2008	Private employers with at least 15 employees Local, state, and federal governments	Instructs courts and employers to adopt a broad standard when determining whether an individual is considered disabled	http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm
Title II of the Genetic Information Nondiscrimination Act of 2008	Private employers with at least 15 employees Labor unions, employment agencies, and educational institutions Local, state, and federal governments	Prohibits discrimination on the basis genetic information	https://www.federalregister.gov/articles/2010/11/09/2010-28011/regulations-under-the-genetic-information-nondiscrimination-act-of-2008
Rehabilitation Act of 1973	Federal contractors with contracts exceeding $2,500 must engage in affirmative action	Individuals with a handicap	http://www.eeoc.gov/laws/types/disability.cfm
Age Discrimination in Employment Act of 1967	Private employers with at least 20 employees	Protects people 40 years of age or older	www.eeoc.gov/policy/adea.html http://www.eeoc.gov/laws/types/age.cfm
Immigration Reform and Control Act of 1986	Employers with at least 4 employees must verify the employment eligibility of everyone hired	Citizens, U.S. nationals, and aliens authorized to work in the United States are eligible for employment	https://www.oig.lsc.gov/legis/irca86.htm
Worker Adjustment and Retraining Notification Act (WARN) of 1988	Employers with at least 100 employees not including employees who have worked less than six months in the last 12 months and not including employees who work less than 20 hours per week Private, public, quasi-public entities which operate in a commercial context Regular local, federal, and state government entities that provide public services are *not* covered	Must provide 60 days advance notice of covered plant closings and covered mass layoffs of 50 or more people (excluding part-time workers)	www.doleta.gov/layoff/warn.cfm

TABLE 3-2 (Continued)

Law or Executive Order	Who Is Covered	General Provisions	Further Information
The Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994	All members of the uniformed services (including non-career National Guard and Reserve members, as well as active duty personnel)	Ensures that members of the uniformed services are entitled to return to their civilian employment after their service	www.dol.gov/elaws/userra.htm
Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) (Amended in 2002 by the Jobs for Veterans Act)	Any contractor or subcontractor with a contract of $25,000 or more with the federal government	Prohibits discrimination against and requires affirmative action for disabled veterans as well as other categories of veterans	http://www.dol.gov/compliance/laws/comp-vevraa.htm http://www.doleta.gov/Seniors/html_docs/docs/veteransjobs.cfm
Consumer Credit Reporting Reform Act of 1996	Employers who conduct credit checks for employment purposes (e.g., if an employee handles money, which may require being bonded)	Employers must disclose in advance the company's intention to obtain a credit report and obtain written permission from the applicant or employee. The applicant or employee must receive a copy of the report and a written description of their rights under this Act before action is taken based on the report	www.ftc.gov/os/statutes/03.1224fcra.pdf

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 Title VII of the Civil Rights Act of 1964, amended in 1991, prohibits employment discrimination based on race, color, religion, sex, or national origin. Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex. Title VII explicitly states that race can never be used as a bona fide occupational qualification when making hiring decisions.

Under Title VII, it is an unlawful employment practice for an employer[23]

1. "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"; or
2. "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Congress established that intentional discrimination was established "when a complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[24] The Civil Rights Act of 1991 is enforced by the Equal Employment Opportunity Commission and provides monetary damages in cases of intentional employment discrimination.

EXECUTIVE ORDER 11246 OF 1965 AND EXECUTIVE ORDER 11375 OF 1967 Executive Orders 11246 and 11375 apply to employers with a federal contract exceeding $10,000. Among other things, these Executive Orders establish that an employer with a federal contract exceeding $10,000[25]

> ...will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

Affirmative action is required by the executive orders, which are enforced by the U.S. Department of Labor. In one case, Goodwill Industries of Southern California favored female applicants for entry-level positions as attendants at local donation centers, in part due to the perception that women have better customer skills than men. The OFCCP found that these outdated notions about what constitutes "men's work" or "women's work" resulted in Goodwill denying 200 qualified male applicants the opportunity to receive job offers. The conciliation agreement required Goodwill to pay $130,970 back in wages to those individuals and give 18 job offers to qualified men who were not previously offered positions as jobs open as well as undertake extensive training and self-monitoring to ensure future compliance with Executive Order 11246.[26]

THE PREGNANCY DISCRIMINATION ACT OF 1978 The Pregnancy Discrimination Act of 1978 prohibits private employers with at least 15 employees, labor unions, employment agencies, educational institutions, and local, state, and federal governments from discriminating on the basis of pregnancy, childbirth, or related medical conditions. Pregnancy, childbirth, and related medical conditions must be treated the same way as other temporary illnesses or conditions are treated.[27]

THE AMERICANS WITH DISABILITIES ACT (ADA) OF 1990 The Americans with Disabilities Act (ADA) of 1990 and the Americans with Disabilities Act Amendments Act of 2008 that became effective on January 1, 2009, apply to private employers with at least 15 employees as well as to local, state, and federal governments. The ADA guarantees equal opportunity for individuals with disabilities or perceived as having disabilities and grants similar protections to those provided on the basis of race, color, sex, national origin, age, and religion. A person is to be considered disabled regardless of whether or not any form of treatment or corrective device (other than contact lenses or glasses) is used to ameliorate or control the condition. The Equal Employment Opportunity Commission enforces the ADA.

THE GENETIC INFORMATION NONDISCRIMINATION ACT (GINA) OF 2008 The Genetic Information Nondiscrimination Act prohibits employers from discriminating against individuals based on the results of genetic testing when making hiring, firing, job placement, or promotion decisions. Genetic testing is a type of testing that can identify people genetically susceptible to certain diseases that could result from exposure to toxic substances, such as chemicals or radiation, in the workplace. However, few diseases or conditions are due to a single gene or even several genes acting alone. Most are due to a combination of factors such as stress, diet, and environmental pollutants so genetic tests can't reliably predict whether someone will develop a particular condition.

HR professionals should ensure that job applications do not ask questions that can discriminate based on genetic makeup. In addition, no employment decisions can be made based on genetic information. In fact, GINA makes the mere collection of genetic information illegal. Hiring managers must also be trained to not ask about genetic information or family health issues on interviews, while making hiring or any employment decisions. HR departments must also ensure that they update labor posters and handbooks to reflect this law.

THE REHABILITATION ACT OF 1973 The Rehabilitation Act of 1973 requires federal contractors with contracts exceeding $2,500 to engage in affirmative action to promote the hiring of individuals with a disability. The Act protects qualified individuals from discrimination based on a disability. As with the ADA, qualified individuals with disabilities are defined as persons who, with reasonable accommodation, can perform the essential functions of the job for which they have applied or have been hired to perform. **Reasonable accommodation** means an employer is required to take reasonable steps to accommodate a disability unless it would cause the employer undue hardship.[28]

REASONABLE ACCOMMODATION

reasonable steps to accommodate a disability that do not cause the employer undue hardship

THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) OF 1967 The Age Discrimination in Employment Act (ADEA) prohibits employers with more than 20 employees from discriminating against any worker with respect to compensation or the terms, conditions, or privileges of employment because he or she is age 40 or older. Specifically related to staffing, it is unlawful for an employer[29]

1. "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"; or
2. "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."

The Supreme Court has held that the ADEA does not apply to claims of "reverse discrimination" where "young" older workers receive less favorable treatment than "older" older workers. As a result, employers may provide more favorable benefits (formal phased retirement programs, for example) to older workers within the over-40 age group.[30]

Some states have expanded the ages protected from employment discrimination. In New Jersey it is illegal to discriminate against employees between the ages of 18 and 70.[31]

THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 Under the Immigration Reform and Control Act, employers must use an I-9 verification form to verify the employability status of every new employee within three days of their being hired. This form requires documentation verifying a new hire's eligibility, identity, and authorization to work in the United States. To avoid the appearance of discrimination on the basis of national origin, it is a good idea to make the job offer contingent on proof of employment eligibility.

For privacy reasons, I-9s must be kept where managers cannot see them. Training recruiters and hiring managers on I-9 compliance is also important.[32] The voluntary and free Internet-based E-Verify system operated by the Homeland Security Department in partnership with the Social Security Administration can help employers determine a person's eligibility to work in the United States.[33]

Rather than conducting workplace raids to pick up undocumented workers, Immigration and Customs Enforcement policy has shifted to the criminal prosecution of businesses for workplace immigration law violations. In 2007, Immigration and Customs Enforcement made 863 work-site criminal arrests of corporate officers, managers, and contractors, up from 25 in 2002, and 4,077 administrative arrests, up from 485 in 2002.[34] It is a good idea to keep I-9 records clean and error-free and regularly conduct internal I-9 workforce audits to identify and correct problems on your own.

THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN) OF 1988 In brief, the WARN Act is a federal law requiring employers of 100 or more full-time workers who have worked at least six of the last 12 months and an average of 20 hours or more per week to give employees 60 days' advance notice of closing or major layoffs.[35] Hourly, salaried, managerial, and supervisory employees are all entitled to notice under WARN, although business partners, workers participating in strike actions, and contract employees are not. More details about what is covered are available on the Department of Labor's Web site.[36]

Some states have passed their own WARN-type Acts expanding this coverage. California requires a WARN notice when a company cuts at least 50 workers in one place. New York requires 90 days' notice when laying off 250 or more workers at a site.

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA) OF 1994 The Uniformed Services Employment and Reemployment Rights Act of 1994 (significantly updated in 1996 and 1998) prohibits employers from discriminating against job applicants who may be called into military service or who volunteer for military service. The act seeks to ensure that members of the uniformed services are entitled to return to their civilian employment upon completion of their service with the seniority, status, and rate of pay they would have obtained had they remained continuously employed by their civilian employer. The law also protects individuals from discrimination in hiring, promotion, and retention on the basis of present and future membership in the armed services. The Department of Labor enforces the USERRA.

VIETNAM ERA VETERANS' READJUSTMENT ASSISTANCE ACT (VEVRAA) OF 1974 (AMENDED IN 2002 BY THE JOBS FOR VETERANS ACT) The Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) prohibits discrimination against protected veterans and it requires federal government contractors and subcontractors with a contract of $25,000 or more with the federal government to take affirmative action to employ and advance in employment the veterans protected by VEVRAA and its amendments. VEVRAA requires that contractors and subcontractors list their employment openings with the appropriate employment service delivery system, and that covered veterans receive priority in referral to such openings. Further, VEVRAA requires that federal contractors and subcontractors track and submit annually the number of current employees who are covered veterans.

THE CONSUMER CREDIT REPORTING REFORM ACT OF 1996 Under the Consumer Credit Reporting Reform Act of 1996, an employer must disclose in advance its intention to obtain an applicant's or employee's credit report and obtain written permission from the individual. The applicant or employee must receive a copy of the report and a written description of their rights under this act before action is taken based on the report.

Bona Fide Occupational Qualification (BFOQ)

BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ)

a characteristic that is essential to the successful performance of a relevant employment function

There are situations in which a protected characteristic can be considered a **bona fide occupational qualification (BFOQ)** and legally be used to make employment decisions. A BFOQ means that the characteristic is essential to the successful performance of a relevant employment function. As established in the Supreme Court case *Diaz v. Pan Am World Airways*,[37] only a qualification that affects an employee's ability to perform the job can be considered a BFOQ. BFOQs do not apply to all jobs, and race and color can never be considered BFOQs. One example of how sex can be a BFOQ is in relation to employment in a setting, such as a locker room, that is exclusively used by members of one sex.

It is important to develop a specific job description outlining the requirements and duties of the position and a job specification detailing the corresponding qualifications of the individual needed for the position before beginning a recruitment effort. BFOQs must be based only on the actual inability of individuals with some protected characteristic (e.g., their sex) to perform job duties, not on stereotyped characterizations.

Asking about protected characteristics that are not BFOQs during employment interviews is a mistake made by many uninformed hiring managers. This chapter's Develop Your Skills feature contains several taboo interview questions and an explanation of why they should be avoided.

DEVELOP YOUR SKILLS

Improper Interview Questions

Court rulings and Equal Employment Opportunity Commission guidelines prohibit the use of all preemployment inquiries that disproportionately screen out members of protected classes, are not valid predictors of on-the-job performance success, or cannot be justified by "**business necessity**."[38] A **protected class** is a group of people who share a particular characteristic protected by federal and/or state employment discrimination laws. A business necessity is an important business objective of the employer.

Although interview questions in and of themselves are not illegal, questions that can have an illegal impact in terms of a firm's hiring should be avoided. The following are five interview questions that are likely to have a discriminatory effect on employment and that should be avoided:[39]

1. *How many children do you have?* Questions regarding an applicant's marital status, children, and childcare arrangements can be construed as being discriminatory. Title VII of the Civil Rights Act makes it illegal to deny a female applicant employment because she has or is planning to have children.
2. *What is your native language?* If an English-language skill is not a job requirement but the employer requires English-language proficiency, an adverse effect upon a minority group may result, violating Title VII. Inquiring how an applicant acquired the ability to read, write, or speak a foreign language is also inappropriate.
3. *What clubs or organizations do you belong to?* The courts may view this question as seeking information that is not job related and that could result in discrimination based on a person's gender, national origin, or religion in violation of Title VII.
4. *What is your height? What is your weight?* Minimum height and weight requirements have been found to be illegal under Title VII if they screen out a disproportionate number of minorities or women and the employer cannot show that these standards are essential to the safe performance of the job(s) in question.[40]
5. *Are you able to work on Christmas Day?* An employer can be accused of religious discrimination in violation of Title VII if its interviewers ask about an applicant's willingness to work any particular religious holiday.

Global Issues

BUSINESS NECESSITY
an important business objective of the employer

PROTECTED CLASS
a group of people who share a particular characteristic that is protected by federal and/or state employment discrimination laws

Employment laws vary across countries. For example, Mexican workers not only enjoy a right to severance pay, they also benefit from laws that give them absolute caps on the number of hours they can work, paid vacations at premium-pay rates, paid holidays, paid weekends, paid maternity leave, employer-funded housing, annual profit-sharing bonuses, and annual 13th-month pay bonuses. None of these practices exists under U.S. law. Mexico's constitution also grants affirmative action–related employment rights and bans noncompete agreements.[41]

U.S. multinational companies operating in Europe must also comply with the employment laws of their European host countries. Although many European nations have statutes or constitutional clauses prohibiting employment discrimination, unlike U.S. laws, many of these laws lack provisions by which government agencies can enforce them or private litigation can be pursued. But this situation is changing because Europeans are concerned that due to the formation of the European Union, people's employment rights and working conditions will deteriorate to the point where they mirror the lowest levels of protection afforded by a particular member-nation. This concern has resulted in European Union–level legislation requiring member nations to strengthen their legal provisions.[42]

EQUAL EMPLOYMENT OPPORTUNITY, AFFIRMATIVE ACTION, AND QUOTAS

Equal employment opportunity, affirmative action, and staffing quotas are frequently misunderstood and often the subjects of debate. Next, we discuss each of them.

Equal Employment Opportunity

EQUAL EMPLOYMENT OPPORTUNITY (EEO)
employment practices designed and used in a "facially neutral" manner

Equal employment opportunity (**EEO**) means that a firm's employment practices must be designed and used in a "facially neutral" manner. Facially neutral means that all employees and applicants are treated consistently regardless of their protected characteristics, such as their sex and race. EEO laws require firms to make an unbiased assessment and interpretation of applicants' job qualifications. The consistent administration of staffing practices is thought to create an equal opportunity for everyone to obtain a job or promotion, not just members of protected classes.

A person cannot be discriminated against (i.e., he or she would fall into a protected class) based on the following characteristics:[43]

- Age
- Disability
- National origin
- Pregnancy
- Race
- Religion
- Sex

EEO laws also prohibit employees from retaliatory discharge and from being sexually harassed. In addition, the laws prohibit employers from paying employees more than other employees based upon their sex or discriminating against employees based on the fact that they are pregnant.

Affirmative Action

AFFIRMATIVE ACTION
the proactive effort to eliminate discrimination and its effects, and to ensure nondiscriminatory results in employment practices in the future

You might have wondered at some point in your lifetime what exactly affirmative action consists of. **Affirmative action**[44] refers to the proactive efforts of the U.S. government to eliminate discrimination and its past effects. Affirmative action programs began in the 1970s to improve the outcome of the Civil Rights Act of 1964, which prohibited race discrimination in employment. As President Lyndon Johnson put it in 1965: "We seek...not just equality as a right and a theory but equality as a fact and equality as a result." Out of concern that ending formal discrimination would not eliminate racism by employers, President Johnson issued Executive Order 11246 in September 1965, requiring employers who received federal contracts to take extra steps—affirmative action, that is—to integrate their workforces. Executive Order 11246 requires contractors with federal contracts of at least $50,000 and 50 or more employees to have an affirmative action plan.

The goal of affirmative action is to provide employment opportunities to groups formerly underrepresented in employment. These groups, particularly blacks, Native Americans, Asian Americans, Hispanic Americans, and women, have been identified by the U.S. Department of Labor as "protected classes." Affirmative action is also required for handicapped persons, disabled veterans, and Vietnam War veterans. Although Executive Order 11246 requires that federal contractors set goals for hiring minorities and females, there are currently no laws or regulations requiring they set goals for hiring other protected classes (handicapped persons and Vietnam veterans).

AFFIRMATIVE ACTION PLANS An *affirmative action plan* describes in detail the actions to be taken, procedures to be followed, and standards to be adhered to when it comes to establishing an affirmative action program. Affirmative action plans can include, but are not limited to, adhering to provisions for nondiscriminatory recruitment, training, and promotion. Procedures for internal record keeping, internal compliance auditing, and reporting are often included to measure the success of the plans. Employers adhere to affirmative action plans because they want to, because a court orders them to, because they are federal contractors, or because they agree to them as a remedy for discrimination that occurred in the past.

Affirmative action programs can temporarily give preferential treatment to qualified applicants from underrepresented protected groups. Preferential treatment is only allowable in cases settled by courts in contexts of discrimination claims. (A firm cannot legally decide to give preferential treatment on its own, in other words.) Numerical benchmarks are usually established based on the availability of qualified applicants in the job market or qualified candidates in the employer's workforce. These numerical goals do not create quotas for specific groups, nor are they designed to guarantee proportional representation or equal results. In most cases, the plans identify voluntary goals and timetables for integrating workers from underrepresented groups into the workplace. In other words, the plans give employers a framework to use as they develop their recruiting, hiring, and promotion strategies. Moreover, a contractor's failure to attain its goals is not in and of itself an affirmative action violation. However, failing to make a good faith effort to attain the goals is.[45] Affirmative action plans should be temporary and be discontinued when the workforce is representative of the available population, and should be formally stated in writing.

The practice of affirmative action (making an effort to undo the results of discrimination that has occurred in the past) tends to be controversial. Nonetheless, since the establishment of affirmative action programs, women and minorities have experienced significant employment gains. In the first 25 years following the government's affirmative action efforts, the participation by blacks in the workforce increased 50 percent, and the percentage of blacks holding managerial positions jumped fivefold.[46] But the result has been far from perfect. For example, in 2013, only 20 of the Fortune 1000 CEOs were women.[47]

It is important to understand some of the key factors that determine the legal defensibility of an affirmative action plan, particularly if it requires giving preferential treatment to any subgroup. Several federal court decisions[48] have helped to clarify some of the factors that are important in determining whether an affirmative action plan that involves preferential treatment is in violation of Title VII. These are summarized in Table 3-3[49] Rather than giving any protected group preferential treatment, it may be better for employers to identify the business-related characteristic they are seeking (e.g., a goal to hire people with knowledge of and influence in the African American community) and use it in making hiring decisions rather than using the protected characteristic itself.

In addition to hiring decisions, affirmative action implications extend to layoffs as well. In 1986, *Wygant v. Jackson Board of Education*[50] challenged a school board's policy of protecting minority employees by laying off nonminority teachers first, even though they had seniority. The Supreme Court ruled against the school board, saying that the injury suffered by the nonminorities affected could not justify the benefits to minorities: "We have previously expressed concern over the burden that a preferential-layoffs scheme imposes on innocent parties. In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job."

An equal opportunity/affirmative action statement should be included in all recruitment communications. Most organizations use phrases or acronyms such as *EOE/AA* (Equal Opportunity Employer/Affirmative Action), *Equal Opportunity Employer*, or *An Equal Opportunity/Affirmative Action Institution*. If these statements are ineffective in recruiting the quality and range of applicants desired, the employer can create a more explicit and proactive statement, such as the following: "Applicants from underrepresented groups are strongly encouraged to apply." An excellent sample affirmative action program is available at www.dol.gov/ofccp/regs/compliance/pdf/sampleaap.pdf.

Quotas

Staffing quotas establish specific requirements that certain percentages of disadvantaged groups be hired. Staffing quotas are generally illegal. The goal of quotas is often to equalize the proportional representation of underrepresented groups in the company's workforce with their proportions in the organization's relevant labor market. The size and location of a firm's

STAFFING QUOTAS

establish specific requirements that certain numbers of people from disadvantaged groups be hired

TABLE 3-3 Affirmative Action Plans Involving Preferential Treatment[51]

- ***Affirmative action plans should be remedial in nature.*** Employers found guilty of discrimination can be forced to implement an affirmative action plan to remedy the discrimination. Employers that have an imbalanced workforce but that have not been found guilty of discrimination may be able to justify an affirmative action plan to remedy the imbalance. Employers whose workforce is representative of the available workforce will have a difficult time justifying an affirmative action plan.
- ***An affirmative action plan should not exclude all nonminorities.*** Exactly how restrictive any subgroup quotas can be is unclear, but an affirmative action plan that excludes all members of a nonminority group would likely be found to be illegal.
- ***An affirmative action plan should be temporary.*** Discontinue the plan after meeting the affirmative action goals.
- ***An affirmative action plan should be formalized.*** Actions taken under informal affirmative action plans (i.e., those lacking formal goals or a formal statement of the actions to be taken under the plan) have been found to be discriminatory.

relevant labor market depends on the nature of the job. As an illustration, for faculty positions, the relevant labor market is usually defined as national. For management and professional positions, the relevant labor market is generally defined as regional. For staff and laborer positions, the relevant labor market is usually defined as local.

By the late 1970s, flaws in affirmative action policy began to arise, and *reverse discrimination*, or discrimination against white males, became an issue. The landmark 1978 *Bakke* case made numerical quotas illegal in college admissions programs. Allan Bakke, a white male, had been rejected two years in a row by a medical school that had accepted less-qualified minority applicants. The school had a separate admissions policy for minorities and reserved 16 out of 100 slots for minority students. The Supreme Court outlawed inflexible quota systems in affirmative action programs. In the same ruling, however, the Court upheld the legality of affirmative action per se. *Regents of University of California v. Bakke*[52] prohibited schools from considering race as a factor in admissions to promote racial diversity unless race is considered alongside other factors and on a case-by-case basis. In 2003, the Supreme Court ruled in *Grutter v. Bollinger*[53] and *Gratz v. Bollinger*[54] that a school can make action-based admission decisions if it treats race as one factor among many for the purpose of achieving a "diverse" student population. In other words, each applicant must be reviewed individually, and an affirmative action policy is unconstitutional if it automatically increases an applicant's chances over others simply because of his or her race.[55] Although these school admissions cases are not Title VII cases, similar mechanisms are applied to them.

Employers are not required to have a proportional representation in their workforce as long as they can show that they are not engaging in discrimination. However, they are more open to lawsuits if they do not. Although affirmative action, preferential treatment policies, and quotas are not required by law, they are not prohibited either. Because numerical quota systems allow less-qualified members of protected groups to be hired over more-qualified candidates, there are limitations on their features and usage. A quota is most often used as a court-imposed remedy for past discrimination or as part of a voluntary affirmative action plan.

ENFORCEMENT AGENCIES

Legislative bodies at the local, state, and federal levels have the power to create, amend, and eliminate laws and regulations, including those pertaining to staffing and employment. Legislative bodies also create agencies for the purposes of interpreting, administering, and enforcing these laws. The two most important federal agencies in terms of staffing are the Equal Employment Opportunity Commission (EEOC) and the Department of Labor's Office of Federal Contract Compliance Programs.

The Equal Employment Opportunity Commission (EEOC)

When the EEOC was established by Title VII of the Civil Rights Act of 1964, its primary responsibility was to receive and investigate charges of unlawful employment practices and, for those charges found to be of "reasonable cause," to try to resolve the disputes. The agency's responsibilities have expanded with the enactment of new and amended legislation, and in 1972, the commission was given the power to enforce certain laws. Currently, the EEOC enforces the following federal statutes:

- Title VII of the Civil Rights Act of 1964
- The Age Discrimination in Employment Act of 1967 (ADEA)
- Pregnancy Discrimination Act of 1978
- Title I and Title V of the Americans with Disabilities Act of 1990 (ADA)
- Sections 501 and 505 of the Rehabilitation Act of 1973
- Sections 102 and 103 of the Civil Rights Act of 1991
- The Equal Pay Act of 1963
- The Genetic Information Nondiscrimination Act of 2008 (GINA)

The EEOC receives over 90,000 charges each year,[56] and recently increased its staff to help resolve a backlog of charges.[57] Even companies with large, sophisticated staffing functions are vulnerable. In one case, the EEOC filed a lawsuit against United Parcel Service on behalf of a

Rastafarian who was told he had to shave his beard if he wanted to be hired as a driver's helper.[58] The EEOC regularly files national class-action sex and race discrimination lawsuits.[59] The EEOC looks for **systemic discrimination**, which occurs when a process or practice discriminates against significant numbers of applicants or employees, as opposed to discrimination against a single employee.

SYSTEMIC DISCRIMINATION
when a process or practice discriminates against significant numbers of applicants or employees

In addition to enforcing equal employment laws, the EEOC encourages and facilitates voluntary compliance via tailored programs that meet the needs of employers, including small business and federal-sector employers, and via programs to educate the public on EEO laws. Another good reason to ensure that recruiters and hiring managers rely on objective standards and comply with antidiscrimination laws is that the EEOC is pursuing more systemic discrimination cases, which can generate judicial damage awards that run into hundreds of millions of dollars.

The remedies available to the EEOC for employment discrimination, intentional or not, include

- Back pay, or the pay a plaintiff is entitled to up to the time the court rendered its judgment.
- Hiring, promotion, or job reinstatement.
- Front pay, or pay a plaintiff is entitled to between the time the judgment is reached and the time the worker returns to the place of employment.
- Reasonable accommodation.
- Other actions that will make an individual "whole" (i.e., in the condition he or she would have been if not for the discrimination).

When the EEOC finds that a firm has intentionally discriminated, it can award the victims compensatory damages for their actual past and future monetary losses as well damages for their mental anguish and inconvenience. It can also award punitive damages as a deterrent or punishment if an employer acted with malice or reckless indifference (although punitive damages cannot be levied against federal, state, or local government employers). EEOC workplace discrimination charges have been increasing, with hundreds of millions of dollars recovered each year.[60] The employer can also be required to take corrective or preventive actions to cure the source of the identified discrimination and minimize the chance of its recurrence.[61] The EEOC's compliance manual can be found at http://www.eeoc.gov/laws/guidance/compliance.cfm.

All employers with 15 or more employees are required to keep employment records. Some large employers are also required to file an EEO-1 report annually depending on the number of employees and federal contracts they have.[62] A sample EEO Standard Form 100 used for this reporting can be found at http://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2.pdf.

The Office of Federal Contract Compliance Programs (OFCCP)

The Office of Federal Contract Compliance Programs (OFCCP) is part of the U.S. Department of Labor[63] and is responsible for administering and enforcing three equal employment opportunity programs that apply to federal contractors and subcontractors: Executive Order 11246 (later expanded by Executive Order 11375), Section 503 of the Rehabilitation Act of 1973, and the affirmative action provisions of the Vietnam Era Veteran's Readjustment Assistance Act of 1974. The primary mission of the OFCCP is to ensure that federal contractors with at least 50 employees and who receive $50,000 or more in grants, goods, and services take affirmative action to promote equal employment opportunity and annually file appropriate affirmative action plans with the agency. The OFCCP systemically reviews employers' employment practices to make sure firms are complying with U.S. discrimination laws.[64] However, the office focuses to a greater extent on class-action discrimination. After President Obama launched the National Equal Pay Task force in January 2010, the OFCCP made combating pay discrimination a top priority. In its first two years, the Task Force recovered over $24 million in back wages and almost 5,500 job opportunities on behalf of over 50,000 discrimination victims. It also recovered $1.4 million in back pay and salary adjustments for 500 workers.[65]

The OFCCP undertakes compliance reviews for contractors flagged by a software program as having below average participation rates for minorities or women. The OFCCP also conducts reviews of contractors selected randomly and those identified through complaints. If it finds a violation of affirmative action or antidiscrimination requirements, the OFCCP attempts to reconcile with the contractor before referring the case for formal administrative enforcement. The OFCCP gives Exemplary Voluntary Efforts (EVE) and Opportunity 2000 awards to those companies that demonstrate significant achievement in terms of their equal opportunity and affirmative action. Although a contractor in violation of Executive Order 11246 may have its federal contracts terminated or suspended, such administrative actions are rare, and the contractor gets sufficient due process before this happens.[66]

HOW DOES THE OFCCP DEFINE AN "APPLICANT"? Because they must track the gender, race, and ethnicity of applicants and analyze whether hiring practices, policies, or procedures have a "disparate impact" on minority and women applicants, the definition of an applicant is particularly important to federal government contractors. The OFCCP's record-retention regulations under Executive Order 11246 require federal contractors to retain paper résumés and applications for two years if the contractor has at least 150 employees and a government contract of at least $150,000. Contractors with less than 150 employees or no contract of at least $150,000 must retain paper applications and résumés for one year. The OFCCP's regulations also require government contractors to identify the gender, race, and ethnicity of each applicant, where possible.[67] The legal definition of an applicant is particularly important because only "applicants" can allege that unlawful discrimination has occurred with regard to a firm's hiring decisions under state and federal discrimination statutes. Understanding the definition of an applicant can help employers minimize risk and protect themselves from costly audit defense.

INTERNET APPLICANTS To help federal contractors and subcontractors manage the burdens created by the Internet, which can generate thousands of applicants for a single position, in 2005, the OFCCP published a revised definition of what constitutes an "Internet applicant."[68] By "Internet and related electronic technologies" the OFCCP includes e-mail, résumé databases, job banks, electronic scanning technology, applicant tracking systems, applicant service providers, and applicant screeners. The OFCCP's 2005 definition applies only to data collection and record-keeping requirements under Executive Order 11246 (data related to race, color, religion, national origin, and sex).[69] A person applying via the Internet and related technologies is an "applicant" if all four of the following criteria are satisfied:

1. The individual expresses an interest in a job via the Internet or related electronic data technologies.
2. The contractor considers the individual for employment in a particular position.
3. The individual's expression of interest indicates that he or she possesses the basic qualifications for the position.
4. The individual at no point in the contractor's selection process, prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.

Consider a contractor who wants to hire a bilingual manufacturing supervisor and searches an Internet job database containing 30,000 résumés for two basic qualifications: a four-year business degree and fluency in English and Spanish. The initial screen for these two basic qualifications narrows the pool to 5,000 people. The contractor then adds a third, preestablished basic qualification of two years of management experience, which reduces the pool to 1,500. Finally, the contractor adds a fourth, preestablished basic qualification of experience in a manufacturing environment, which results in a pool of 85 job seekers. Under the rule, only the 85 job seekers meeting all four basic qualifications would be Internet applicants, assuming they met the other three prongs of the "Internet applicant" definition.

Contractors are allowed to use data management techniques, such as random sampling or absolute numerical limits, to reduce the number of people who express interest in their jobs as long as the techniques are facially neutral and the applicants aren't individually assessed for their qualifications. For example, if the contractor receives a large number of applicants expressing interest, it can decide that it will only consider the first 200.

Contractors must retain records "identifying job seekers contacted regarding their interest in a particular position," and, with respect to internal résumé databases, retain the following:

- A record of each résumé added to the database.
- a record of the date each résumé was added to the database.
- The position for which each search of the database was made.
- For each search, the substantive search criteria used and the date of the search.

With respect to external résumé databases, the contractor must maintain the following:

- A record of the position for which each search of the database was made.
- The substantive search criteria used.
- The date of the search.
- The résumés of job seekers who met the basic qualifications for the particular position who are considered by the contractor, even if they do not qualify as Internet applicants.

Contractors must also keep all documents related to the Internet job seekers it contacts regarding their interest in a particular position, the applicants' tests and test results, interview notes, and records identifying their race, gender, and ethnicity.[70] The OFCCP requires contractors to maintain only (1) those records relating to the analyses of the impact of employee selection procedures on Internet applicants, and (2) the impact of employment tests (without regard of whether the tests were administered to Internet applicants) because the OFCCP does not consider employment tests to be basic qualifications. Although the OFCCP generally will use labor force statistics and census data to determine whether basic qualifications have an adverse impact on race, gender, or ethnicity, contractors should consider performing their own analyses.[71]

As we have explained, the OFCCP's definition of an Internet applicant applies only to people applying for jobs with federal contractors via the Internet and related technologies. For noncontractors and for people applying for jobs through nonelectronic means, the Uniform Guidelines on Employee Selection Procedures[72] states that "The precise definition of the term 'applicant' depends upon the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending on the employer's practice."[73]

The information collected allows the organization to provide the documentation it needs to justify its selection decisions and defend those decisions against any legal challenges. Much of the information can also be used by firms to evaluate their staffing systems. For example, applicants' assessment scores can not only be used as evidence in a legal proceeding to show the firm acted in an unbiased way, but can also be used to evaluate the quality of the firm's various recruiting sources. Care must be taken to ensure that records on protected characteristics are not easily accessible during the selection process so that charges of discrimination cannot be made.

THE BASES FOR EMPLOYMENT LAWSUITS

Faulty recruiting, hiring, promotion, and termination procedures can all generate lawsuits. Employees who initiate lawsuits often reach all the way back to the hiring process to show that a firm's practices systematically discriminated against them.[74] Next, we discuss several different types of staffing-related lawsuits and what is required for them to succeed in court.

Disparate Treatment

Disparate treatment is intentional discrimination based on a person's protected characteristic. If the employment decision (hiring or firing) would change if the applicant's race, religion, national origin, color, sex, disability, or age were different, disparate treatment has taken place. Disparate treatment can be *direct*, as when it results from a company's policy to not hire older workers. It can also be *inferred* from situational factors or result from a combination of permissible and prohibited factors, both of which we discuss next.

DISPARATE TREATMENT
intentional discrimination based on a protected characteristic

AN INFERRED DISPARATE TREATMENT CASE Disparate treatment can be inferred from situational factors. To establish this type of case of discrimination, the plaintiff must show:[75]

1. That he or she belongs to a group protected from discrimination (race, gender, etc.).
2. That he or she applied for the job and was qualified for the job for which the employer was seeking applicants.
3. That despite being qualified, he or she was rejected. (The plaintiff does not need to prove that he or she was rejected because of his or her protected status, only that despite his or her qualifications, he or she was rejected.)
4. That after being rejected, the position remained open, and the employer continued to seek applicants whose qualifications were similar to those of the plaintiff.

Once these four aspects are established, the burden shifts to the employer to show that the hiring decision was the result of a BFOQ based on business necessity. Demonstrable evidence of a business necessity is required. The defendant can offer as evidence statistical reports, validation studies, expert testimony, prior successful experience, and other evidence to that effect.[76]

If the defendant is successful in establishing a BFOQ defense, the plaintiff then has the opportunity to present evidence showing that the employer's stated reason for the rejection was false and merely a pretext. To establish a case allowed to go to court, the plaintiff need not prove that discrimination was the motivating factor in the hiring or promotion decision, only raise an inference that such misconduct occurred.

MIXED MOTIVE

when an employer is accused of having both a legitimate and an illegitimate reason for making an employment decision

A MIXED MOTIVE CASE A **mixed motive** case of disparate treatment is one in which the employer is accused of having both a legitimate and an illegitimate reason for making the employment decision. Under the 1991 Civil Rights Act, a plaintiff can establish an unlawful employment practice by showing that a protected characteristic (such as race, sex, color, religion, or national origin) was a motivating factor in an employment decision, even if other legitimate factors—for example, the fact that the plaintiff was tardy, frequently absent, or violated the company's rules—also motivated the decision. A plaintiff only needs to prove that race and/or gender was *a motivating factor*—one of the reasons for the decision—no matter how small a role it played. If the plaintiff satisfies the burden of proof that discrimination was a motivating factor in the employer's action, the employer is found liable. The burden of proof then shifts to the employer to cut off or reduce a plaintiff's monetary damages by proving to the jury that it would have made the same employment decision in the absence of the discriminatory motive. Under the mixed motive analysis, the burden of proof is on the defendant to show that the decision would have been the same despite the plaintiff's race or sex. Under the disparate treatment method, the burden of proof is on the plaintiff to disprove the same thing.

The Supreme Court has ruled that plaintiffs do not need a "smoking gun" or direct evidence in showing a protected characteristic to be a motivating factor but can rely on "circumstantial evidence" that does not have to be linked directly to the employment decision.[77] This includes circumstances from which the jury can infer a discriminatory motive—for example, providing evidence that a black employee who had three unexcused absences was fired whereas a white employee with the same number of unexcused absences was not.

Adverse (or Disparate) Impact

ADVERSE (DISPARATE) IMPACT

when an action has a disproportionate effect on a protected group, regardless of the employer's intent

Adverse (disparate) impact occurs when an action has a disproportionate effect on a protected group, regardless of its intent. Employment practices that are facially neutral in their treatment of different groups but that have a significantly adverse effect on a protected group when compared with other practices can be legally challenged. The only defense for adverse impact is when it can be justified by a business necessity or job relatedness.

The seminal adverse impact case is the Supreme Court's 1971 decision in *Griggs v. Duke Power Co.* The Court held that if the Duke Power Company could not show a "business necessity" for requiring applicants to possess a high-school diploma or pass off-the-shelf intelligence tests, due to the difference in pass rates for white and minorities, the employer would be in violation of Title VII. Examples of practices that may be subject to an adverse impact challenge include written tests, educational requirements, height and weight requirements, strength requirements (e.g., being able to carry at least 50 pounds), and subjective procedures, such as interviews. In larger organizations, the probability of adverse impact taking place somewhere in the company is greater because of the larger numbers of jobs and job families, or clusters of jobs in the same general areas.

Assessment scores cannot be altered or changed to reduce the adverse impact on protected groups. According to the Civil Rights Act of 1991, it is an unlawful employment practice "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of employment related tests on the basis of race, color, religion, sex, or national origin." This means that *race norming*, or comparing an applicant's scores only to members of his or her own racial subgroup and setting separate passing or cutoff scores for each subgroup, is unlawful.

STATISTICS There are three types of statistics relevant for showing adverse impact: stock statistics, flow statistics, and concentration statistics. **Stock statistics** compare the percentage of men, women, or minorities employed in a job category with their availability in the relevant population of qualified people interested in the position. This is also called a *utilization analysis*. If the employment rate of men, women, or minorities is less than what would be expected based on their availability, they are said to be *underutilized*.

STOCK STATISTICS

compare the percentage of men, women, or minorities employed in a job category with their availability in the relevant population of qualified people interested in the position

To properly conduct a utilization analysis, employers must compile stock statistics by job group (a group of related jobs) and do them separately for women and minorities. Usually firms compile these statistics as a starting point when developing affirmative action programs. Although it is relatively easy to identify the number of people in each subgroup employed by the firm, it can be difficult to accurately identify each subgroup's availability in the relevant population. The percentage of women or minorities in the recruitment area who have the required skills must be taken into account as well as the percentage of women or minorities among those promotable, transferable, and trainable within the organization—both of which can be difficult to estimate or measure. Different utilization rates do not demonstrate adverse impact; they only show that there is a reason to further investigate an employer's staffing practices to see why the underutilization is occurring. Economists are often hired to conduct utilization analyses. Firms are also advised to seek legal assistance when compiling stock statistics and developing affirmative action plans.

Table 3-4 identifies a firm's utilization rates of women in the clerical job group relative to their availability in the relevant population. In the table, we see that females are 80 percent and males are 20 percent of the company's clerical workers. We see from the right column that females make up 60 percent of the available clerical workers and males 40 percent. This suggests that males may be underutilized in the clerical job category because they are employed at a rate (20 percent) that is less than their availability (40 percent).

Flow statistics compare protected groups' *selection rates*, or the percentage of applicants hired from different subgroups, to determine if the rates are significantly different from each other. If a significant difference is found, adverse impact is demonstrated. This is the only one of the three statistics that can establish adverse impact by itself. The Uniform Guidelines on Employee Selection Procedures,[78] which are on the Internet at www.uniformguidelines.com/uniformguidelines.html, address the requirements for computing and interpreting flow statistics. These guidelines state that

FLOW STATISTICS

statistics that compare the percentage of applicants hired from different subgroups to determine if they are significantly different from each other

- Organizations must keep records so the relevant selection rates (also called applicant flow statistics) can be calculated.
- Selection rates must be calculated
  - for each job category,
  - for both internal and external selection decisions,
  - for each step in the selection process, and
  - by applicant race and sex.
- The 80 percent (or 4/5) rule determines whether or not companies' procedures have an adverse impact. The 80 percent rule states that "a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or 80 percent) of the rate for the group with the highest rate will generally be regarded by federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by federal enforcement agencies as evidence of adverse impact."[79]
- The 80 percent rule is only a guideline, and exceptions to it can be made based on issues surrounding the statistical and practical significance of the differences in selection rates (such as small sample sizes).

TABLE 3-4 Stock Statistics

	Job Category: Clerical Workers	
	Current Clerical Workers (%)	Availability in Relevant Population (%)
Females	80	60
Males	20	40

Statistics are not sufficient to show adverse impact. In the 2009 case of *Ricci v. DeStefano*,[80] the U.S. Supreme Court ruled that the results of assessment tests cannot be ignored simply because they have an adverse impact on a protected group. Once an employer has established the selection or promotion process and selection criteria, invalidating the test results without strong evidence of an impermissible adverse impact amounts to racial preference, which is counter to the Title VII notion of a workplace where individuals are guaranteed equal opportunity regardless of race.

The courts have also found that adverse impact occurs if the difference between the number of members of the protected class selected and the number that could be reasonably anticipated to be selected in a random selection system is more than two or three standard deviations. We will discuss this in greater detail in Chapter 8.

In Table 3-5 we see the different selection rates (the percentage of applicants hired) of women and men for the sales associate job category. To apply the four-fifths, or 80 percent, rule to determine if adverse impact has occurred, we start by identifying the most favorable subgroup selection rate. In this example we see that men were hired at the higher rate, and that 50 percent of male applicants were hired (100/200). Four-fifths (or 80 percent) of 50 percent is 40 percent (0.80 × 50 percent). So if females were selected at a rate of less than 40 percent, then the subgroup selection rates differ enough to suggest that the selection method is discriminatory. We see that women were selected at a 25 percent rate, which is less than 40 percent, suggesting the possibility that sex discrimination has occurred.

The 80 percent rule highlights why targeted recruiting is important. If an organization was to simply target a particular subgroup for recruiting with little or no attention to talent, skills, and quality in that pool, then it could unintentionally create a situation in which it would be likely to violate the rule. Simply increasing the size of the pool without maintaining or improving its quality can reduce the selection rate of certain protected subgroups, thereby violating the rule.

CONCENTRATION STATISTICS

statistics that compare the percentages of men, women, or minorities in various job categories to see if men, women, or minorities are concentrated in certain workforce categories

Concentration statistics compare the percentages of people in various job categories to see if men, women, or minorities are concentrated in certain workforce categories. For example, 50 percent of an organization's total employees may be female, but if women tend to comprise 90 percent of the clerical workforce and men tend to comprise 90 percent of the managerial workforce, then women may be underutilized in managerial positions and men underutilized in clerical positions. Concentration statistics do not establish adverse impact by themselves, but they can give the EEOC a reason to investigate an employer's staffing practices further to see why the differences are occurring.

In Table 3-6, we see that the concentration of blacks in the sales positions is 50 percent, and that the concentration of Hispanics in the clerical positions is 65 percent. By contrast, the concentration of whites in management positions is 80 percent. This suggests that racial subgroups do tend to be concentrated in certain job categories and may suggest discrimination. There are two possible methods for evaluating concentration data. The first is to compare the representation of employees in a subgroup (e.g., Hispanics) with all of the other employees (e.g., non-Hispanics). The other is to compare the representation of employees in one subgroup with other specific subgroups (e.g., Hispanics compared to Asians, or Hispanics compared to whites). It is often helpful to look at the concentration data using both methods when investigating the possibility of disparate impact. No standard statistical test currently exists as a legal guideline when evaluating concentration statistics; it is expected that different proportions across jobs and organizational levels will be noticed.

TABLE 3-5 Flow Statistics: An Example

Job Category: Sales Associates			
	Number of Applicants	Number Hired	Selection Rate (%)
Men	200	100	50
Women	100	25	25

TABLE 3-6 Concentration Statistics: An Example

	Job Category		
	Sales (%)	Clerical (%)	Management (%)
Whites	30	15	80
Blacks	50	20	15
Hispanics	20	65	5

ESTABLISHING A LEGAL CASE The steps in establishing an adverse impact case are as follows:

1. The plaintiff must prove, generally through statistical comparisons, that the challenged practice or selection device has a substantial adverse impact on a protected group.[81] The defendant can then criticize the statistical analysis or offer different statistics.
2. If the plaintiff establishes adverse impact, the employer must prove that the challenged practice is "job-related for the position in question and consistent with business necessity."[82]

Even if the employer proves business necessity, the plaintiff can still prevail by showing that the employer has refused to adopt an alternative employment practice that would satisfy the employer's legitimate interests without having an adverse impact on a protected class.[83]

Defending Failure-to-Hire Lawsuits

Lawsuits for failure to hire can be difficult to defend. In wrongful termination or failure-to-promote lawsuits, personnel records can help establish that the decision to terminate or not promote a person was based on a legitimate, nondiscriminatory reason. But when a company is sued for failure to hire, the employer frequently has no history with the employee on which to rely. Providing an accurate job description to all recruits and using a standardized and well-documented recruitment and screening process is, therefore, very important for the employer. This will be the foundation of the employer's defense. Screening candidates using objective, job-relevant criteria and archiving all recruiter and interviewer notes, test and interview scores, and so forth for each applicant can help the employer defend its hiring decisions in court.[84]

One of the best ways for an organization to reduce the chances of being sued for failure to hire is to reduce the desire of an aggrieved individual to file a lawsuit. On the one hand, if an organization proactively and genuinely tries to generate applicants from diverse groups and subsequently treats all recruits fairly and with respect, rejected applicants may be less likely to engage in legal action. On the other hand, if an organization makes no effort to recruit from diverse groups and treats some applicants differently than others, or treats all applicants unfairly or with disrespect, those who are not hired may be more motivated to sue. The large number of jobs at a big organization increases the chances that adverse impact is occurring somewhere in the company. Although important for all organizations, using proactive recruitment practices and attending to applicant reactions to the recruitment and hiring processes are even more important for larger organizations wishing to avoid lawsuits.

Fraudulent Recruitment

Fraudulent recruitment, also called *truth in hiring*, involves misrepresenting the job or organization to a recruit. In a tight job market or during periods of low unemployment among people with the skills they are seeking, employers may be tempted to exaggerate the benefits of their jobs or make unrealistic promises to attract new hires. If they fall prey to this temptation, they risk being hit with a tort lawsuit filed by employees based on a theory of fraudulent inducement to hire. A *tort* involves a claim that someone was harmed by a wrongful but not necessarily criminal act of another party and does not require the existence of a contract. Damages must generally go beyond the loss of employment in order for a plaintiff to make such a claim. If an employer intentionally exaggerates what a job offers, it could be vulnerable to a charge of fraud. Although employment fraud cases are not common or easy to prove, they are becoming more

FRAUDULENT RECRUITMENT
(truth in hiring) misrepresenting the job or organization to a recruit

frequent. In addition to sizable jury awards (one plaintiff won $10 million in a breach-of-contract case having claimed that an oil company never intended to keep the promises it made while recruiting him), the damage to a company's reputation as an employer can compromise its future recruiting efforts.[85]

In one fraudulent recruitment case, the Colorado Court of Appeals upheld a $250,000 jury award against a company for concealing information from a candidate during the recruitment process. The company presented a positive picture of itself and of the plaintiff's future with it and concealed its financial losses and the substantial risk that the plaintiff could soon be laid off. The court ruled that an organization may not have to divulge its financial condition to every applicant, but that full disclosure is required if statements are made to an applicant that would create a "false impression" about the employer's outlook and the applicant's future employment prospects.[86]

Statements made to convince a job applicant to accept a position can be legally binding on the employer, even when no employment contracts are involved and even if the contract states that no promises about employment have been made. In other words, an employment-at-will arrangement will not preclude an employee from making a fraudulent recruitment claim.[87] Moreover, any actions that adversely affect a recently hired employee's compensation or status can make it look like the employer acted in bad faith and potentially give rise to a fraudulent recruitment claim. To defend itself, the employer would have to show that intervening circumstances after the person was hired justified the action.

To win a case involving an allegation of fraudulent recruitment and hiring, the plaintiff must prove the following five things:[88]

1. That the employer made a false representation of a material fact.
2. That the employer knew or believed the representation was false or that there was an insufficient basis for asserting that it was true.
3. That the employer intended the employee to rely on the representation.
4. That the employee justifiably relied on the representation.
5. That the employee suffered damages as a result of doing so, such as costs related to relocating, resigning from the firm, or rejecting other offers.

A variation on fraudulent hiring occurs when an employer uses fraud to keep an employee from resigning. In one instance, following the purchase of a controlling interest in another company, a man's employer assured him that "absolutely no changes would be made" that could hurt his job security. The man stayed with the firm, was soon subjected to a pay cut, and eventually laid off. In this case, the court allowed the man's claim for fraudulent misrepresentation to go to trial.[89]

Employers can reduce the likelihood of being faced with such lawsuits by instructing all individuals involved in recruiting and hiring not to make any statements about the company or the job that they know are not true, and not to make any promises concerning a job's functions, pay, benefits, or job security that the employer does not intend to keep. Although it is only natural to want to present the job in a positive light, it is a good idea to qualify such statements so they are not taken as guarantees. Any written employment agreement should clearly spell out the terms of employment, including the temporary nature of the employment if the job is not permanent, and state that the written agreement supersedes all prior agreements or understandings concerning the employment. Written reminders that employment is at will can also refute future employees' claims of having been promised long-term job security.[90]

Negligent Hiring

NEGLIGENT HIRING

when an employer hires an applicant it knows or should have known could harm a third party

Negligent hiring is a tort claim based on the common law concept that an employer has a general obligation not to hire an applicant it knows or should have known could harm a third party. Essentially, an organization is considered responsible for the damaging actions of its employees if it failed to exercise reasonable care in hiring the employee who caused the harm. These issues are particularly important when the employee will have a lot of contact with the public, customers, patients, or children, or when the firm is hiring employees whose jobs would give them access to homes and apartments—installers, maintenance workers, delivery drivers, and the like.

A company can be found legally liable for negligent hiring if it fails to uncover a job applicant's incompetence or unfitness by checking his or her references, criminal records, or general background. In order for a customer, employee, or other third party to win a negligent hiring suit against an employer, the following must generally be shown:[91]

1. The existence of an employment relationship between the employer and the worker.
2. The employee's unfitness.
3. The employer's actual or constructive knowledge of the employee's unfitness (failing to investigate an employee's background can lead to a finding of constructive knowledge).
4. The employee's act or omission caused the third party's injuries.
5. The employer's negligence in hiring the employee was the most likely cause of the plaintiff's injuries.

An employer's obligation to its employees and third parties for negligent hiring depends upon whether that employer acted as a reasonable prudent employer would when hiring its employees. Preemployment background checks are often the responsibility of recruiters. Because the law also requires organizations to respect applicants' privacy, candidates' backgrounds should be researched as thoroughly as possible without violating their privacy rights. Background checks should seek to identify the felony convictions of would-be employees, but not prior arrests that didn't result in convictions since these arrest records are generally protected by privacy laws. Employers should contact all previous employers of the people they want to hire and keep a written record of all of their investigation efforts. Applicants should also be required to explain any gaps in their employment histories. If the organization can afford it, outsourcing background checks to qualified professionals can help the firm refute later claims that it failed to make a reasonable effort to learn about the employee's history.[92] Performing background checks routinely and consistently can also help the firm defend itself against other suits filed, for example, on the basis of disparate treatment and adverse impact. *Negligent retention* is similar to negligent hiring, but it focuses on situations in which a company knowingly retains employees who have a high risk of injuring themselves or others.[93]

Negligent Referral

A growing number of states recognize **negligent referral** as being the basis for a claim. Negligent referral involves misrepresenting or failing to disclose complete and accurate information about a former employee. An employee's former employer can be sued for negligent referral if the employee is involved in some incident at his or her new workplace that might have been predicted based on prior behavior. For example, suppose an employee of Company A is a poor performer or has violent tendencies and the company wants the employee to leave. The employee then applies for a job with Company B, who calls Company A for a reference on the employee. Company A provides either minimal information about the employee or gives a positive reference, so Company B hires the employee who subsequently injures someone in his new position. Not only could Company B end up in court for negligent hiring, Company A could also find itself defending a negligent referral claim brought by Company B or the person injured.[94] Unfortunately, there have been several incidents in the United States in which nurses killed their patients and then moved on to do the same thing at new hospitals. How could this have happened? It happened because administrators at the nurse's former hospitals failed to disclose the information during their reference checks for fear of being sued for defamation.[95] *Defamation* is defined as "an unprivileged publication of false statements to third parties that tends to harm the reputation of the plaintiff in the community."[96]

NEGLIGENT REFERRAL
misrepresenting or failing to disclose complete and accurate information about a former employee

Clearly, checking a person's references is an important part of conducting a thorough background check as well as establishing an applicant's credentials and potential fit with the organization and position. But many employers provide only dates of employment, salary, and title, fearing that revealing more information about former employees could expose them to defamation suits by disgruntled former employees unable to find new employment. To promote safe workplaces, over 30 states have passed laws providing varying degrees of immunity to former employers who provide honest references about their former employees. It is too early to tell whether the immunity given to employers under these laws will sufficiently protect former employers from defamation. Defamation is currently the most common cause of action used by former employees to challenge a reference given by a former employer. Virtually unheard of prior to the 1990s, defamation in wrongful-termination lawsuits has become a growing trend.[97] Basically, recruiters can be trained to obtain information the firm needs to know about a candidate, but it can still be difficult for them to learn all the firm would like to know about a candidate from a reference check.

Certainly, it is wise for managers to exercise caution in giving references for former employees, even in the states that currently have laws granting immunity to employers for giving references. However, a blanket policy of providing only cursory referral information to avoid being sued for defamation claims can result in a company's failure to disclose certain information about former employees that it should. This, too, could lead to a lawsuit for the company. Some experts believe that the best advice is to say as little as possible except in those situations where the employee's behaviors could endanger others in the new workplace. Saying nothing or providing a good reference for a bad employee could be riskier than simply telling the truth.[98]

Managers should also be trained in the company's policy about giving references on social networking sites like LinkedIn. If managers' comments about former employees are inconsistent with the reason for their termination, the employee might be able to prove that the company's reason for termination was a pretext. For example, a lawyer representing Jamie Sky, who was terminated for poor performance, will be thrilled to find a LinkedIn recommendation by Jamie's former manager stating that Jamie was the best employee she ever had.[99]

Trade Secret Litigation

Under the Uniform Trade Secrets Act, which has been adopted by most state legislatures, *trade secrets* can be any type of information, process, idea, or "know how" that is not generally known and gives the possessor an advantage in the marketplace. Trade secrets include a wide range of confidential business or proprietary information, such as chemical formulas, industrial processes, business strategies, and, under certain circumstances, customer lists. Almost all organizations have trade secrets they must protect. To maintain business information as a trade secret, companies must take reasonable precautions including requiring employees to sign confidentiality, noncompete, and nondisclosure agreements to prevent them from disclosing the information to competitors. A sunroom manufacturer was ordered to pay $8.6 million for interfering with the noncompete contract of a competitor's employee and subsequently stealing a business plan.[100] Best Buy recently broadened its noncompete restrictions to vice presidents and directors, who must agree not to work for a competitor anywhere in the world or use any idea or experience gained at Best Buy for at least one year after leaving the company if they want to be eligible for stock awards.[101]

Trade secret litigation can take place after an employee is hired by a competitor, or during the interview process. Intel once accused Broadcom of conducting job interviews of Intel employees to obtain confidential information. A judge determined that Broadcom had attempted to extract trade secrets during the interviews and granted a preliminary injunction against Broadcom. The company was later ordered to change its interviewing and training processes so that new employees are neither encouraged nor permitted to disclose the trade secrets of their previous employers.[102] Even asking a candidate to list the customers with whom he or she regularly does business, or whom the candidate could bring over as new customers, could lead to an accusation of wrongful conduct. Virtually any employee may be in possession of confidential information.

The best defense from trade secret litigation is to prevent job candidates from disclosing protected information about other companies. Interviewers need to know what information is protected and how to question job candidates. Candidates should be warned at the beginning of an interview not to share a previous employer's proprietary information. When requesting a general description of the interviewee's job responsibilities and capabilities, ask the candidate to omit the specifics of accomplishments, which might include details that could reveal a trade secret. An example of a carefully worded interview question would be, "Without telling me anything about the actual recipe for a particular product, what role do you play in terms of developing new food products for your company?" It is also possible to ask the candidate before the interview to acknowledge in writing that he or she has been asked to avoid discussing confidential or trade secret information.[103]

Sexual Harassment

Under Title VII, the ADA, and the ADEA, harassment on the basis of race, color, religion, sex, national origin, disability, or age is illegal, as is retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices. Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability is also illegal.[104]

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, including same-sex harassment. The "hostile environment" standard also applies to harassment conducted on the basis of race, color, national origin, religion, age, and disability. Sexual harassment is recognized as intentional discrimination, and companies may be subject to punitive and compensatory damages by a jury if found guilty of it.

EEOC BEST PRACTICES

In addition to enforcing EEO laws, the EEOC provides programs to educate the public and employers on EEO laws and EEO compliance. One of the ways they do this is by identifying specific examples of good EEO and diversity programs and deriving examples of "best practices" that other companies might successfully emulate.[105] The EEOC defines a best staffing practice as one that[106]

- Complies with the law.
- Promotes equal employment opportunity.
- Addresses one or more barriers that adversely affect equal employment opportunity.
- Manifests management commitment and accountability.
- Ensures management and employee communication.
- Produces noteworthy results
- Does not cause or result in unfairness.

This general set of key elements that support successful EEO programs corresponds to the acronym SPLENDID:[107]

- Study—know the laws and standards, remove EEO barriers, and seek assistance from the EEOC, professional consultants, associations or groups, and so on.
- Plan—know the relevant workforce and demographics, define the problem(s), propose solutions, and develop strategies for achieving them.
- Lead—have all levels of management champion the cause and provide leadership for EEO implementation at all organizational levels.
- Encourage—link pay and performance for how employees interact, support, and respect each other.
- Notice—monitor the impact of EEO practices, ensure that unfairness does not occur as a result of a corrective strategy.
- Discuss—communicate and reinforce the message that diversity is a business asset.
- Include—bring all employees and groups into the analysis, planning, and implementation process.
- Dedicate—assign needed resources and stay persistent; an investment in EEO may take a little while to pay off.

BARRIERS TO LEGALLY DEFENSIBLE STAFFING

Strategically responding to the legal context surrounding staffing requires leveraging laws and guidelines to employ and retain the employees who will best help the firm compete and execute its business strategy. In addition to obeying staffing laws, it is critical that organizations identify and reduce the barriers that exist to legally defensible staffing and provide equal employment opportunities.

Many barriers to equal employment opportunity exist. Some of these barriers tend to be specific to a particular employer, rather than being societal or cultural in nature. Other general barriers based in societal or cultural practices or norms tend to be external to the employer. Next, we describe some of the general and specific barriers to equal employment opportunity.

General Barriers

A report by the EEOC has identified the most common equal employment opportunity barriers that tend to exist.[108] Because understanding and proactively addressing these barriers can minimize their impact and reduce the chances that an organization is discriminating unintentionally or intentionally in its staffing practices, we discuss each next.

THE "LIKE ME" BIAS People tend to associate with other people who they perceive to be like themselves. This bias is part of human nature, and may be conscious or unconscious. Although it can create a higher comfort level in working relationships, it can lead to the discrimination of people based on protected characteristics, such as their race, sex, a disability, or age. Perceived cultural and religious differences and ethnocentrism can compound the "like me" bias and result in equal employment opportunities being denied people.

Because the "like me" bias can influence the assessment of performance norms, there may be a perception that someone "different" is less able to do the job and that someone "like me" is more able to do the job. For example, a male scientist who tends to believe that women make poor scientists is unlikely to hire a female scientist. This perception can influence a firm's targeted recruiting efforts and further reduce equal employment opportunities.

STEREOTYPES A *stereotype* is a belief about an individual or a group based on the idea that everyone in a particular group will behave the same way. For example, "all men are athletic," "all women are nurturing," and "people who look a certain way are dangerous" are all examples of stereotypes. Stereotypes are harmful because they judge an individual based solely on his or her being part of a particular group, regardless of his or her unique identity.

People may have stereotypes of other individuals based on their race, color, religion, national origin, sex, disability, or age. Stereotypes are often negative and erroneous, and thus adversely affect the targeted individuals.[109] Because stereotypes can breed subtle racism, sexism, prejudice, and discomfort, they must be addressed in the EEO context. Recruiters and hiring managers may have stereotypes of what makes a good employee that, if they are the underlying beliefs and attitudes that form the bases of the firm's recruiting decisions, can adversely affect people's equal employment opportunities.

A common example of stereotyping occurs when rejecting an applicant as "overqualified." An employer might assume that a highly experienced person will have no interest in a lower-paying position, or will soon leave for something better. Although this assumption might be true, case law says that a person who is overqualified is, by definition, qualified. So, he or she cannot be rejected on that basis. Also, if a person is truly qualified but not hired, the candidate might erroneously assume that age discrimination occurred. The best solution is to ask the candidates why they are interested in the position—they may honestly be looking to change careers or seeking a job with less responsibility. If there is evidence that the individual has done a lot of job-hopping, the interviewer is no longer simply speculating about whether the person will stay in the job and has a more solid basis for rejecting them.[110]

IGNORANCE Some employers, particularly smaller organizations, are not aware of all of the EEOC's requirements and discriminate against people out of ignorance. Although it is not an effective legal defense, organizations may not know how the law applies to them because they have received poor or inaccurate advice. Even the largest employers may have individual hiring managers and recruiters who are not well versed in employment laws. As noted by the EEOC, to a large degree, stereotyping feeds on ignorance, but the repercussions of ignorance go much farther than stereotyping.[111]

PREJUDICE It is also possible that outright bigotry still occurs on the part of an employer or its management for or against a targeted group, despite Title VII now having been in existence for over 40 years.[112] Even if an organization has a strong commitment to equal employment opportunity, it is possible that the beliefs and actions of the firm's individual hiring managers or recruiters are inconsistent with the organization's policies and values. Organizations can help to reduce the occurrence of prejudice by carefully selecting and training hiring managers and recruiters, evaluating their performance, and tracking the diversity of the candidates recruited and hired by different recruiters and hiring managers to identify possible discriminatory trends that warrant further investigation and attention.

THE PERCEPTION OF LOSS BY PERSONS THREATENED BY EEO PRACTICES As voluntary efforts are made by companies to address EEO and fairness concerns, individuals of groups who traditionally have been the predominant employees of a particular workforce or occupation may grow anxious or angry, believing they are "losing out" on employment opportunities. Some of these people may feel that they need to protect their own prospects by impeding the prospects of others.[113] This can influence employees' willingness to refer diverse candidates for a position, objectively screen diverse recruits, and help persuade them to accept the job offers extended to them.

HIRING MANAGERS Hiring managers often lack an understanding of employment laws and may be unaware that the same antidiscrimination laws that apply to employees apply equally to applicants. In one successful discrimination case, the U.S. Court of Appeals for the Seventh Circuit found that a car dealership's hiring managers had never been trained concerning bias laws. The court wrote, "Leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an 'extraordinary mistake' for a company to make."[114]

Hiring managers are also often untrained and unprepared to ask the right kinds of questions during an interview. The most common problematic types of questions they ask are questions related to child care and child rearing. If a hiring manager is concerned that someone might not be able to come to work because of child care issues, instead of asking about the candidate's child care arrangements, the manager should ask the candidate directly how often he or she misses work. Asking questions related to attendance and productivity is entirely appropriate.[115]

Specific Barriers

Unlike the general barriers just discussed, there are additional barriers to equal employment opportunity that tend to be specific to an employer. In Table 3-7, we summarize some of the more common specific barriers identified by the U.S. Equal Employment Opportunity Commission.[116]

TABLE 3-7 Barriers to Equal Employment Opportunity Identified by the EEOC[117]

Barriers to Recruiting:
- The failure to advertise widely in order to attract diverse applicants.
- Recruiting practices that overlook or fail to seek all qualified individuals.
- An over-reliance on informal networks for recruitment (such as the "good old boy" network).
- A lack of or no formal systems for recruitment.

Barriers to Advancement and Promotion:
- Deficient feedback, performance evaluation, and promotion processes of employees.
- A lack of access to informal networks of communication by employees of protected classes.
- Different standards of performance used for different classes of employees.
- A lack of equal access to assignments that provide key career experiences, visibility, and interaction with senior managers.
- Equal opportunity HR personnel excluded from the recruiting process when it comes to the firm's higher-level positions.

Barriers in Terms and Conditions:
- Unequal pay.
- Counterproductive behavior and harassment in the workplace.
- Employer policies that are not family-friendly.
- Inflexible working hours and working conditions.
- Failure to provide reasonable accommodation to qualified individuals with disabilities.

(Continued)

TABLE 3-7 (Continued)

Barriers in Termination and Downsizing:

- Unfair standards used to make layoff decisions; different benefits given to different types of employees.
- Inadequate planning for the layoff.
- A lack of adequate incentives to encourage voluntary separations.
- A lack of communication between employers and employees.
- The failure to provide counseling, job placement assistance, and training to laid-off employees.

Recruiting and Hiring to Promote a Brand Image

In June 2003, a lawsuit was filed by the EEOC that alleged that Abercrombie & Fitch violated Title VII of the Civil Rights Act of 1964. The EEOC contended that Abercrombie's recruiting and staffing practices to reinforce its brand image and marketing strategy by featuring predominantly white, attractive young people limited the number of minority and female employees hired. The lawsuit began when several black, Hispanic, and Asian plaintiffs complained that when they applied for jobs, they were steered away from sales positions and into low-visibility jobs, such as stocking and cleaning.[118] Ultimately, about 20,000 people joined the class-action suit.[119]

The consent decree required Abercrombie to abandon its practice of recruiting employees from predominantly white fraternities and sororities—a practice that helped it develop its trademark look. As part of the settlement, Abercrombie agreed to hire 25 diversity recruiters and set benchmarks for hiring women and minorities. Abercrombie was also required to "reflect diversity, as reflected by the major racial/ethnic minority populations of the United States, in its marketing materials (taken as a whole)."[120] So, not only did Abercrombie have to change its recruitment and hiring practices, it also had to avoid the appearance of discrimination in its marketing materials. Diverse models are now used in the company's quarterly magazines and on shopping bags, store posters, and other advertising to encourage minorities to apply for jobs with Abercrombie.[121] Although the firm did not admit it was guilty, it also agreed to hire a monitor, to provide diversity training to all hiring managers, and to make its managers' progress toward their diversity goals a factor in their bonuses and compensation.[122]

Trying to create a particular "look" for a sales force is not inherently unlawful. "But if recruiters use a subjective or 'creative' component in the hiring process, the employer must carefully review the results for adverse impact," warns Eric Dreiband, the general counsel for the EEOC. "The company needs to consider whether this 'creative' component breeds discrimination. At Abercrombie, it created a group of employees who were young, lily-white males."[123] Dreiband also stated, "businesses cannot discriminate against individuals under the auspice of a marketing strategy or a particular 'look.' Race and sex discrimination in employment are unlawful."[124]

Abercrombie has made significant strides in the area of diversity since the settlement. The number of nonwhite store employees has quadrupled since 2004, and the company has increased its recruiting relationships at colleges with a high percentage of minorities. The company also launched a Building Cultural Dexterity training program to teach employees how to respond to the expectations of diverse people, filter business decisions through different lenses, and lead people with cultural differences. Abercrombie also now hosts a biannual contest to uncover internal diversity champions.[125]

Summary

Given the many federal and state regulations affecting staffing practices, it is clear that those involved in staffing activities need to thoroughly understand them. A firm's failure to comply with government regulations, even if it is unintentional, can have adverse consequences. Fortunately, the government has tried to help organizations to comply with the regulations by providing "best practice" suggestions and encouraging organizations to be proactive when it comes to resolving any underrepresentation that might exist in their workforces. In addition to avoiding legal trouble, many organizations also realize the benefits of an expanded candidate pool and better quality hires when legal compliance leads to greater recruitment and selection of previously overlooked sources of talent.

Takeaway Points

1. Complying with staffing laws is obviously a good idea from a moral, ethical, and legal perspective, but doing so can also be strategic for firms. In addition to avoiding the expense of lawsuits and the negative public relations associated with litigation, legal compliance allows companies to capitalize on the strengths of diversity and perform better by appealing to a broader customer base.
2. Employees, independent contractors, and contingent workers have different types of employment relationships with firms. Employment relationships may also be "at will," meaning that either party can terminate the employment relationship at any time, for any legal reason, with no liability as long as there is no contract for a definite term of employment.
3. Disparate treatment is intentional discrimination based on a person's protected characteristic. Adverse impact occurs when an action has a disproportionate effect on a protected group, regardless of its intent or actual disparate treatment. Fraudulent recruitment is the misrepresentation of the job or organization to an applicant. Negligent hiring occurs when an applicant is hired that the company knew or should have known poses a risk of harm to third parties, and the person harms another person. Negligent referral is misrepresenting or failing to disclose complete and accurate information about a former employee. Trade secret litigation occurs when confidential information from another company is acquired after an employee is hired by a competitor, or during the interview process.
4. Equal employment opportunity in staffing means that the firm's employment practices are designed and used in a "facially neutral manner"—in other words, they clearly do not illegally favor some applicants over others. Affirmative action is the proactive effort to eliminate discrimination and to ensure nondiscriminatory results in the workforce. Affirmative action plans describe in detail the staffing procedures and standards an employer will take to remedy the underemployment of certain groups. Affirmative action plans can include, but are not limited to, provisions for nondiscriminatory recruitment, training, and promotion.
5. Various barriers to legally defensible staffing exist. Some barriers tend to be specific to a particular employer, rather than being societal or cultural in nature. The "like me" bias, stereotypes, ignorance, and prejudice are common barriers, as are uneducated hiring managers. Other general barriers based in societal or cultural practices or norms tend to be external to the employer.

Discussion Questions

1. Do laws prohibiting certain kinds of hiring discrimination benefit only job seekers? Or do companies benefit from the enforcement of discrimination laws? If so, how?
2. What is meant by "at-will employment" and what advice would you give an organization considering this type of employment relationship?
3. What is the difference between flow, stock, and concentration statistics? How is each type of statistic used?
4. What is affirmative action? What is an affirmative action plan? Do you feel that affirmative action is a good way to remedy past discrimination? Why or why not?
5. Which three general barriers to legally defensible staffing do you feel are most common? What can companies do to remove these barriers?

Exercises

1. *Strategy Exercise:* Analyzing Adverse Impact
Mary was recently hired as an HR generalist at Super Foods, an organic grocery chain. One of her first assignments is to review the store's data on its cashiers to identify if its hiring and promotion practices have had an adverse (disparate) impact on men or women. Mary generated the following reports from the company's employee database to use in her analyses.

   Working in groups of three to four students, use this information to determine whether there is evidence of sex discrimination for cashiers. Write a brief report explaining why there is or is not

Stock Statistics	**Job Category: Cashiers**	
	Current Cashiers (%)	**Availability in Relevant Population (%)**
Men	30	50
Women	70	50

Flow Statistics	**Job Category: Cashiers**		
	Number of Applicants	**Number Hired**	**Selection Rate (%)**
Men	200	100	50
Women	150	75	50

Concentration Statistics	**Job Category:**		
	Cashiers (%)	**Stockers (%)**	**Cleaners (%)**
Men	30	70	65
Women	70	30	35

adverse impact. If there is, try to identify what might be happening and suggest ways the firm can reduce it.

2. *Opening Vignette Exercise:* The opening vignette describes how Abercrombie & Fitch engaged in "creative" recruiting to fill sales jobs with candidates who matched the company's carefully constructed marketing image. The high-profile clothing retailer staffed its stores with good-looking young white men and women and touched off a lawsuit that ultimately cost the company $40 million and a barrage of bad publicity.

   Working alone or in a group of three to five students, answer the following questions. Be prepared to share your answers with the class.
   a. Do you think Abercrombie should be allowed to staff its stores in a way that reinforces its marketing image? Why or why not?
   b. What are some alternative ways Abercrombie can staff its stores legally and still project a desirable image?

3. *Develop Your Skills Exercise:* The best test of any question posed to a job applicant is whether the employer can demonstrate a job-related necessity for asking the question. Because both the intent behind the question and how the information is to be used by the employer are important, an employer should consider whether the answers to the question, if used to make the hiring decision, will adversely affect and screen out minorities or members of one sex.

   This chapter's Develop Your Skills feature presented five improper interview questions (provided again here), along with an explanation of why each question should be avoided. Working with a partner, identify what the employer really wants to know by asking each question, and come up with an alternative way to find out the same information.[126]
   1. How many children do you have?
   2. What is your native language?
   3. To what clubs or organizations do you belong?
   4. What is your height? What is your weight?
   5. Are you able to work on Christmas Day?

CASE STUDY

Global biopharmaceutical company Pfizer believes that a diverse workforce leads to more innovative and creative thinking.[127] The company also feels that inclusion is the foundation to the ownership culture that it wants to build among its employees.[128] Pfizer recognized that better attracting and retaining diverse employees would require it to pay more attention to its diversity and inclusion initiatives. In addition to relying more on its worldwide diversity and inclusion leadership council comprised of senior executives from around the company, Pfizer also created employee resource groups, including people with disabilities, Latino/Hispanics, African American, and LGBT employees, to better apply their ideas to influence company results.[129]

Questions

1. Why is Pfizer interested in improving diversity and inclusion at the company?
2. How does a proactive focus on diversity and inclusion improve Pfizer's legal compliance?
3. If you were in charge of diversity and inclusion at Pfizer, what would you do to further improve diversity and inclusion at the company?

Semester-Long Active Learning Project

You should have finalized your choice of job and organization and begun collecting information about it from the organization, the Internet, and from http://online.onetcenter.org. This week, finish your background research on the job and organization, and add to your report a description of the existing staffing systems for the job.

Case Study Assignment: Strategic Staffing at Chern

See the appendix at the back of this book for this case study assignment.

Endnotes

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