AMERICAN BAR ASSOCIATION

SECTION OF LABOR AND EMPLOYMENT LAW

EQUAL EMPLOYMENT OPPORTUNITY COMMITTEE

PRESENTS:

EEO LAW BASICS

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Introduction to the EEO Basics Materials

The ABA Section of Labor and Employment Law and the Section's Equal Employment Opportunity Committee[1] welcome you to the EEO Basics Program. These program materials are designed to provide a basic overview of the federal Equal Employment Opportunity ("EEO") laws and to highlight some key litigation and ethics issues prevalent in EEO matters. This paper is not intended to be a comprehensive treatise on EEO law. Rather, it is to provide a fundamental understanding of EEO law. Indeed, should the reader desire a more detailed analysis of any EEO topic, the Section and Committee recommend the following book series that BNA publishes in connection with the Section: Barbara Lindemann Schlei and Paul Grossman, *Employment Discrimination Law Second Edition and Updates*.

The EEO Basics materials present an overview of the applicable federal statutes relating to equal employment opportunities, including: Title VII of the Civil Rights Act of 1964 (Race, National Origin, Sex, Religion); Sections 1981 and 1983 (Race); the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefits Protection Act ("OWBPA"); the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973; the Equal Pay Act of 1963 ("EPA"); the Family and Medical Leave Act ("FMLA"); and the Fair Labor Standards Act ("FLSA"). For each law, there is a discussion of basic information, such as whom the law covers, what conduct is prohibited, what the elements of a cause of action are; the relief generally available; the theories of liability; and the key defenses.

In addition to the various labor and employment statutes relevant to the EEO practice area, the materials also include specific sections discussing harassment and retaliation, types of damages, the agency process, and litigation practice tips. Finally, the materials conclude with a discussion of a few ethical pitfalls that an employment law practitioner may encounter in the areas of multiple representation of parties and *ex parte* communications.

We welcome you to this interesting and ever-changing area of the law.

[1] The materials are the collaborative efforts of Tarik Ajami, Elizabeth Alexander, Lisa Bornstein, David Cook, Barbara D'Aquila, Elaine Koch, and Charles Powell, IV.

Title VII of the Civil Rights Act,
42 U.S.C. §§ 2000e et seq.

A. Who is covered under Title VII?

The following entities are covered under 42 U.S.C. § 2000e:

1. Employers and their agents that "affect commerce" and have "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year[.]"[2] The definition includes American employers (including foreign corporations controlled by American employers) outside U.S. territorial jurisdiction, with respect to treatment of U.S. citizens, unless otherwise required by host country's law.[3]

2. State and local government employers.

3. The federal government's executive branch and units of judiciary and legislature subject to competitive civil service and Congressional entities.[4]

4. Employment agencies and their agents ("any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer").

5. Labor organizations ("engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization").[5]

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[2] Walters v. Metropolitan Educ. Enters., Inc., 519 U.S. 202 (1997) (all employees on employer's payroll count toward 15-employee threshold).

[3] 42 U.S.C. §2000e(f); §2000e-1(b)(c).

[4] Protections of Title VII and certain other worker protection laws were extended to employees of the House, Senate, Capitol Police, Congressional Budget Office, inter alia, by the Congressional Accountability Act ("CAA"), Pub. L. 104-1 (1995), 2 U.S.C. §1301 et seq.

[5] Pursuant to 42 U.S.C. § 2000e(e),

> [a] labor organization shall be deemed to be engaged in an industry affecting commerce if
> **(1)** it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or

6. Training programs ("joint labor-management committees controlling apprenticeship or other training or retraining, including on-the-job training").

The definition of employer excludes:

1. A bona fide membership club ("(other than a labor organization) which is exempt from taxation under section 501 (c) of title 26").

2. Indian tribes.

3. The United States and wholly owned corporations.

4. "Any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5)[.]"

4. Religious organizations ("with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities").[6]

B. What classes are protected?

The following classes are protected under 42 U.S.C. § 2000e-2:

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(2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is
(A) twenty-five or more during the first year after March 24, 1972, or
(B) fifteen or more thereafter, and such labor organization—
(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];
(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or
(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or
(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or
(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

[6] 42 U.S.C. § 2000e-1(a).

1. Race.

2. Color.

3. Religion.

4. Sex (which includes sexual harassment[7] and discrimination based on pregnancy, childbirth or related medical conditions.[8]).

5. National origin.

C. What conduct does Title VII prohibit?

Title VII's employment protections cover the following types of conduct under 42 U.S.C. § 2000e-2:

1. For an employer, it is unlawful to discriminate based on a protected class in matters involving:

   a) hiring;

   b) discharge;

   c) compensation; and

   d) terms, conditions, and privileges of employment.

   It is also unlawful for the employer to "limit, segregate, or classify his [her] employees or applicants in any way which would deprive or tend to deprive any individual of opportunities or which would otherwise affect his [her] status as an employee" because of membership in a protected class.

2. For an employment agency, it is unlawful to "fail or refuse to refer" a person for employment or "otherwise discriminate" against an individual because of his/her protected class. It is also unlawful to classify or refer an individual for employment on the basis of his/her protected class.

3. For a labor organization, it is unlawful to:

   a) "exclude or expel from its membership, or otherwise discriminate" against an individual because of his/her protected class;

[7] See Chapter on Sexual Harassment.

[8] Title VII was amended in 1978 to prohibit discrimination based on pregnancy, childbirth, and related medical conditions. 42 U.S.C. §2000e(k). This statutory provision is referred to as the Pregnancy Discrimination Act ("PDA").

b) "limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's" membership in a protected class;

c) "cause or attempt to cause an employer to" unlawfully discriminate.

4. For any training program (of "any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining,") it is unlawful to "discriminate against any individual because of his [her] race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

Note: Under 42 U.S.C. § 2000e-2(f), it is not unlawful to take action because of membership in a Communist-based organization. There is also a national security exception under 42 U.S.C. § 2000e-2(g).

Note: Under 42 U.S.C. § 2000e-2(h), among other things, it is not unlawful to take different action "pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate" based on a protected class.

Note: Under 42 U.S.C. § 2000e-2(i), the discrimination provisions do not apply "to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

D. What is the "bona fide occupational qualification" exception?

Under 42 U.S.C. § 2000e-2(e)(1), it is generally not an "unlawful employment practice" for an employer, an employment agency, a labor organization, or a training program to base an employment decision on an individual's protected class "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise[.]"

Under 42 U.S.C. § § 2000e-2(e)(2), a similar "qualification" exception exists for schools, colleges, and other educational institutions as it relates to religion.

E. What theories are used to prove Title VII discrimination?

There are four basic theories used to prove Title VII discrimination: 1) disparate treatment; 2) policies or practices that presently perpetuate the past effects of

discrimination; 3) disparate impact; and 4) failure to make a religious accommodation.[9] The two most common theories are discussed here.

E. What is disparate treatment and how do you prove it in an individual case?

Disparate treatment is the different (and typically less favorable) treatment of an individual because of his/her protected class. Teamsters v. U.S., 431 U.S. 324, 335 n.1 (citation omitted) (1977). The key issue is whether the employer's actions were motivated by discrimination. The plaintiff employee may prove the employer's discriminatory intent by direct evidence or by circumstantial evidence.

Direct evidence is evidence that directly proves discrimination. For example, a statement by the decision maker in the decisional process that he/she is terminating the employee because of the employee's religion would be direct evidence of discrimination. "[S]tray remarks[,]" which are "statements by nondecisionmakers" and "statements by decision makers unrelated to the decisional process itself," do not constitute direct evidence. Hopkins v. Price Waterhouse, 490 U.S. 228, 277 (1989).

Circumstantial evidence is evidence that, although not direct, would permit the factfinder to "infer" that discrimination has occurred. An example of circumstantial evidence would be proof that qualified African Americans have applied, but that no qualified African Americans have been hired. Although there is no rigid test for proving discrimination (see St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993) (citation omitted) ("The McDonnell Douglas methodology was 'never intended to be rigid, mechanized, or ritualistic.'")), the McDonnell Douglas framework is the generally-accepted approach to evaluate circumstantial evidence. In a discriminatory discharge case, that framework first requires an employee to prove a *prima facie* case by showing that he or she was:

a) a member of a protected class;
b) qualified for the position;
c) discharged from the position; and
d) replaced by a non-member of a protected class.

Id. at 506. If the employee meets this burden, then the employer has a burden of producing evidence of a legitimate nondiscriminatory business reason for its decision. Id. at 506-07. Once the employer proffers such a reason, the presumption of discrimination "simply drops out of the picture," and the employee must then show that the employer's proffered reason is a pretext for discrimination. Id. at 511 & 515. As the Hicks Court has indicated, "a reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." Id. at 516 (emphasis in original). Further, depending on the strength of the evidence, "rejection of the defendant's proffered

[9] See Barbara Lindemann Schlei and Paul Grossman, *Employment Discrimination Law Second Edition and Updates, Third Edition*, Ch. 1, p. 4 (BNA 1997).

reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." Id. at 511 (emphasis in original).

F. What is disparate impact and how do you prove it?

To prove disparate impact (sometimes referred to as "adverse impact"), an employee must show that a facially-neutral policy or practice has a significant adverse impact on a protected class. For disparate impact, the employee need not show discriminatory intent. Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971).

As a result of the Civil Rights Act of 1991's amendment to Title VII, an employee seeking to prove disparate impact must articulate a *prima facie* case of disparate impact by showing that the challenged practices have a disproportionate impact on a protected group. If the employee makes this showing, the burden of persuasion shifts to the employer to show that the challenged practices are "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2k(1)(A). To meet this burden of persuasion, the employer can use any of the three validation techniques included in the EEOC's Uniform Guidelines on Employee Selection Procedures. 29 C.F.R. § 1607.

G. Under the statute, what are the damages for Title VII discrimination?

Title VII remedies include back pay, attorney fees, interest, and equitable relief. 42 U.S.C. § 2000e-5(g)(k). Where an employee shows intentional discrimination (*i.e.*, disparate treatment), the employee can recover compensatory and punitive damages up to a specified, capped amount. 42 U.S.C. § 1981a. Punitive damages require "malice" or "reckless indifference to the federally protected rights" of the employee. Id. The Supreme Court has held that such punitive damages may only be awarded where there is conscious wrongdoing. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 537 (1999). Compensatory damages include "future pecuniary losses [*i.e.*, front pay], emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a. The damages cap on the sum of compensatory and punitive damages ranges from $50,000 to $300,000 based on the size of the company. Id.

SECTION 1981,
42 U.S.C §§ 1981-1988

A. Who is protected under Section 1981?

1) All persons within the jurisdiction of the United States have the same right in every state and territory to make and enforce contracts, to sue, be parties, and give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and are subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

   All jurisdictions that have addressed the employment-at-will issue have held that the employment-at-will relationship is a contract for Section 1981 purposes. The following discussion is limited to situations in which an employer has violated Section 1981 in his/her relations with an employee.

2) Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987): Racial discrimination prohibited by Section 1981 is any discrimination against identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.

3) Hostile environment-racial harassment claims and race-based constructive discharge also may be brought under Section 1981

4) Retaliation claims premised on assertion of rights are also protected by Section 1981

5) A Section 1981 claim CANNOT be based on allegations of national origin, religious discrimination, citizenship status, gender discrimination, disability or age discrimination

B. Who may be liable?

1) Private Sector Employers

   a) There is no restriction as to employer size, which is found in other anti-discrimination statutes.

   b) The employer may be liable under certain circumstances for acts of intentional discrimination by employees even when the employees are not supervisors.

   c) Under certain circumstances, the parent corporation may be liable for discriminatory acts of its subsidiary.

   d) Supervisors may be individually liable if they make or recommend employment decisions.

e) There is no liability for a corporate official when he/she did not participate in discrimination.

2) Public Sector Employers

a) Section 1981 does not waive sovereign immunity in suits against the United States. Federal officials may be personally liable for *ultra vires* acts/unauthorized acts or acts beyond the scope of their power.

b) Local government employers

c) State government employers

(1) State governmental entities and officers sued in official capacity enjoy sovereign immunity.

(2) State officials, in their individual capacity, may be sued for injunctive relief and damages.

C. What is prohibited?

1) Section 1981 guarantees freedom from racial discrimination in the making, enforcement performance, modification, and termination of contracts.

2) Section 1981 also guarantees enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship

D. What are the required elements of a Section 1981 claim?

1) General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982):

To state a claim:

a) The plaintiff must allege deprivation of rights caused by racial discrimination (*i.e.*, that the person was deprived of a right which, under similar circumstances, would have been accorded to a person of a different race);

b) The plaintiff must present sufficient evidence to allow the jury to conclude that the defendant's action was motivated by racial considerations.

c) Proof of disparate impact alone is insufficient.

d) The plaintiff must establish a purposeful intent to discriminate.

2) Patterson v. McLean Credit Union, 491 U.S. 164 (1989):

Section 1981 prohibits not only racially motivated refusals to contract, but it also prohibits offers to enter into contracts only upon discriminatory terms.

E. What is the burden of proof?

1) Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981):

The plaintiff maintains the ultimate burden of proving intentional racial discrimination under Section 1981.

2) The plaintiff's burden includes establishing a *prima facie* case of intentional discrimination by a preponderance of the evidence.

3) Under the burden shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and reiterated in Burdine, 450 U.S. 248 (1981), the plaintiff may prove intentional discrimination either by direct evidence of racial discrimination or by an inference of racial discrimination.

4) When the plaintiff has no direct evidence of racial discrimination, the plaintiff's claims must be analyzed under the framework established by the Supreme Court in McDonnell Douglas. Under this framework, the Plaintiff must prove that:

(a) she is a member of a protected class;

(b) an adverse employment action occurred;

(c) similarly situated persons outside her protected class were treated differently.

McDonnell Douglas, 411 U.S. 792; Burdine, 450 U.S. 248.

F. There Can Be No Section 1981 Cause of Action Based On Disparate Impact:

1) General Building Contractors Assn. v. Pennsylvania United Engineers and Constructors, Inc., 458 U.S. 375, 388-91 (1982):

Section 1981 only prohibits purposeful discrimination. It does not prohibit disparate impact discrimination.

G. Who may sue under Section 1981?

1) An individual may bring suit.

2) Section 1981 suits MAY NOT be pursued by organizations whose injuries derive only from the violation of others' civil rights.

H. What damages are allowed under a Section 1981 claim?

The following relief may be obtained:

1) Unlimited monetary damages;

2) Compensatory damages;

3) Future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses;

4) Punitive damages when the employer (except municipalities) discriminated with malice or with reckless indifference to the federally protected rights of an aggrieved individual; and

5) Injunctive relief.

SECTION 1983,
42 U.S.C. § 1983

A. Who is covered under Section 1983?

Section 1983 covers any citizen of the United States or other person within the jurisdiction thereof.

> Wheeldin v. Wheeler, 373 U.S. 647 (1963):
>
> "Congress made liable in civil suits 'every person' who 'under color' of any state … law deprives anyone of a right 'secured by the Constitution and laws' of the United States".

B. What is prohibited?

Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, equity, or other proper proceeding for redress."

C. Who may be liable?

Any person acting under color of state law (state action requirement):

1) Local governments, municipalities, and individual municipal agents acting in official capacities may be liable. Monnell v. Department of Social Services, 436 U.S. 658 (1978).

   A municipality may only be held liable for acts that it officially sanctioned or ordered OR where the constitutional deprivation occurred as a result of a custom or policy of the municipality Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397 (1997).

   Municipalities & local governments not liable for legislative (as opposed to administrative) acts.

2) State governments

   a) State governments and officials in official capacity are immune from suit. State governments are not divested of Eleventh Amendment immunity, even when the state is indemnified by the federal government for litigation costs as well as costs of adverse judgments. Regents of University of Cal., 519 U.S. 425 (1997).

b) A state official may be sued in his/her individual capacity.

3) Section 1983 does not apply to the federal government (in most instances). Therefore, actions by federal officials, unless taken in conjunction with state officials or pursuant to local custom, law, or regulation, cannot be challenged in a Section 1983 suit.

4) Section 1983 does not apply to private entities unless they become enmeshed in governmental entity.

Rendell-Baker v. Kohn, 457 U.S. 830 (1982):

Rendell-Baker addressed the issue of a privately owned university which was 90% publicly subsidized and whether Section 1983 was applicable to its employment practices. The United States Supreme Court found no state action, noting that the symbiotic relationship between the private entity and the state was not present.

Likewise, hospitals and utilities have been found free of state action even though substantial state funding and regulation were present.

D. What is the basis of discrimination prohibited by Section 1983?

Section 1983 does NOT create federal rights. Rather, it is used to enforce already existing federal rights, such as:

1) Equal protection/right to be free from racial and gender discrimination, including sexual harassment. Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

Courts have held that Title VII does not foreclose a Section 1983 claim for the same conduct.

2) Freedom of speech

a) Where a private sector employee is retaliated against for advocating certain issues, that retaliation may give rise to Section 1983 claim.

b) A public employee's speech protection and whether he/she has been retaliated against for that speech is controlled by Pickering v. Board of Education, 391 U.S. 563 (1968).

3) Due process of law is analyzed on a case by case basis.

E. What establishes a *prima facie* case?

1) The plaintiff must prove that the defendant, acting under color of state law, deprived the plaintiff of his/her constitutional rights.

2) State action is required.

a) The state action requirement reaches employment discrimination involving police, fire departments, public schools, colleges and universities, public hospitals, and public transportation authorities.

b) Private entities may be so involved with the state that state action is found. This may happen in varying circumstances including:

(1) Licensing, regulation, receipt of public funds, location in state owned facilities;

(2) Carrying out functions normally carried out by state; and

(3) State supported monopoly

c) Graham v. Connor, 490 U.S. 386 (1989):

The plaintiff must identify one or more specific constitutionally protected rights that have been infringed by the defendant's actions.

F. What Relief is Available Under Section 1983

Available relief under Section 1983 includes damages and injunctive relief.

1) Damages

a) Memphis Community School Dist. V. Stachura, 477 U.S. 299 (1986):

Section 1983 creates a species of tort liability in favor of persons who have been deprived of the rights, privileges, or immunities under the Constitution. Therefore, the level of damages is ordinarily determined according to the principles derived from common law torts. Damages may include:

(i) Compensatory damages for emotional distress, embarrassment, impairment of reputation and humiliation;

(ii) Actual and nominal damages; and

(iii) Punitive damages available where there has been a willful or malicious violation or where the defendant acted with evil motive or reckless and callous indifference. Municipalities are immune from punitive damages.

2) Injunctive relief

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)
29 U.S.C. §§ 621-634
and
OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA)[10]
29 U.S.C. § 626(f)(1)

A. Who is covered under the ADEA?

1) The ADEA Applies to:

a) Private Sector Employees

Any employee or job applicant age 40 or older working for or applying to work for an employer that is engaged in interstate commerce and employs more than 20 workers.

b) Public Sector Employees Employed By:

(i) Federal government;

(ii) State and local governments and state agencies;

(iii) State colleges and public school districts;

(iv) Employment agencies; and

(v) Labor organizations.

c) U.S. citizens employed overseas by a U.S. corporation or a subsidiary

d) Recipients of federal funds, such as Head Start, recipients of block grants such as health entities, and low income energy assistance

e) Presidential appointees and employees of elected state and local officials

f) Federal government contractors and subcontractors: Executive Order 11141

2) The ADEA Does Not Apply to

a) An employee working for an employer who is a foreign person not controlled by a U.S. employer

b) Uniformed personnel in active or reserve armed forces

c) Independent contractors:

[10] The OWBPA amended the ADEA.

(1) Test for distinguishing independent contractor from employee

(a) "right to control test"

(b) "economic realities test"

d) Partners in a partnership

e) Indian tribes

3) Other:

a) Religious institutions are not given a blanket exemption under the ADEA. Courts apply the test set out in NLRB v. Catholic Bishop, 440 U.S. 490 (1979) on a case by case basis.

B. What is prohibited?

1) The ADEA prohibits discrimination against an employee 40 years old or older on the basis of age with respect to any term, condition, or privilege of employment, including, but not limited to hiring, firing, promotion, layoff and recall, transfer, testing, use of company facilities, compensation, benefits, job assignments, classifications of employees, recruitment, fringe benefits, retirement plans, disability leave, training, apprenticeship programs

a) "Employee" is defined as "an individual employed by any employer."

b) "Employer" is defined as "one engaged in an industry affecting interstate commerce with 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year"

c) "Adverse employment action"

(i) To constitute an adverse employment action, the action must significantly alter the terms and conditions of the job.

(ii) An important question is, "Would the employment action which has occurred be viewed as material by a reasonable person?"

(iii) Actions, other than discharge, have been held to violate the ADEA, including:

(a) Reassignment

(b) Age-based harassment

(iv) Not all actions have been held to be a violation, generally including the following:

(a) Adverse employment actions taken for reasons other than age or any other unlawful discrimination motive;

(b) Mere threats to downgrade or to fire;

(c) Lateral transfer; and

(d) Reassignment to specific geographic area

2) Evaluation of employees

a) Employers are to evaluate older employees on their individual merits and not on their particular age.

b) Employers cannot rely on age as a proxy for an employee's other characteristics, such as productivity, stamina, mental acuity but rather must address each of those factors on an individual basis. Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)

3) Job notices and advertisements may not include age preferences, limitations, or specifications, except in rare circumstances in which age is a bona fide occupational qualification reasonably necessary to the normal operation of the business.

4) Pre-employment inquires may include age or date of birth, but such inquiries are closely scrutinized to make sure the inquiry is made for a lawful purpose.

5) The disparate treatment theory of employment discrimination is also applicable under the ADEA. Hazen, 507 U.S. 604.

6) Employer may not discriminate between two employees over the age of 40 by favoring one on the basis of age.

7) Mandatory retirement is not lawful, except in limited cases:

a) Bona fide executive

b) High policymaking employee

8) Reverse age discrimination is not prohibited.

C. How does a plaintiff establish a *prima facie* case of age discrimination in employment?

1) A plaintiff must ordinarily show he/she was:

   a) Within the protected age group;

   b) Adversely affected by the defendant's employment decision;

   c) Qualified for the position at issue; and

   d) Replaced by a person outside the protected group.

D. What is the burden of proof?

1) A plaintiff may proceed by either of two general methods to carry the burden of making his/her case:

   a) A plaintiff may attempt to meet burden directly, by presenting direct or circumstantial evidence that age was a determining factor resulting in an adverse employment action.

   b) A plaintiff may rely on the proof scheme for a *prima facie* case . . . ." McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981))

   c) Most often, a plaintiff will choose the "burden shifting analysis" set forth in McDonnell Douglas

      (i) The plaintiff must establish *prima facie* case;

      (ii) The defendant must then come forward with a legitimate, nondiscriminatory reason for the adverse action; and

      (iii) The plaintiff must demonstrate that the defendant's reason is pre-textual.

   d) Mixed-motive analysis

E. Who May Be Held Liable Under ADEA?

1) The employer

2) The employer's agents

3) An overwhelming majority of cases have held that an individual employee, such as a manager or supervisor, cannot not be held liable under the ADEA.

F. What is required for posting notices?

1) A notice is posted to advise employees of all rights under the ADEA.

2) The notice should be conspicuous.

3) The notice should be accessible to employees with visual or other disabilities that affect reading.

G. What are the standard defenses to an ADEA Claim?

1) Action, otherwise prohibited, in which age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business.

   a) Narrowly construed on case by case basis

   b) Used to defend maximum hiring or mandatory retirement ages for jobs involving public safety, such as federal air traffic controller, Park Police officer and other law enforcement officers, nuclear materials courier, Armed Service reserve and active personnel

      (1) Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985): Airline to provide same transfer privileges to 60 year old captains as afforded to captains disqualified for reasons other than age.

      (2) Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985): Mandatory flight engineers mandatory retirement at 60 held unlawful.

      (3) Johnson v. Mayor & City Council of Baltimore, 462 U.S. 353 (1985): Mandatory retirement age of 55 for firefighters must be applied on an individual basis.

   c) Acts or omissions taken in a good faith effort to conform with or in reliance upon any administrative regulation, order, ruling, or interpretation issued by the EEOC.

2) Action, otherwise prohibited, is taken based upon reasonable factors other than age, including:

   a) Deteriorating job performance

   b) Age-neutral staff reduction

   c) Safety concerns

d) Employee's pension status or seniority

3) Action, otherwise prohibited, in which involve an employee working in foreign country and ADEA compliance would violate foreign country's law.

4) Action, otherwise prohibited, in compliance with a bona fide seniority system.

5) Action, otherwise prohibited, in compliance with a bona fide employee benefit plan.

6) Action taken to discharge or discipline employee for good cause.

H. What is required to obtain a waiver of ADEA rights governed by the OWBPA?

1) Permissible to request waiver of any ADEA right or claim:

a) In a settlement of an administrative or court claim;

b) In connection with an exit incentive program; and

c) Employment termination.

2) Valid waiver must knowing and voluntary and:

a) Be in writing and be understandable;

b) Specifically refer to ADEA rights or claims;

c) Not waive rights or claims that may arise in the future;

d) Be in exchange for valid consideration in addition to any benefits or other amounts to which the employee is already entitled;

e) Advise the employee in writing to consult an attorney before signing waiver; and

f) Provide the employee at least 21 days to consider the agreement and at least 7 days to revoke the agreement after signing.

g) There are additional requirements if waiver involves termination or severance program offered to a group of employees.

3) No waiver or agreement may affect the EEOC's enforcement responsibilities or interfere with and employee's right to file a charge or participate in EEOC investigation.

I. How is the ADEA enforced?

1) Equal Employment Opportunity Commission

2) Individual suit

3) Representative/Class actions

J. What Relief is Available Under the ADEA?

1) Back pay

2) Front pay

3) Liquidated damages for willful violations

4) Reinstatement or promotion

5) Injunctive relief

6) No punitive damages or recovery for emotional distress

7) Prejudgment interest discretionary

8) Attorneys fees and costs

AMERICANS WITH DISABILITIES ACT OF 1990 ("ADA")
42 U.S.C. §§ 12101 et. seq.
and
THE REHABILITATION ACT OF 1973
29 U.S.C. §§ 705, 791-794

A. Who is covered?

1) The ADA applies to the following employers:

   a) Private employers "affecting" interstate commerce, employing more than 15 workers each working day is each of 20 weeks in the current or preceding calendar year.

   b) Public Sector Employers:

      (i) State and local governments, state agencies.

      (ii) State colleges and public school districts.

   c) Employment agencies.

   d) Labor organizations.

   e) Joint labor-management committees.

   f) Covered entities in foreign countries.

2) The ADA does not apply to the following employers

   a) *Bona fide* membership clubs.

   b) Indian tribes.

   c) The federal government, corporations owned by the United States recipients of federal financial assistance, and federal contractors, which are all covered by the Rehabilitation Act of 1973.

3) A qualified individual with a disability is protected under the ADA.

   a) Employer and employee status is determined by the common-law "control test." Clakamas Gastroenterology Assocs., P.C. v. Wells, 538 440 (2003).

   b) "Disability" is "(A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual, (B) having a record of such an impairment, (C) being regarded as having such an impairment."

c) Excluded from the definition of "disability" is the current use of illegal drugs or the use of alcohol at the workplace. But former drug users who have completed a supervised drug rehabilitation program are protected. Also excluded from "disability" are homosexuality, bisexuality, transvestitism, pedophilia, exhibitionism, voyeurism, sexual behavior disorders, compulsive gambling, kleptomania, psychiatric substance abuse disorders.

d) A "major life activity" is a function such as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Mental and emotional processes such as thinking, concentrating, and interacting with others are major life activities.

e) Determining if an individual is "substantially limited" in a major life activity turns on the nature, severity and duration of the impairment. The individual must be significantly restricted in a class or broad range of jobs. Courts must consider whether the individual can correct or "mitigate" the disability.

f) A disabled individual is "qualified" where she can, "with or without a reasonable accommodation" "perform the essential functions of the job."

g) The "essential functions" of the job are the fundamental duties actually performed by incumbents.

B. What is prohibited?

1) Discrimination prohibited under the ADA includes:

a) Limiting, segregating, or classifying an applicant or employee in a way that adversely affects their opportunities or status because of disability;

b) Participating in a contractual or other arrangement or relationship that subjects a qualified applicant or employee to disability discrimination;

c) Utilizing standards, criteria, or methods of administration that perpetuate or have the effect of discrimination on the basis of disability; or

d) Denying equal jobs or benefits to a qualified individual because an individual who has a relationship to or association with a qualified individual has a known disability;

e) Not making reasonable accommodations for a qualified applicant or employee the known physical or mental disability, unless the accommodation would impose an undue hardship on the operation of the business of such covered entity;

f) Using tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless job-related and consistent with business necessity; and

g) Failing to select and administer employment tests in the most effective manner to so that the test results accurately reflect the skills, aptitude, or whatever is being tested for, and not an employee or applicant's impaired sensory, manual, or speaking skills.

2) A "reasonable accommodation" can include measures such as making existing facilities readily accessible to and usable by individuals with disabilities; and restructuring a job or work schedules, reassigning the employee to a vacant position, acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials or policies, providing qualified readers or interpreters.

4) Pre-employment inquiries and medical exams are permitted in certain circumstances:

a) Employers are permitted to ask an applicant whether he/she is able to perform job-related activities with or without a reasonable accommodation. An employer cannot ask whether the applicant is disabled or has any physical or mental impairment that may prevent the applicant from performing the job; about the nature of severity of the applicant's disability; how often the applicant will require leave because of the disability or for treatment; or about the applicant's workers' compensation history.

b) Pre-employment medical exams, other than drug tests, are generally not permitted. Offers of employment contingent on confidential medical exams, so long as they are required of all incoming employees, are permitted provided that, if the exams screen out persons with disabilities, the criteria used are job-related, the criteria used are consistent with medical necessity, and there is no reasonable accommodation that would allow the individual to perform the job.

c) Medical exams and inquiries of current employees are permitted only where they are job-related and consistent with business necessity, or where they are necessary to making a reasonable accommodation.

C. What are the key defenses?

1) The individual poses a "direct threat" to the health and safety of others. Factors to be considered are the duration of the risk posed, the nature and severity of the proposed harm, and the imminence and likelihood of the harm.

2) The employer was not made aware of the need for accommodation. In many instances, almost any request by an employee related to a medical condition is sufficient, provided that it is sufficiently specific.

3) The requested accommodation poses an "undue hardship" on an employer in that it is significantly difficult or expensive, considering factors such as the nature and cost of the accommodation, the nature of the employer's facility and operations, and the employer's resources.

4) A reasonable accommodation was offered and refused.

D. What is required for posting notices?

Notices describing rights under the ADA must be conspicuous and accessible to employees and applicants.

E. How is the ADA enforced?

1) Equal Employment Opportunity Commission

2) Individual suit

3) Representative/Class actions

F. What relief is available under the ADA?

1) Back pay

2) Front pay

3) Reinstatement, promotion, hiring

4) Compensatory damages

5) Punitive damages

6) Injunctive relief

7) Attorneys fees and costs

THE EQUAL PAY ACT OF 1963 ("EPA")
29 U.S.C. § 206(d)

A. Who is covered?

1) "Employers" as defined broadly in the Fair Labor Standards Act to include anyone who suffers or permits another to work, but subject to certain exemptions, including:

   a) Private employers

   b) Labor organizations

   c) State and federal employees

   d) Certain industries and classes of employers are excluded, such as certain agricultural and domestic workers, some not-for-profits, elected officials, and military personnel

B. What is prohibited?

1) Payment of unequal wages between men and women

2) On the basis of sex

3) For "equal work," which is work

   a) Requiring equal skill, effort, and responsibility

   b) Performed under similar working conditions

4) A labor organization may not cause or attempt to cause an employer to discriminate in wages on the basis of sex

C. What are the key defenses?

1) The plaintiff must make out a *prima facie* case that she is performing equal work but receiving less pay than a male employee in the same establishment.

2) An employer may show that difference in pay is attributable to sex-neutral systems:

   a) Seniority system

   b) Merit system

   c) A system that measures earnings by quality or quantity of work

d) A premium for completing a *bona fide* training program

3) An employer may show the difference in pay is based on any other factor other than sex.

D. How is the EPA enforced?

1) Statute of limitations is two years, three years if the violation is "willful"

2) No administrative filing requirement

3) EEOC

4) Private lawsuits:

a) Individual action

b) Collective action with "opt in" provision

E. What are the remedies?

1) Back wages

2) Liquidated damages or prejudgment interest

3) Injunctive relief for EEOC

4) No punitive damages, except perhaps in retaliation cases

5) No compensatory damages

6) Attorneys fees and costs

FAMILY AND MEDICAL LEAVE ACT (FMLA)
29 U.S.C. § 2601 et seq.

A. Who is covered and when is the right to a leave triggered?

The FMLA requires covered employers (those with 50 or more employees) to provide eligible employees (those who have been employed with their current employer for at least 12 months and who have worked at least 1250 hours in the last 12 months) with up to 12 weeks[11] of unpaid leave each year for:

1) The employee's own serious health condition which makes the employee unable to perform the essential functions of her job;

   a) A serious health condition[12] is an illness, injury, or physical or mental condition that involves either:

      (1) inpatient care (an overnight stay) in a hospital or other medical facility, including any period of incapacity (inability to work, attend school or perform other daily activities) or for subsequent treatment in connection with such care; or,

      (2) continuing treatment by a healthcare provider[13] consisting of any of the following:

      (a) a period of incapacity of more than 3 consecutive days and subsequent treatment or incapacity relating to the same condition that also involves:

         (i) treatment 2 or more times by a health care provider, or

         (ii) at least 1 treatment by a health care provider that also results in a regimen continuing treatment;

      (3) any period of incapacity due to pregnancy or for prenatal care;

      (4) any period of incapacity or treatment for incapacity due to a chronic serious health condition; or,

      (5) any period of absence to receive multiple treatments for restorative surgery or for a condition that would likely result in incapacity for more than 3 days without medical intervention.

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[11] Employer is not obligated to hold job open beyond the 12-week period when employee unable to return at the end of the period.

[12] Serious health condition does not include occasional days taken for the flu or for some other purpose, unless all of the conditions for a serious health condition are met. This is significant because if the employer allows such occasional sick leave, that leave may not be counted against as employee's 12 week FMLA entitlement.

[13] Includes a doctor of medicine or osteopathy who is authorized to practice medicine or surgery in the state or a podiatrist, dentist, clinical psychologist, optometrist, chiropractor (in limited circumstances), nurse practitioner authorized to practice in state.

2) The care of a spouse, son, daughter or parent of the employee who has a serious health condition;

3) The birth and first year care of the employee's child; and,

4) The placement with the employee of a son or daughter through adoption or foster care.

B. What is an FMLA-qualifying event?

1) Employers are charged with determining whether the reason for the absence is FMLA-qualifying.

2) If an employer is on notice that the reason for the leave *may* qualify under the FMLA, the employer must make further inquiry to make the right determination.

C. What are the employee's obligations?

1) The employee is required to provide adequate notice of his/her need for FMLA leave in person or by telephone, fax or other electronic means.

a) Foreseeable need for leave

(1) Ask for leave 30 days in advance if foreseeable such as planned medical treatment, child birth or placement

(2) If less than 30 days then notice as soon as practicable (ordinarily 1-2 business days)

b) Unforeseeable need for leave

(1) Ask for leave within 2 days of knowing need for leave

(2) Give notice as soon as practicable

(3) Notice can be given by employee's representative

2) Information imparted to the employer must be sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition.

3) An employee is not required to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice.

4) An employee must prove that he/she is afflicted with an FMLA-qualifying condition.

5) An employee may be required to periodically report on status.

6) An employee may be required to obtain a fitness-for-duty medical certification prior to returning to work.

a) Certification must be uniformly applied

b) Employee must be on notice of such a requirement

c) Employer must also comply with ADA requirements

d) Employer may deny reinstatement until certification is obtained

D. What are the employer's obligations?

1) Notifying Employees of FMLA Rights and Obligations

a) Notice of rights and obligations must be posted in the workplace.

b) Willful violations of posting requirements may subject an employer to civil penalty of $100 for each separate offense.

c) An employer who fails to post required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

2) Employee manuals and handbooks, if provided by employer, must contain rights and obligations such as:

a) providing advance notice for foreseeable leave; or

b) providing a medical certification[14] of the need for the leave; or

c) providing a return to work certification; or

d) using accrued paid time off as a part of the leave.

3) If an employer has no written handbooks or policies, written guidance must be given to the employee setting out all rights and obligations whenever a request for FMLA leave is made.

4) Notice, however imparted to the employee, should include:

a) that leave will be counted against the employee's annual FMLA leave entitlement;

b) any requirements regarding medical certification and failure to do so;

c) employee's right to substitute paid leave and whether the employer will require substitution of paid leave, and conditions regarding substitution;

d) any required premium payments to maintain health benefits and arrangement for payments;

e) any requirement for fitness-for-return-to-duty;

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[14] When the employer disputes the medical certification, the FMLA permits second and third medical opinions at the employer's request by health care providers selected by the employer. Such opinions must come from health care providers who do not regularly contract with the employer. The employer may also require periodic recertification no more often than every 30 days, unless there is a requested extension of the leave, a significant change in the circumstances involved in the original certification, or the employer receives information which casts doubt on the continuing validity of the original certification.

The employer must notify the employee if the employer suspects that the medical certification is incomplete, and must give the employee the opportunity to correct the deficiencies. The employer may not directly request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, to clarify and authenticate the certification.

f) employee's status as a "key employee" and potential consequences;

g) right to restoration to same or equivalent position upon return; and

h) employee's potential obligation for health premiums paid by employer during leave.

5) Keeping employee medical records separate and confidential and limiting who may access records.

6) FMLA leave may not be counted against the employee *in any manner* under "no-fault" attendance policies.

7) An employer cannot enforce the employee's obligation to obtain a medical certification of the need for the leave unless the employer complied with its notification obligations. An employer must give the employee a "reasonable time" (at least 15 days) to obtain the certification.

8) An employer cannot discipline or terminate employees for taking FMLA leave.

9) Granting the returning employee the same job or equivalent job[15] with same pay, benefits[16] and terms and conditions of employment. If the employee fails to return at the end of the period, the right to the job expires.

a) Key employee exception/if reinstatement would cause" substantial and grievous harm"

b) Employee entitled to no greater right to restoration/benefits than if he/she had been continuously employed

c) No restoration is required if leave fraudulently obtained

E. What are the elements of an FMLA claim?

1) In an interference claim, the employee must allege:

a) His/her status as an eligible employee;

b) He/she has fulfilled employee obligations under the FMLA, such as notification;

c) The employer has failed to fulfill its statutory obligations under the FMLA; and

d) The employee need only establish entitlement, as the employer's intent is immaterial.

[15] Equivalent position must have the same pay, benefits and working conditions, including privileges and status. It must also involve the same or substantially similar duties and responsibilities.

[16] Employer is required to maintain any pre-existing health coverage during the leave and, once leave period has concluded, to reinstate the employee to the same or equivalent position.

2) In a retaliation claim, the employee may seek recovery for a claim involving asking for or receiving leave if:

a) The plaintiff availed herself/himself of a protected FMLA right;

b) The plaintiff was adversely affected by an employment decision; and

c) There was a causal connection between a) and b).

F. What are the defenses to an FMLA claim?

1) The employee failed to fulfill his/her obligations under the act.

2) The employee has not worked the required minimum number of hours.

3) The employer honestly believed the employee had abandoned his/her job and that the employee is/was not using the FMLA leave for its intended purpose.

G. How are FMLA rights enforced?

An employee may file private suit within 2 years of alleged FMLA violation and, if the violation is willful, within 3 years.

H. What are the remedies?

1) Damages equal to back pay, employment benefits, other compensation denied or lost to employee due to violation (plus interest).

2) Additional damages equaling the damages in 1) UNLESS the Court determines violation was in good faith and the employer had reasonable grounds for believing it had not violated the FMLA.

3) Equitable relief including employment, reinstatement and promotion, and reimbursement for costs and reasonable attorneys and expert fees.

4) Punitive damages are not recoverable.

I. How are FMLA rights waived?

1) A knowing waiver is permitted.

2) The waiver is enforceable pursuant to relevant state contract law.

FAIR LABOR STANDARDS ACT (FLSA)
29 U.S.C. §§ 201-219

A. What is the purpose of the FLSA?

Brooklyn Savings Bank v. Maddrix, 324 U.S. 697, 707 (1945):

The FLSA was passed in

> recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided.

B. Who is protected?

1) Private and public sector employees/ the FLSA uses the "economic realities" test to determine whether a worker is an independent contractor (not protected) or an employee

2) Economic realities test factors

   a) Degree of the alleged employer's right to control the manner in which the work is performed

   b) Alleged employee's opportunity for profit or loss depending on his/her managerial skill

   c) Alleged employer's investment in equipment or materials required for his/her task of his employment of helpers

   d) Whether service rendered requires a special skill

   e) Degree of permanence of the working relationship

   f) Whether service rendered is an integral part of the alleged employer's business

3) An employee in private industry may be covered by the FLSA in one of two broadly interpreted ways:

   a) If employee is engaged in interstate commerce, the production of goods for interstate commerce, or works in activities closely related and directly essential to the production of goods for commerce, he/she is covered/i.e., employees who manufacture or handle goods

moving in interstate commerce, clerical workers who use the mails or telephones for interstate communication or keep records of interstate transactions, employees who regularly cross state lines in the course of their work, and communication and transportation workers, including those involved with maintenance, repair and improvement.

b) If the business enterprise/employer is engaged in interstate commerce, production of goods for interstate commerce, or working in goods or materials moved in interstate commerce and the business enterprise has an annual business volume of at least $500,000, all employees are covered. If an employer has two or more employees who are individually engaged in interstate commerce, then all the remaining employees are also covered.

C. What are an employer's statutory obligations under the FLSA?

An employer's statutory obligations include:

1) Payment of the minimum wage (currently $5.15/was .25 when FLSA initially passed in 1938). In addition to actual wages, the reasonable cost or fair value of board, lodging or other "facilities" that are customarily furnished by the employer may be credited toward the minimum wage. (The FLSA makes it possible, subject to certain conditions, to employ learners, apprentices, messengers, and handicapped workers at sub minimum wage rates. In addition, persons aged 16-19 may be employed at a sub minimum training wage, subject to certain conditions) (Additionally, volunteers are not covered by the FLSA. The Supreme Court has held that volunteer means "an individual, who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit." Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 295 (1985)).

2) Payment for hours worked/includes all the time employee is required to be on duty or on the employer's premises or at a prescribed work place and all time he/she is "suffered" or "permitted to work" for employer.

3) Payment of time-and-a-half for overtime/ one and one-half times regular hourly wage for hours worked beyond standard 40 hour workweek[17].

4) Maintenance of required records[18].

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[17] The minimum wage and overtime provisions of the FLSA apply on a normal workweek basis. The normal workweek is a fixed and regularly recurring period of seven consecutive 24-hour periods. It may begin on any day of the week and at any time of the day. An employer may change the beginning day of the workweek only if the change is intended to be permanent and is not made to evade the statutory overtime pay requirements.

[18] There are numerous and detailed requirements for maintaining employee records. The employer is responsible for determining the hours worked and paying the required wages. Failure to keep records or keeping inaccurate, uncertain records result in a presumption in favor of the employee. Failure to keep such records may also result in criminal penalties.

D. What are the elements of a cause of action?

1) The plaintiff is an employee;

2) The plaintiff has worked the required period of time; and

3) The employer failed to fulfill its statutory obligations pursuant to the FLSA.

E. How is the FLSA administered and enforced?

1) Secretary of Department of Labor

2) Private suit

F. What are the exemptions under the FLSA?

The burden clearly is upon the employer affirmatively to show that the plaintiff-employee is within the scope of any exemption. Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190 (1966); Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

1) "White collar exemptions"

a) Executive or Managerial Exemption Qualification/Employee:

(i) Earns at least $455 a week /($23,660/year)

(ii) Has a primary duty of managing the enterprise or a recognized department or subdivision/determination of the employee's primary duty "'must be based on all the facts in a particular case' . . . [T]he amount of time spent on managerial duties is a relevant, but not a dispositive factor." Murray et al., v. Stuckey's, 939 F.2d 614, 618 (8th Cir. 1995).

(3) Regularly and customarily directs work with two or more employees/ the equivalent of two full time employees is any combination of part-time and/or full-time employees whose total number of work hours meets or exceeds 80 per week Murray, 50 F.3d 564, 567-69 (8th Cir. 1995); Krieg v. Pell's Inc., 2002 WL 449797 (S.D. Ind. 2002).

(4) Has authority to hire and hire other employees or their recommendations as to hiring, firing, promotion or other changes of status are given particular weight

b) Administrative Exemption/Employee:

(1) Earns at least $455 per week/($23,660/year)

(2) Has a primary duty of performing office or nonmanual work related to the management or general business operations[19] of the employer or the employer's customers

(3) Holds a position of responsibility[20] with the employer

c) Professional Exemption:

(1) Earns at least $455 a week /($23,660/year)

(2) A primary duty of performing office or nonmanual work requiring advance knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction

(3) Such advanced knowledge or learning may be acquired by an equivalent combination of intellectual instruction and work experience

d) Computer Employee:

(1) Earns at least $455 a week or if paid on an hourly basis are he/she earns at least a regular rate of $27.63 per hour

(2) Must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field

(3) Subject to detailed definition of what constitutes computer work

e) Outside Sales:

(1) Have a primary duty to make sales, obtain orders or contracts for services, or use of the facilities

(2) Must customarily and regularly engage away from employer's place of business while performing such duties

f) Highly Compensated Employees/executive, administrative or professional earning over $100,000

[19] "Management or general business operations" includes tax, finance, accounting auditing, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations and similar activities.
[20] "Position of responsibility" is defined as either work of substantial importance or work requiring a high level of skill or training.

(1) In order to qualify for this exemption, the employee's total annual compensation cannot be based entirely on commissions and bonus payments, and must include at least $455/week paid on a salary or fee basis); and

(2) Must perform office or non-manual work

(3) Must "customarily and regularly" perform one or more of the responsibilities of an executive, administrative or professional employee

(4) Additional highly detailed requirements

G. What relief is available under the FLSA?

1) Individual private suit.

a) Recovery of unpaid minimum wage/overtime compensation.

b) Liquidated damages discretionary subject to employer good faith defense/employer had an honest intention to ascertain and follow the dictates of the FLSA/advice of counsel insulates employer from liquidated damages but not from charge of willful violation. Hill v. J.C. Penney Co., Inc., 688 F.2d 370 (5th Cir. 1982).

c) Costs and attorneys fees.

d) Employment, reinstatement, promotion. Potence v. Hazelton Area Sch. Dist., 357 F.3d 366 (3rd Cir. 2004).

2) Employee may sue on behalf of "similarly situated" employees.

3) Wage suits by Secretary of Labor on behalf of employees

a) Wage recovery: Back wage recovery is limited to going back 2 years, except that a plaintiff may go back 3 years where the violation is found to be willful.

b) Injunctive relief.

H. What are the employer's penalties for repeated and willful FLSA violations?

A violation is willful if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited. Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

1) Civil penalty of $1,000 per violation

2) Criminal penalty of up to $10,000/second conviction results in imprisonment

I. Can FLSA rights be waived?

Brooklyn Savings Bank v. Maddrix, 324 U.S. 697 (1945): Held that basic policy considerations forbade waiver of the basic minimum and overtime wages guaranteed by FLSA.

RETALIATION

A. Overview of Protection From Retaliation under Title VII, Section 704(a):

Section 704(a) of Title VII protects an employee or applicant for employment (and in some circuits a former employee) from adverse action. Likewise, most federal employment and discrimination statutes similarly include a prohibition on retaliation. Retaliation claims generally are analyzed the same, regardless of the authority under which filed, for the following reasons:

Employees are protected from retaliation on both the bases of participation and opposition:

1. Participation:

   Where an employee has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under the relevant statute.

   Court's broadly construe the participation clauses and extend derivative protection where an employer mistakenly believes an employee has engaged in protected conduct and where an employee is related to or allied with someone who engaged in protected activity.

2. Opposition:

   Where an employee has opposed any practice made an unlawful employment practice under the relevant statute.

   Under the opposition clause the courts are not unanimous on what constitutes protected activity and consideration must be given to (1) whether the practice opposed must be in fact and in law a violation of the relevant statute; (2) under what circumstances broad or ambiguous complaints will be interpreted as opposition; and (3) under what circumstances the form of the opposition, such as unlawful or disruptive conduct, will withdraw statutory protection that otherwise might exist.

B. What are the elements of a retaliation claim?

1. That the employee engaged in statutorily protected conduct, i.e., either participation or opposition;

2. That the employee suffered adverse treatment; and

3. That a causal connection exists between the protected conduct and the adverse treatment. This nexus normally is established for purposes of a prima facie case by proof that the protected conduct preceded the adverse

treatment and proof of the employer's knowledge of the employee's protected activity prior to taking the adverse action.

C. What is cognizable adverse treatment?

Courts have considered the following types of treatment adverse: transfer, reassignment, termination, suspension with pay, failure to promote, exclusion from necessary information, refusal to process a grievance, deviation from established in-house procedures, harassment, disciplinary demotion, unjustified evaluations and reports, loss of normal work assignments, etc. Accordingly, adverse treatment may include actions that are not economically detrimental to the employee. However, courts consistently have held that personality conflicts and snubbing that may make an employee's position more difficult do not constitute retaliation.

D. False Motive: The McDonnell Douglas Corp. v. Green Burden Shifting Analysis?

Where an employee establishes a prima facie case of retaliation, courts analyze the claim under the McDonnell Douglas Corp. v. Green, 411 U.S. 791 (1973), framework. The employer has the burden of producing evidence that it had a nonretaliatory, legitimate reason for its actions, i.e., insubordination, poor performance, lack of qualifications, reorganization. If the employer presents proof of a legitimate, nonretaliatory reason for its action, the employee has an opportunity to prove pretext, or that the employer is not being truthful. This effort frequently includes evidence that the employer treated the employee differently than similarly situated employees. The employee will seek to present evidence that creates disbelief of the employer's proffered reason. Of uppermost importance is the temporal relationship between the protected conduct and the adverse action. Actions closer in time enhance an employee's case, and vice versa.

E. Mixed Motive: The Price Waterhouse v. Hopkins Analysis:

The employee need not show that a retaliatory motive was the sole motive for the adverse treatment. If an employee demonstrates that the employer was motivated at least in part by the plaintiff's protected conduct, then under Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), the employee may prevail without necessitating the McDonnell Douglas burden shifting analysis. Where the employer can show it would have made the same decision it did even without the presence of a retaliatory motive, the employee would still be entitled to declaratory relief, injunctive relief (not including hiring, reinstatement or promotion), attorneys fees and costs.

HARASSMENT

A. Historical Overview of Harassment:

The first claim of harassment to be recognized by the U.S. Supreme Court involved sexual harassment. In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Court held that a claim of sexual harassment may be actionable even if the harassment does not cause a direct economic injury.

Since 1986, claims of harassment have been recognized with respect to other protected classes. Circuit courts have expanded harassment to the following protected bases, applying the same legal standard as applies to sexual harassment claims:

1. Age, see, e.g., Burns v. AAF-McQuay, Inc., 166 F.3d 292 (4th Cir. 1999);

2. Race or national origin, see e.g., Celestine v. Citgo, 266 F.3d 343 (5th Cir. 2001);

3. Disability, see, e.g., Flowers v. Southern Reg'l Physician Servs., Inc., 247 F.3d 229 (5th Cir. 2001); and

4. Religion, see, e.g., Daron v. Premdor Entry Sys., 172 F.3d 48, 1998 U.S. App. LEXIS 31017 (6th Cir. Dec. 3, 1998).

Historically, harassment was divided into two basic categories:

1. Quid Pro Quo: Where a supervisor relies on actual or apparent authority to extort sexual favors from an employee and submission to those favors is an implicit or explicit condition of an individual's employment or the basis for an employment decision." See Barnes v. Costile, 561 F.2d 983 (D.C. Cir. 1977)

2. Hostile Environment: Where an individual has been required to endure a work environment that substantially affects a term or condition of the individual's employment thought not directly causing economic harm. Meritor, 477 U.S. 57 (1986)

In 1998, the Supreme Court decided Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), which more clearly define the analysis of harassment claims and provide an affirmative defense to claims of environmental harassment. The Court abandoned the quid pro quo framework and introduced an analysis based on whether a (a) "tangible employment action" occurred or (b) the harassment is environmental.

1. Tangible Employment Action. The Court defined tangible employment action as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities,

or a decision causing a significant change in benefits." Normally, a tangible employment action requires action of a supervisor or management employee. Direct economic harm is an important indicator, but courts have found tangible action in its absence.

2. Environmental Harassment: The Court did not redefine environmental harassment, but reaffirmed environmental harassment to be offensive conduct (both objectively and subjectively) based on sex so severe or pervasive as to alter the conditions of the employee's employment and create an abusive working environment.

Since Faragher and Ellerth, the *quid pro quo* and hostile environment distinctions have been essentially abandoned and replaced with analysis of tangible employment action versus purely hostile environment harassment.

B. The Elements Where There Is Tangible Employment Action:

The elements where there is a tangible employment action are:

1. Membership in a protected group: established by a statement of gender. The complaining employee may be of the same gender as the alleged harasser(s);

2. Sex based: the conduct need not be sexual in nature, but must be "because of sex;"

3. The tangible employment action: (see above);

4. The supervisor placed sexual demands on employee: evidence of direct or express sexual demands is not required, but rather, courts have permitted a "broad array" of evidence to satisfy this element; and

5. A nexus between tangible action and the employee's acceptance or rejection of alleged harassment: evidence relevant to a determination of the nexus includes the temporal relationship of the sexual demand and acceptance or rejection and the employment action, comparative evidence of how employees of the opposite gender were treated and evidence of the alleged harasser's involvement in the adverse employment decision.

Following Faragher and Ellerth, when an employee can prove these elements, the employer is vicariously liable per se and is not entitled to an affirmative defense.

C. The Elements of A Hostile Environment Claim:

The elements of an environmental claim are:

1. Membership in a protected group: established by a statement of gender. The complaining employee may be of the same gender as the alleged harasser(s);

2. Sex based: the conduct need not be sexual in nature, but must be "because of sex;"

3. Unwelcome: normally requires proof that the employee complained of the conduct or that the employer knew of the offensive conduct; and

4. Severe or pervasive: the conduct must, both objectively and subjectively, alter the conditions of employment and create an abusing working environment:

The Supreme Court in Faragher and Ellerth set forth a two-pronged affirmative defense that, if satisfied, in some instances permits an employer to avoid liability even if an employee establishes a *prima facie* case of environmental harassment. The affirmative defense does not apply where there was a tangible employment action.

Prong 1 The employer exercised reasonable care to prevent and correct promptly any harassment: Generally satisfaction of this prong requires that the employer have and disseminate a formal policy prohibiting harassment that includes a complaint procedure that allows an employee to bypass the offending supervisor. Courts will consider the policy, the employee's complaint, if any, and the employer's response. Analysis of this prong includes the promptness and effectiveness of the employer's response (where a complaint was made) and the employer's compliance with its policy prohibiting harassment.

Prong 2 The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise: Generally, if an employee fails to come forward with a complaint, the courts typically find the employee unreasonably failed to take advantage of the preventative or corrective opportunities provided by the employer. Fear of retaliation is not an excuse.

D. Variance in Potential Employer Liability Based on Position of "Harasser":

1. Harassment by high level manager. Faragher and Ellerth suggest that harassment by an individual "indisputably within that class of an employer organization's officials who may be treated as the organizations proxy" results in automatic liability. Courts have provided little guidance on this "proxy" component.

2. Harassment by a "supervisor." Where there has been no tangible employment action, the employer is presumptively liable, subject to the Faragher and Ellerth affirmative defense. Generally, supervisors are those whose authority includes the power to hire, fire, demote, promote, transfer or discipline. Absent authority such as this, an employee does not qualify as a "supervisor" for imputing liability to the employer.

3. Harassment by a co-worker. Following Faragher and Ellerth, the courts have continued to apply a negligence standard to cases where the alleged harasser

is a co-worker. The employee must prove the employer "knew or should have known" of the alleged harassment. Courts, in essence, largely consider the two prongs of the Faragher and Ellerth affirmative defense to determine negligence.

4. Harassment by nonemployees. Courts apply the negligence standard reasoning that the employer ultimately controls the conditions of the work environment. In this instance, "appropriate corrective action" includes consideration of the authority and control the employer has over the nonemployee.

DAMAGES IN EEO LITIGATION

A. Title VII and the ADA:

1) Injunctions

2) Order directing hire, reinstatement, promotion, payment of higher salary and benefits

3) Back pay: wages and benefits lost as a result of discrimination

   a) Mitigation: employer may try to prove that the plaintiff was not reasonably diligent in seeking comparable employment and would have had reasonable chance of securing a comparable job had she diligently searched for one.

4) Reasonable attorneys' fees and costs (unless lawsuit is frivolous, lacking foundation, or unreasonable, fees and costs are not generally awarded to prevailing defendants)

5) Compensatory and punitive damages

   a) Subject to caps. Total compensatory and punitive damage award cannot exceed:

      i. $300,000 for employers with more than 500 employees
      ii. $200,000 for employers with 201 – 500 employees
      iii. $100,000 for employers with 101 – 200 employees
      iv. $50,000 for employers with 100 or fewer employees

   b) Punitive damages require intentional discrimination, done with malice or reckless indifference

6) Declaratory relief

7) Front pay, not subject to damages caps applicable to compensatory and punitive awards

8) Prejudgment and postjudgment interest.

B. Section 1981 and 1983:

1) Courts may award generally the same relief as under Title VII, including attorneys' fees.

2) Damages caps imposed on compensatory and punitive damage awards under Title VII do not apply.

C. The ADEA:

1) Courts may award generally the same equitable relief as under Title VII, including attorneys' fees.

2) In the case of willful violations of the ADEA, a plaintiff may recover "liquidated damages" in an amount equal to the backpay award.

Compensatory and punitive damages are not generally

EEOC PROCEDURES

A. What are the charge filing requirements?

1) Except for the Equal Pay Act (29 U.S.C. § 206 (d)), the substantive statutes administered by the EEOC require that a person claiming discrimination file a charge of discrimination with the EEOC. See 42 U.S.C. § 2000e – 5(b) (Title VII); 29 U.S.C. § 626 (d) (ADEA); 42 U.S.C. § 12117 (a) (ADA).

2) Charges must be in writing and under oath. See id.; see also 29 C.F.R. § 1601.9.

3) If an unsworn charge is filed, a charging party may verify the charge while it is still pending before the Commission and the verification will relate back to the original filing date. See Edelman v. Lynchburg College, 535 U.S. 106 (2002); 29 C.F.R. § 1601.12(b).

4) The charge, at a minimum, must be "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

5) A charge may be filed in person or by mail at any EEOC field office, Commission headquarters in Washington, D.C., or with any designated representative of the Commission. See 29 C.F.R. §1601.8.

6) The charge filing process also may be started by calling the Commission's National Contact Center at 1-800-669-4000, but an actual charge must be filed with a district office to constitute a charge.

B. What are the procedures after a charge is filed?

7) The EEOC must serve the charge on the respondent within 10 days of the filing of the charge. See 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117 (a); 29 C.F.R. § 1601.14 (a).

8) The Commission is authorized to investigate the allegations of the charge, including requiring the Charging Party to provide a statement identifying when and how they believe they were discriminated against, and the facts which lead the person to believe that they were discriminated against. See 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 12117 (a); 29 U.S.C. § 626(d); 29 C.F.R. § 1601.15.

9) The Respondent typically is asked to provide a Statement of Position responding to the allegations of the charge, and the EEOC can request documents and interview witnesses.

10) The Commission has the authority to issue administrative subpoenas compelling the production of witnesses and documents. See 29 C.F.R. § 1601.16 (a).

11) Upon completion of its investigation, the EEOC has no authority to issue a binding determination against any Respondent other than a Federal agency.

12) If the Commission determines that there is reasonable cause to believe that a violation has occurred, the Commission will invite the parties to attempt to resolve the allegedly unlawful practice through conciliation. See 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 12117 (a); 29 U.S.C. § 626 (d); 29 C.F.R. § 1601.21 (reasonable cause) and § 1601.24 (conciliation).

13) If conciliation fails, the EEOC will notify the parties of that fact (29 C.F.R. § 1601.25).

14) At this stage, the EEOC may file suit on behalf of the charging party or issue a Notice of Right to Sue (a/k/a Dismissal and Notice of Rights). See 29 C.F.R. § 601.27 and § 1601.28 (b).

15) A charging party also may request the issuance of a Notice of Right to Sue from the EEOC where the charge has been pending for at least 180 days or the Commission determines that it is unlikely to complete its investigation within 180 days. *See* 29 C.F.R. § 1601.28 (a)(1) and (2). There is a split among the Circuits as to the validity of early Notices of Right to Sue, and the Supreme Court has not yet addressed the issue. Compare Martini v. Federal National Mortgage Association, 175 F.3d 1336 (D.C. Cir. 1999), cert. dismissed, 528 U.S. 1147 (2000) (holding that the Notice and the authorizing EEOC regulation are void, vacating the jury verdict after five years of litigation, and sending the case back to the EEOC) with Brown v. Puget Sound Electrical Apprenticeship & Training Trust, 732 F.2d 726, 729 (9th Cir. 1984), cert. denied, 469 U.S. 1108 (1985) (upholding the same EEOC regulation) and Sims v. Trus Joist MacMillan, 22 F.3d 1059, 1061-63 (11th Cir. 1994) (same). Some courts invalidating the regulation have simply required the action to be held in abeyance while the case is re-submitted to the EEOC for the number of days necessary to make the full 180 days. E.g., Spencer v. Banco Rela, *S.A.*, 87 F.R.D. 739,741-48 (S.D. N.Y. 1980). The Supreme Court has referred to the "early notice" regulation in passing, but without ruling on its validity. EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 595 n.6 (1981). Most lower-court decisions do not mention this reference.

16) Although the Commission has the authority to issue substantive "No Cause" determinations, the Commission currently does not do so and instead issues determinations that it is unable to conclude that there was reasonable cause.

17) In every instance where the Commission elects not to file suit, the charging party is entitled to a notice of right to sue. See 29 C.F.R. § 1601.28 (b).

18) The notice of right to sue should contain the Commissions determination on the charge and the date of service of the notice. See e.g., 29 C.F.R. § 1601.28 (e).

19) The charging party has 90 days from receipt of the notice of right to sue to file suit. See 42 U.S.C. § 2000e-5(f); 42 U.S.C. § 12117 (a); 29 U.S.C. § 626 (e).

C. What is administrative exhaustion?

20) The charge filing requirement is not jurisdictional and is subject to waiver and estoppel. See Zipes v. TWA, Inc., 455 U.S. 385, 395 (1982).

21) Commissioner's charges are subject to greater requirements of specificity than individual charges. See EEOC v. Shell Oil Co., 466 U.S. 54, 73 (1989).

22) The ADEA and EPA do not provide for Commissioner's charges, and the EEOC uses directed investigations, sometimes followed by suit by the EEOC, to serve the same role of initiating investigations and enforcement in the absence of a charge by a person aggrieved.

23) When one charge of discrimination has been filed by a named plaintiff, in some circumstances other named plaintiffs or interveners may sue as to the same practice without having to file their own EEOC charges. Because of the importance of notice to the EEOC and the defendant, the success of such "piggy backing" efforts may depend on whether the charge on which the others seek to "piggy back" put the EEOC and the defendant on notice of large-scale or class-type liability, or instead that the number of the persons seeking "piggy backing" is small. See e.g., Howlett v. Holiday Inns, Inc., 49 F.3d 189, 194 (6th Cir. 1995) (ADEA; only one piggy backer); Tolliver v. Xerox Corp., 918 F.2d 1052, 1057-58 (2nd Cir. 1990) (Title VII), cert. denied, 499 U.S. 983 (1991)); Anderson v. Montgomery Ward & Co., Inc., 852 F.2d 1008 (7th Cir. 1988) (ADEA); Levy v. U.S. General Accounting Office, 175 F.3d 254, 255 (2nd Cir.) (per curiam), cert. denied, 528 U.S. 876 (1999) (rule did not apply where the additional plaintiffs had filed their own charges and let their notices of right to sue expire); Whalen v. W.R. Grace & Co., 56 F.3d 504, 507 (3rd Cir. 1995) (recognizing conflicting authority but holding that "single filing" rule does not allow amendment of an individual ADEA complaint, not alleging a class or representative action, to add new plaintiffs who have not filed charges with the EEOC, and holding that new individuals may not "opt in" to the individual action); Forehand v. Florida State Hospital at Chattahoochee, 89 F.3d 1562, 1565 n. 8 (11th Cir. 1996) (dictum).

24) Although EEOC charges are intended to put the Commission and the respondent on notice of the alleged acts of discrimination, EEOC charges are not construed with "literary exactitude," and the classic test is that "it is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Sanchez v. Standard Brands, 431 F.2d 455, 465-66 (5th Cir. 1970).

25) The courts have generally held that plaintiffs may include post-charge retaliation claims in their judicial complaints without having filed a retaliation charge with the EEOC. See, e.g., Clockedile v. New Hampshire Department of Corrections, 245 F.3d 1, 4-5 (1st Cir. 2001); Anderson v. Reno, 190 F.3d 930, 938 (9th Cir. 1999).

26) Even though the statutes provide that a civil action may be brought against a respondent named in the charge, courts have taken different views on what it means to be "named" in the charge, and tend to focus on the reasonable scope of the EEOC investigation, actual notice to the unnamed party, and identity of interest between the named and unnamed parties.

27) A plaintiff is required to have exhausted claims, not the evidence on which the plaintiff relies to establish the claim. See, e.g., Rutherford v. Harris County, 197 F.3d 173, 186 (5th Cir. 1999); Kline v. City of Kansas City Fire Department, 175 F.3d 660, 668 (8th Cir. 1999), cert. denied, 528 U.S. 1155 (2000).

D. What are the timing filing requirements?

1) In non-deferral jurisdictions, a charging party must file their charge within 180 days of the allegedly discriminatory act or practice. See 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117 (a); 29 U.S.C. § 626 (d)(1).

2) In deferral jurisdictions, a charging party has up to 300 days to file a charge with the commission. See 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117 (a); 29 U.S.C. § 626 (d)(2) and §633(b).

3) A deferral jurisdiction is a state with "a comprehensive law and an investigatory agency with enforcement powers that has applied for deferral status." Fair Employment Practices Manual, § 451.2 (BNA). A list of approved deferral agencies can be found at 29 C.F.R. § 1601.74.

4) Neither the deadline for filing a charge, nor the 90 day deadline for filing suit after receipt of the notice of right to sue are jurisdictional. They are subject to waiver, estoppel, and equitable tolling. See Irwin v. Dept. of Veterans Affairs, 498 U.S. 89 (1990); Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984); Zipes v. TWA, 455 U.S. 385 (1982).

5) The time to file a charge, or to file a lawsuit where there is no administrative exhaustion requirement (ex., 42 U.S.C. §1981), starts to run when the individual is notified of the final adverse employment action, not when the action is put into effect, even if there is a process for reconsideration still available to the plaintiff. See *Delaware State College v. Ricks*, 449 U.S. 250, 257-58 (1980).

6) In pay discrimination cases, each discriminatory paycheck is an actionable incident of discrimination from which the filing deadline is calculated. *See Bazemore v. Friday*, 478 U.S. 386, 395-96 (1986).

7) Discrete retaliatory or discriminatory acts such as hiring, firing, demotion, and the like, occur for purposes of computing filing deadlines on the day the event happens. See National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110-15 (2002).

8) Unlike discrete events, Morgan held that a claim of hostile work environment is one practice even though it is ordinarily composed of a number of separate actions, some of which may fall outside the period of limitations. "Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by the court for purposes of determining liability." Morgan, 536 U.S. at 117.

9) Morgan expressly provides employers a laches defense in hostile environment claims, and indicates that other equitable defenses may be available as well. Morgan, 536 U.S. at 121-22.

10) The laches defense "'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" Morgan, 536 U.S. at 121-22 (citations omitted).

11) Morgan does not address when an act or practice occurs in the context of a pattern or practice case. Morgan, 536 U.S. at 1115 n. 9.

12) The time to file suit under 42 U.S.C. §1981 is not tolled during the pendency of an EEOC charge. See Johnson v. Railway Express, 421 U.S. 454 (1975).

13) The time to file suit or a charge is not tolled pending the exhaustion of an internal review procedure as to a decision that is otherwise final. See Delaware State College v. Ricks, 449 U.S. 250 (1980).

14) The time to file suit or a charge is not tolled during a collectively bargained grievance procedure. See International Union of Electrical, Radio and Machine Workers, AFL CIO, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976).

E. What is mediation?

1) The Commission has implemented a mediation program, and its Alternative Dispute Resolution Policy Statement is available at www.eeoc.gov.

2) Each District Office has a designated staff member who is responsible for coordinating mediation activities within that Office's geographical jurisdiction. The EEOC's mediation contact list is also available on the Commission's website.

3) The EEOC screens all charges to determine if they are appropriate for mediation.

4) Both parties must consent to participate.

5) If the EEOC does not initially offer mediation, the parties may request that the charge be referred to mediation.

6) The mediation process is confidential, and no information divulged during the mediation is disclosed to EEOC investigators.

7) If a charge is resolved at mediation, the Commission will take no further action on the charge.

8) If a charge does not settle, the file will be referred to the EEOC's investigative unit and will be processed through the normal investigative procedure.

LITIGATION PRACTICES: A BASIC OVERVIEW OF CERTAIN EVIDENTIARY ISSUES IN EEO LITIGATION

Employment litigation may involve unique evidentiary issues. A comprehensive review of all potential evidentiary issues is beyond the scope of these Basics Program materials. Nevertheless, we highlight certain key evidentiary issues that arise with some regularity in EEO litigation.

A. Comparator Evidence:

Comparator evidence is the phrase used to refer to a common type of evidence that is proffered to demonstrate discrimination or the lack thereof, by comparing the treatment of the aggrieved plaintiff to the treatment of a non-class member person who is similarly situated in all relevant respects. For example, the female plaintiff may attempt to advance evidence that shows that a male employee who is "similarly situated" in all respects is treated materially better than she. On the other hand, the defendant employer may attempt to introduce evidence that a male employee who is "similarly situated" in all respects is treated worse or the same as the female plaintiff.

Much litigation exists regarding the definition of "similarly situated" and whether the non-protected class person is truly similar in all relevant respects. The basic issue is whether the comparison of the plaintiff to the other non-class member individual is a fair comparison, such that it would enable a factfinder to draw a relevant and reasonable conclusion regarding the comparison.

B. Statistics:

Statistics are sometimes used in EEO litigation as probative evidence of discrimination or the lack thereof. The U.S. Supreme Court has noted that "[s]tatistics showing [a protected class] imbalance are probative . . . because such imbalance is often a telltale sign of discrimination." International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 340 n.20 (1977) (citations and internal quotations omitted). Whether statistics are useful will depend on the particular facts and circumstances. Id. at 340. Further, statistics may be rebutted. Id. Generally, statistical evidence that fails to account for nondiscriminatory explanations is not permissible. See e.g., Smith v. Xerox Corp., 196 F.3d 358, 371 (2d Cir. 1999) (granting the employer summary judgment where the plaintiff's statistical evidence failed to account for nondiscriminatory explanations; court noted that the evidence "only showed that chance was most likely not responsible for the perceived" differential treatment).

Although statistics are most frequently present in class or representative actions, they are sometimes used in individual cases, as well.

C. Bona Fide Occupational Qualification:

Both Title VII and the ADEA contain bona fide occupational qualification provisions that enable an employer to make a lawful distinction based on the protected class provided that the distinction is a bona fide occupational qualification ("BFOQ"). Title VII's BFOQ applies only to religion, sex, or national origin and only where the protected class is "reasonably necessary to the normal operation" of the "particular" business. 42 U.S.C. § 2000e-2(e)(1). Title VII's BFOQ does not include race or color. Similarly, the ADEA's BFOQ applies "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1).

Generally, whether the BFOQ defense is available will turn on whether the decision made on the basis of the person's religion, sex, national origin, or age is based on an occupational qualification (*i.e.*, "objective, verifiable" qualifications that "concern job-related skills and aptitudes") that are "reasonably necessary" to the "normal operation" of the "particular" business. See International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) (Title VII BFOQ case in which U.S. Supreme Court noted that: a) the statutory wording of the BFOQ defense "contains several terms of restriction" that indicate that the exception only reaches special situations; b) the statutory terms, "certain, normal, and particular" favor "an objective, verifiable" requirement; and c) the most telling term is the word "occupational[,]" which "indicates that these objective verifiable requirements must concern job-related skills and aptitudes"); Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 416-17 (1985) (ADEA BFOQ case).

D. Allegedly Biased Remarks in the Employment Setting:

Frequently, EEO litigation will involve the issue of whether allegedly biased remarks are admissible and probative. Whether the proffered evidence is admissible and/or probative will often turn on one or more questions, including but not limited to the following:

1) How clear (or ambiguous) is the statement?

2) How intense is the statement (does it tend to show bias, and if so, how strongly)?

3) Who uttered the statement?

4) Was the person uttering the statement in management, and did the person have direct or indirect power over the subject employment decision?

5) When was the statement uttered (and how much time has elapsed between the statement's utterance and the subject employment decision)?

6) In what context was it uttered?

7) Did the statement refer to the plaintiff?

8) Was the statement an isolated incident or a stray remark? Alternatively, was the statement frequent in its nature and content?

9) Are there other indications of potential bias from the same person uttering the statement?

10) If the statement was not made by the decision maker, was it communicated to the decision maker?

E. Mixed Motives:

Under Title VII (following the Civil Rights Act of 1991), if an employer's decisionmaking was based on a "mixed motive" – *i.e.*, a legally permissible motive and an unlawful motive based on a protected class, the employer will be liable and the remedies include: a) general injunctive relief (provided the plaintiff has standing to seek it); b) entry of declaratory judgment; and c) attorneys' fees and costs. In a mixed-motives Title VII case, the employer has an affirmative defense to certain aspects of relief (*i.e.*, relief particularized to the employee). 42 U.S.C. § 2000e-5(g). The employer has the burden of providing the mixed motives defense, *i.e.*, that it would have made the same decision even if it had not taken the protected class into account.

Because the Civil Rights Act of 1991, which amended Title VII of the Civil Rights Act of 1964, did not refer to retaliation claims, there is an open question whether Title VII's mixed motives provisions, including the affirmative defense, applies to Title VII retaliation claims. Some courts have held that it does not. See e.g., Kubiko v. Ogden Logistics Services, 181 F.3d 544, 552 n.7 (4th Cir. 1999) (Title VII's mixed motives provision is not applicable in a retaliation claim).

Likewise, Section 703(m) of the Civil Rights Act of 1991 does not explicitly apply to the ADEA or certain other cases, such as whistleblower or other relation claims (*e.g.*, First Amendment retaliation cases). Therefore, it is possible that these cases are still governed by the Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) rule. Under that rule, an employer may avoid liability by establishing that it would have taken the same action had it considered only lawful bases. The mixed-motive analysis is available only after the plaintiff establishes that discrimination "played a motivating part in an employment decision." Id. at 251.

F. Similar Conduct:

On occasion, evidence that similar conduct has occurred may be proffered for different reasons. For example, the plaintiff's counsel make seek to introduce evidence that there was similar conduct in order to show that the employer had notice that of a particular co-worker's alleged harassment of other employees. As another example, the plaintiff's counsel may seek to introduce "similar conduct" evidence to show a "pattern or practice" of discrimination. Whether such evidence

is admissible and probative will depend on the jurisdiction involved and a number of factors including but not limited to the following: 1) the type of claim involved; 2) whether the incident(s) is (are) related; 3) whether the incident(s) of similar conduct violates the law; and 4) whether the alleged similar conduct has any relevance to and is probative of the subject claim. In addition, the traditional rules of evidence may also affect the admissibility of the evidence. See e.g., Fed. R. Evid. 403 (whether the prejudicial effect outweighs the probative value).

G. The Admissibility of EEOC Determinations:

In EEO litigation, either party may attempt to introduce the EEOC's determination. For example, if the EEOC makes a cause finding, the plaintiff's counsel may seek to introduce the EEOC's determination as evidence that is probative of discrimination. Alternatively, the defense counsel may seek to introduce the EEOC's decision if the EEOC failed to make a cause determination. Whether the EEOC's findings are admissible will vary depending on the jurisdiction and whether the matter is tried to a judge or a jury. For example, the Eleventh Circuit has held that the findings are generally admissible in a bench trial, but that they may not be in a jury trial due to the risk of unfair prejudice. See e.g., Lathen v. Department of Children and Youth Services, 172 F.23d 786, 791-92 (11thh Cir. 1999) (discussing the admissibility of agency findings). Thus, it is necessary to research the law in the applicable circuit.

Nevertheless, certain documents submitted by either party in the agency process may be admissible at trial. For example, the employee's signed questionnaire may be admissible as an admission or for impeachment purposes. The employer's representations to the agency may be similarly admissible.

H. Federal Rule of Evidence 412:

Rule 412(a) of the Federal Rules of Evidence generally bars evidence "offered to prove that any alleged victim engaged in other sexual behavior" or to show the "alleged victim's sexual predisposition." However, in civil litigation, the evidence may be admissible "if it is otherwise admissible" and its probative value outweighs any danger of unfair prejudice and harm. Rule 412(b). Rule 412(c) governs the procedure for admissibility of such evidence and generally requires, among other things, the party seeking to use it to submit a motion "specifically describing the evidence" and the purpose "for which it is offered[.]" Should a lawyer seek to have such evidence admitted, it will be necessary to comply with Rule 412(c).

Whether the evidence is admitted is within the trial court's discretion. Considerations may include but not be limited to the following: 1) what the other behavior is and when it transpired; 2) whether the other behavior is probative; 3) whether the other behavior took place in the workplace or outside the workplace; 4) whether the other behavior was known in the workplace regardless of where it occurred, and if so, who knew about it; 5) whether the other-behavior evidence may result in confusion, may be a waste of time, and/or may cause a trial within a trial; and 6) whether the probative value of such evidence otherwise outweighs the prejudicial effect.

ETHICS IN EQUAL EMPLOYMENT OPPORTUNITY LAW

A. Overview of Ethics Issues

The practice of EEO law may often raise a number of ethics issues. A comprehensive review of all potential ethics issues that an EEO practitioner may encounter is beyond the scope of this EEO Basics Program. However, this chapter provides an overview of a few situations that frequently create ethics issues, such as the representation of multiple parties and ex parte communications. This chapter is based on the Model Code of Professional Responsibility ("MCPR" or "Model Code") and the Model Rules of Professional Conduct ("MRPC" or "Model Rules"). In every situation, the prudent practitioner will undertake to know the applicable ethics rules and case law developments in his/her jurisdiction.

B. Representation of Multiple Parties

Representation of multiple parties can present unique ethical issues. Such representation most typically arises when: a) a plaintiffs' counsel represents two or more current or former employees or applicants in cause of action stemming from the same or related events; or b) when a defense counsel represents the corporation and one of its managers in litigation and/or investigations. These situations pose interesting ethical questions, both at the inception of the attorney-client relationship and throughout the process of representation.

In order to demonstrate the ethical issues, these EEO Basics Program materials will focus on: a) the multiple representation of plaintiffs; and b) the representation of the corporation and a manager in an external investigation. Although a complete listing of all ethical issues involved is beyond the scope of these materials, several key topics are highlighted herein, including: relevant ethical rules and how they guide (or fail to guide) attorneys facing the dilemma of representing multiple plaintiffs or the corporation and the manager; and the particularly problematic issues that may arise during settlement negotiations for the plaintiffs' counsel representing multiple plaintiffs.

1. Representation of Multiple Plaintiffs

In the typical multiple representation setting, most if not all plaintiffs involved share a common interest in pursuing the employer. Most often, they assert the same or related causes of action and seek similar remedies for similar injuries. Plaintiffs often choose to work with the same attorney for a number of reasons, including but not limited to: sharing the costs of litigation; the ease of proceeding with the same counsel as a result of the lawyer's familiarity with the claims; and the likelihood of related or "me too" claims. When the plaintiffs have similar interests, the lawyer usually does not face many ethical problems. In some cases, however, the plaintiffs' interests diverge. For instance, in a promotion and pay sex discrimination case, one plaintiff may have suffered great injury and the other plaintiff may have only suffered slight or no real injury. As another example, one employee may have strong direct proof of discriminatory motive and the other employee's case may rest solely on weaker circumstantial evidence. Likewise, certain plaintiffs may have claims

that are more vulnerable to affirmative defenses. In these circumstances, it is the lawyer's duty – at the beginning of the attorney-client relationship and throughout the representation – to conform to the mandates of professional responsibility rules in order to ensure that the lawyer's ethical obligations (including the duty of loyalty to each client) are initially satisfied and maintained throughout the representation.

Joint representation of plaintiffs in an employment setting is fairly commonplace. The main questions such lawyers should be asking in multiple representation settings include the following: a) "Is this permissible?"; b) "What ethical problems exist or could develop?"; c) "How is the duty of loyalty affected by such multiple representation?"; and d) "Even if multiple representation is permissible, is this something that I should undertake?"

There are rules that prohibit representation of multiple parties in some circumstances. Both the Model Code of Professional Responsibility ("MCPR" or "Model Code") and the Model Rules of Professional Conduct ("MRPC" or "Model Rules") express general prohibitions against representing multiple clients with adverse interests, where representing one client could adversely affect the lawyer's representation of another client. "The prohibition is based on three considerations: 1) preserving the sanctity of the attorney-client privilege; 2) ensuring an attorney's zealous representation of clients; and 3) protecting the client's expectation of receiving the complete loyalty of his or her lawyer."[21]

Specifically, Model Code of Professional Responsibility DR 5-105 includes the following provisions:[22] a) DR 5-105(A) generally provides that a lawyer must decline proffered multiple party representation if that lawyer's "exercise of independent professional judgment" "will be or is likely to be adversely affected by" accepting the representation, or if the representation of "different interests" would likely be involved, except as permitted by DR 5-105(C); b) DR 5- 105(B) generally provides that a lawyer must not continue multiple party representation if that lawyer's "exercise of independent professional judgment" "will be or is likely to be adversely affected by" the representation of another client, or if the representation of "different interests" would likely be involved, except as permitted by DR 5-105(C). DR 5-105(C) provides that a lawyer may engage in multiple party representation "if it is obvious that" the interests of all the parties may be adequately represented and if each party consents to the joint representation after "full disclosure" of the possible ramifications on the lawyer's exercise of "independent professional judgment[.]"

Model Rule of Professional Conduct 1.7 specifically addresses joint representation from a conflict of interest perspective. It provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

[21] Leonard M. Ring, *The Ethics of Representing Multiple Plaintiffs in the Same Litigation*, 22 SPRING BRIEF 30 (1993), at 31.
[22] Model Code of Professional Responsibility, DR 5-105; *The Ethics of Representing Multiple Plaintiffs in the Same Litigation*, 22 SPRING BRIEF at 31.

> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
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> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
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> (4) each affected client gives informed consent, confirmed in writing.

Many scholars interpret Model Rule 1.7(a) as only restricting representation of multiple clients when a conflict is apparent from the outset.[23] Such scholars focus on the fact that Model Rule 1.7(a) uses the language "will" and, thus, they reason that the rule does not limit representation when there is only a possibility that the clients' interests "may" conflict at some point during the representation.

In addition, even when Model Rule 1.7(b) bars multiple representation in a situation where there is a direct and obvious conflict, consent of all clients after full disclosure may clear the conflict, provided that the provisions of Model Rule 1.7(b) are satisfied.

Despite the ability to represent multiple clients because there is no concurrent conflict of interest, a lawyer should consider whether joint representation may, nevertheless, be imprudent because of the potential that a conflict of interest may arise. The Comments to Model Rule 1.7 identify some problems with multiple common representation when the potentially adverse interests cannot be reconciled. Comment 29 is particularly insightful in listing the risks and recriminations of joint representation. It states:

> In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests

[23] *See e.g.*, Id. at 30-31.

> cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

Comment 30 clarifies that "[a] particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege." As the Comment indicates, because of the common representation, the attorney-client privilege does not attach" and, consequently, both parties should be advised in advance of the representation.

Comment 31 identifies problems with confidentiality that arise from mutual representation. As the Comment makes clear, "continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation." According to Comment 31, the problem arises because a lawyer has an "equal duty of loyalty to each client[.]"[24]

The lawyer undertaking the joint representation must be able to conclude that a disinterested lawyer would regard multiple representation as in the interest of both the corporate client and the employee client. ABA Model Code of Professional Responsibility, DR 5-105(c). Once counsel has determined that multiple representation is possible, he/she must secure informed consent from both clients after full disclosure of the advantages and risks involved in multiple representation. ABA Model Code of Professional Responsibility, DR 5-105(c). Full disclosure includes disclosure of any conflicting interests that might cloud their representation, including disclosure of any and all defenses and arguments that a client will forgo because of the joint representation, as well as the lawyer's fair and reasoned evaluation of such defenses and arguments and the consequences of failing to raise them. See e.g., N.Y.C. Assoc. B. Comm. Prof. Jud. Eth., Multiple Representations; Corporations and Corporate Constituents, Op. # 2004-02, 2004 WL 2155079, *7 (2004)..

[24] *See also*, Rule 1.4 (governing certain obligations to clients).

The lawyer must also be alert to changes in circumstances that would render continuation of multiple representation impermissible. ABA Model Code of Professional Responsibility, DR 5-105(b). If a conflict arises, the lawyer must reassess the joint representation. See ABA Formal Op. 93-372 (stating that lawyer must reassess the conflict when it arises). Assuming both clients consent to representation, counsel should work to minimize the impact of simultaneous representation. This can be accomplished through prospective waivers of conflict, contractually limiting representation to minimize conflicts, having a written understanding with regard to confidential information, and providing for co-counsel or shadow counsel (because it enhances the likelihood of obtaining substitute new counsel for a party on short notice). Prospective waivers of conflicts require full disclosure in a manner similar to a concurrent waiver of conflicts. In order to render the prospective waiver effective, counsel should at least advise the client of the types of possible future conflicts that might arise. See, e.g., Rymal v. Baergen, 686 N.W.2d 241 (Mich. Ct. App. 2004) (discussion of possible future conflict of interest, combined with limited representation, sufficient to preclude disqualification of attorney); Woolley v. Sweeney, 2003 WL 21488411 (N.D.Tex. 2003) (rejecting prospective waiver due to ineffective disclosure).

In sum, the prudent counsel will address not only actual conflicts of interest, but potential problems that may arise in the areas of confidentiality, attorney-client privilege, duties of loyalty, discrepancies in the strength of claims, and the like.

2. Settlement Issues In Representing Multiple Plaintiffs

As mentioned above, even when it appears that no direct conflicts exist at the outset of representing multiple plaintiffs in a single case, conflicts may arise during the representation. In the employment litigation setting, one typical area where conflict arises is during settlement negotiations. As an example, for the employer, the only monetary issue in settlement is typically the amount of the total settlement. Thus, the employer may offer the multiple plaintiffs a lump sum settlement, without regard to how the former employees (now plaintiffs) split the total settlement. This situation may pose ethical issues for the plaintiffs' counsel. Questions that frequently arise include the following: a) "What is the lawyer to do when one plaintiff wants to settle and the other wants to proceed with litigation?"; b) "How does the lawyer apportion the settlement when one plaintiff has a greater claim to recovery than the other?"; and c) "What is the lawyer to do when the employer offers a "blanket" take-it-or-leave-it settlement, especially when one former employee/plaintiff has stronger claims than the other and yet the other former employee/plaintiff believes the settlement should be split equally?"

There is some guidance in both the Model Rules and the Model Code. They both bar aggregate or group settlements unless all clients consent after full disclosure of all relevant issues. In addition, Rule 23 of the Federal Rules of Civil Procedure governing Rule 23 class actions also provides guidance.[25]

Model Code of Professional Responsibility DR 5-106(A) generally provides that a lawyer cannot participate in an aggregate settlement of his/her clients' claims, unless each

[25] Because class action litigation is beyond the scope of the EEO Basics Programs, the provisions of Rule 23 are not covered here, but must be considered in Rule 23 class action litigation.

client has been advised regarding the existence and nature of the claims being settled and the extent of each party's participation.[26]

Model Rule of Professional Conduct 1.8(g) states:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Further, Comment 13 to Model Rule 1.8 makes clear that "[d]ifferences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer." The Comment reiterates the requirement in the Rule that before an aggregate settlement is accepted, each client must be informed of the material terms of the settlement, including each person's participation.

Several state bar association ethics committees have tackled the issue of conflicts that arise in multiple representation during the settlement process. For example, the New York State Bar Association Committee on Professional Ethics issued an opinion entitled, "*Multiple Representation; Differing Interests,*"[27] in response to a lawyer's inquiry regarding settling claims for multiple plaintiffs stemming from the same incident. The opinion declared:

> Lawyer may not represent in separate actions two plaintiffs against the same defendant where there will be insufficient assets available for full satisfaction of all claims unless it is obvious the lawyer can adequately represent both plaintiffs and both plaintiffs consent after full disclosure.

In the situation on which the Ethics Committee was commenting, the lawyer had sought advice while representing two plaintiffs who were injured in the same fire, after learning that the available assets and insurance coverage would be insufficient to fully satisfy both plaintiffs' claims. The Ethics Committee determined that the insufficient assets resulted in the clients' interests being inconsistent, and thus the clients had "differing interests" within the rules' meaning.[28] As such, the attorney was not allowed to proceed with the dual representation unless it was obvious that the lawyer could adequately represent both clients and unless the parties both consented following full disclosure. The Committee added, "[i]f, however, the circumstances are such that it is not obvious that the lawyer can

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[26] Model Code of Professional Responsibility, DR 5-106(A); *The Ethics of Representing Multiple Plaintiffs in the Same Litigation*, 22 SPRING BRIEF at 34.

[27] N.Y. Eth. Op. 639, 1992 WL 450729 (N.Y. St. Bar. Assn. Comm. Prof. Eth. 1992.).

[28] The Committee concurred "generally in the results reached in Alabama Opinion 82-591 (March 17, 1982) (BNA 801:1030) that a lawyer may not represent all plaintiffs in an automobile accident case where the assets are not sufficient for the full satisfaction of all potential claims and a recovery by one claimant would reduce the assets available for the satisfaction of the other claims."

adequately represent both clients (because, for example, in certain circumstances, one client's damages vastly exceed any claims that could be asserted or proven on behalf of the other client) or if both clients do not consent, the lawyer may not proceed with the multiple representation." Thus, the New York Bar Association has effectively held that it is an impermissible conflict to represent clients in the same matter who have greatly differing damages claims.

Similarly, in Matter of Lauderdale's Guardianship,[29] the lawyer appointed as guardian *ad litem* in a wrongful death action was in a predicament whereby he had to recommend a larger settlement to one client at the possible detriment to the other. The court held such attorney could not act as guardian *ad litem* for the minors, as their interests were not substantially the same. Thus, the court reiterated the notion that representing multiple clients in settling the same action, some of whom have differing damages claims, may present irreconcilable conflicts of interest.

Likewise, the New Jersey Supreme Court Advisory Committee on Professional Ethics has addressed multiple plaintiff settlement issues in an opinion entitled, *Blanket Settlement Offers to Multiple Plaintiffs.* [30] In one of the inquiries addressed by that Opinion, an attorney represented multiple plaintiffs who were all injured in the same car accident. At the outset, the attorney perceived no conflicts, although each plaintiff did have different injuries and different degrees of strength of liability claims. Just before trial, however, the defendant's insurance company made settlement offers to each plaintiff in different amounts. The offers were conditioned as "all or nothing." In other words, either all four plaintiffs accepted, or the offer was extinguished. Only three of the four plaintiffs agreed that they would accept the offer. The Committee concluded that, as an initial matter, this representation presented no ethical dilemmas. However, a problem was created by the insurance company's offer. In this instance, the Committee deferred to the commands of Model Rule 1.8(g), as discussed above. As for the question of whether the attorney had to withdraw at the point of this "all or nothing" settlement offer, the Committee stated:

> The "tie-in" offer being made did not create a conflict of interest situation insofar as the plaintiff's attorney is concerned, since there was no decision to be made by him which would put him in the position of favoring one client over another, or having to make a decision in favor of one client to the detriment of the others. . . Consequently, the determination or decision was not made by the Inquirer but, rather, by the four plaintiffs.

In a second inquiry addressed by this Opinion, the Committee assessed the ethical dilemmas of a mass tort claim case in which the defendant offered a settlement proposal that was unacceptable to most of the plaintiffs. However, upon learning that a hundred of their co-workers' claims could possibly be dismissed on statute of limitations grounds, almost all of the plaintiffs changed their minds and accepted the offer.

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[29] 15 Wash. App. 321, 549 P.2d 42 (1976).
[30] N.J. Eth. Op. 616, 122 N.J.L.J. 764, 1988 WL 356373 (N.J. Adv. Comm. Prof. Eth.).

The Committee saw no ethical problem with representing these multiple plaintiffs, some of whom could have had statute of limitations problems, as this was a matter of law to be determined by the trial judge. However, the Committee was concerned by the fact that this scenario gave defendants the unilateral ability to insert a conflict of interest between the plaintiffs' attorney and some of his [her] clients. Again, the Committee determined that this did not constitute an ethical violation on the defense attorneys' behalf, as the defense attorneys were simply following their ethical duty to present the settlement proposal that their clients instructed them to offer. Thus, under these circumstances, the Committee determined that representing multiple plaintiffs in settlement negotiations may be completed in such a way as to avoid ethical conflicts, so long as Model Rule 1.8(g) is followed.

In sum, representing multiple plaintiffs in a case may pose some difficult – and sometimes unanticipated – ethical quandaries. The prudent lawyer will consider the ethical obligations in the applicable jurisdiction, not just at the beginning of but also throughout the representation, and he/she will act accordingly.

3. Representing Organizations and Officers in an Investigation

Lawyers representing organizations face several challenges that lawyers representing individuals do not face, not the least of which is, "Who is the client?" The situation may arise, for example, when the lawyer is faced with the representation of organizations and officers in an investigation. In addition to consideration of the above model rules, Model Rule 1.13, dealing with the "Organization as Client," provides guidance in this area.

a) Who is the Client?

Model Rule 1.13(a) states, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." According to the Comments to Rule 1.13, when an organization's constituents communicate with the organization's lawyer in that person's organizational capacity, the communication is privileged, and protected by Model Rule 1.6.[31] However, it is important to note that this privilege belongs to the organization, not the constituent. Additionally, simply because this communication is protected does not mean that the organization's constituents are represented by the lawyer.[32] Moreover, although the communications may be privileged, the privilege belongs to the organization and may not offer much (or any) protection to the constituent.

The comments to Rule 1.13 make clear that if the organization's interests are adverse to the constituent's interests, conversations between the organization's lawyer and the constituent may not be privileged.[33] For this reason, Rule 1.13(f) provides, "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interest are adverse to those of the constituents with whom the lawyer is dealing." Additionally, the Comments indicate that

[31] Model Rule of Professional Conduct 1.13, Comment 2.
[32] Id.
[33] Id. at Comment 10.

when there is an adversity of interest, the lawyer should advise the constituent that he/she may want to obtain his/her own representation, that the lawyer cannot represent the constituent, and that their communications may not be privileged.[34] Further, when the possibility of an adversity of interests is present, the lawyer should comply with Rule 4.3, which dictates that the lawyer make clear that he/she is not disinterested and that he/she represents the organization and not the constituent.

Model Rule 1.13(g) covers joint representation and provides:

> A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constitutes, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

As mentioned above, there are times when the interests of a constituent and the organization may conflict at the beginning of the suggested joint representation. However, often times, decisions as to joint representation are made in the early stages of a claim, before all of the facts are known and possibly before any potential conflict looms. If joint representation of an organization and its constituent is undertaken and an adversity of interests later develops, the lawyer may be conflicted and may not be able to represent either the organization or the constituent.

In Hicks v. Edwards,[35] the Court of Appeals of Washington addressed an attorney's joint representation of a corporation and its constituents in a minority shareholder's derivative suit. Hicks involved an attorney ("counsel") who filed an appearance and answered a complaint on behalf of a corporation and some of its shareholders. The underlying suit alleged that the shareholders represented by counsel exploited corporate assets for their own benefit.[36] The plaintiff moved to disqualify counsel on conflict of interest grounds. The trial court found a conflict of interest, disqualified counsel from representing both defendants, and imposed Rule 11 sanctions against counsel for failing to investigate the potential conflict of interest before undertaking joint representation. The trial court based its findings on counsel's lack of evidence of undertaking a thorough investigation into the potential conflict and on the finding that any reasonable attorney would have learned of the conflict of interest in this case before undertaking the joint representation.[37]

Because counsel only appealed the sanctions and not the disqualification issue, the appellate court refused to address the issue of whether the disqualification was appropriate. However, the appellate court found that counsel did not violate Rule 11 and should not have been sanctioned in defending the motion to disqualify. The appellate court based its

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[34] Id.
[35] 876 P.2d 953 (Wash. App. 1994).
[36] Id. at 954.
[37] Id. at 955-56.

decision on the lack of Washington authority on point, the lack of consistency in foreign jurisdictions, the ABA's comment to Rule 1.13 that suggests counsel could represent both the organization and the shareholder, and the fact that experts in Washington disagreed on the appropriateness of the representation.[38]

Even though the court did not answer the issue of whether the disqualification was appropriate, the case demonstrates that joint representation of an organization and one of its constituents may create a conflict of interest that may lead to disqualification and even sanctions for the lawyer. Although not discussed in this case, failure to recognize a conflict may also result in an attorney grievance and/or a malpractice suit.[39]

Another instructive case is Felix v. Balkin.[40] In Felix, an attorney represented an organization and an employee in an employment discrimination lawsuit.[41] After the attorney undertook the joint representation, the employee filed her own discrimination suit against the organization.[42] The attorney withdrew from representing the employee and did not represent the organization in the employee's lawsuit against the organization; however, the attorney later agreed to represent the organization in discrimination suits by the employee's coworkers.[43] Approximately one year after the lawyer's withdrawal from the employee's suit, the coworkers' and the employee's actions were consolidated, at which point the employee moved to disqualify the attorney.[44] The court disqualified the attorney and his firm; the court was also very critical of the investigation that the attorney and the law firm undertook before agreeing to joint representation, stating that the attorney and the law firm "did not adequately discharge their professional obligations to their common clients."[45] Additionally, the court specifically noted that the attorney's decision to engage in joint representation was based on only a "thumbnail sketch" of the facts without even speaking to the employee.[46] And, although the employee had acted dishonestly in failing to inform the attorney or the organization of her potential suit, the court found "it is the lawyer, not the client, who has the obligation to search out and disclose potential conflicts[.]"[47]

A key lesson from both Hicks and Felix is that lawyers undertaking to represent the corporation and its manager need to conduct a thorough investigation into potential conflicts of interest before engaging in a joint representation. Additionally, as the Rules contemplate and as one scholar notes in his article discussing Felix, both clients should sign informed consent forms and should be told that should a conflict develop, the lawyer will likely have to withdraw from representing both parties and that attorney-client

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[38] Id. at 958.
[39] See John M. Burman, *Representing Organizations Part III: Conflicts of Interest*, 25 Aug Wyo. Law 37 (2002).
[40] 49 F. Supp.2d 260, 265-66 (S.D.N.Y. 1999).
[41] Felix v. Balkin is also discussed in Kenneth L. Jorgenson, *Counsel for the Organization: Employee Conflicts*, 61-AUG BENCH & B. MINN. 12 (2004).
[42] Id.
[43] Id. at 266-67.
[44] Id.
[45] Id. at 271.
[46] Id.
[47] Id. (quotation omitted).

communications will not be privileged and protected from the other party (but will be privileged as to third parties).[48]

C. Communications with Former Managers

Another issue that may arise in employment matters is whether the plaintiff's lawyer may contact a former employee of the corporate defendant, particularly a management employee. The answer will depend on the facts and circumstances of the particular situation, but there are some rules that guide a lawyer in determining whether such contact may be made. The Model Rules of Professional Conduct 4.2 bars a "lawyer from communicat[ing] about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter." Further, there is a prohibition against "communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization**,** and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." Comments to Rule 4.2.

The ABA Committee on Ethics and Professional Responsibility has issued a formal opinion that addresses the issue of whether communications with former employees may occur. See, *Contact with Former Employee of Adverse Corporate Party, ABA Formal Op. 91-359* (1991).. The Committee noted that the concerns reflected in the Rule 4.2 and its commentary could survive the termination of the employment relationship. However, the Committee opined that "a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer." *Id.* at 3.

Further, according to a majority of the courts, "in general, Rule 4.2 does not bar *ex parte* attorney contacts with an adversary's former employees who are not themselves represented in the matter." See Olson v. Snap Prods., Inc., 183 F.R.D. 539, 544 (D.Minn.1998), citing United States ex rel. O'Keefe v. McDonnell Douglas Corp., 961 F.Supp. 1288, 1295 (E.D.Mo.1997), aff'd, 132 F.3d 1252 (8th Cir.1998); Jenkins v. Wal-Mart Stores, Inc., 956 F.Supp. 695, 697 (W.D.La.1997); Orlowski v. Dominick's Finer Foods, Inc., 937 F.Supp. 723, 728 (N.D.Ill.1996); Concerned Parents of Jordan Park v. Housing Auth. of St. Petersburg, 934 F.Supp. 406, 408 (M.D.Fla.1996); Terra Int'l, Inc. v. Mississippi Chem. Corp., 913 F.Supp. 1306, 1315 (N.D.Iowa 1996); Aiken v. Business and Industry Health Group, Inc., 885 F.Supp. 1474, 1476 (D.Kan.1995); see also, generally, Benjamin J. Vernia, Right of Attorney to Conduct Ex Parte Interviews with Former Corporate Employees, 57 A.L.R.5th 633 (1998). (citation omitted). But, the lawyer must be careful, as an "attorney's discussions with former members of an organizational party-opponent's management could intrude upon privileged matters, which would not be permissible under Rule 4.2." Olson, 183 F.R.D. at 545.

A lawyer must also be mindful of Model Rules of Professional Conduct Rule 4.4, which provides that "[i]n representing a client, a lawyer shall not use means that have no

[48] 61-AUG BENCH & B. MINN. at 13.

substantial purpose other than to embarrass, delay, or burden a third person, or use methods in obtaining evidence that violate the legal rights of such a person." At the very least, if the lawyer determines that he/she may proceed with the contact with the former manager, the lawyer must take adequate measures to prevent the disclosure of privileged information. See Arnold v. Cargill, 2004 WL 2203410 at *9-10(D. Minn. 2004) (unpub. op.) (sanctioning a lawyer for failure to protect the corporate opponent's privileged information).

D. Conclusion

As the above sections demonstrate, the ethics issues in practicing EEO law can be thorny. Indeed, as attorney-client relationships evolve and the law continues to change, one may anticipate that the ethics issues may become even more complicated and that there may be rule changes and/or case law developments designed to address the changing environment. Thus, the prudent employment lawyer will remain ever-mindful of not only the existing ethical obligations but also the obligations that may arise from new rules and case law developments.

EEO BASICS FACT PATTERN

EEO BASICS: Discontent at ACorp

Several groups of hourly workers who are union members believe that they are being discriminated against in promotional opportunities at their company, ACorp, a manufacturing company with over 500 employees.

Problem 1: To be considered for a promotion into ACorp's management ranks, an employee must pass the "Ready for Management Test." Employees must be nominated by a manager before an employee can take the test. Test results are posted, and those with passing scores are interviewed by a committee of three union and two company representatives. As a result of the interviews, individuals are rated as either "Management Qualified" or "Management Unqualified." Once an individual has been deemed "Management Qualified," he or she may apply for any first-level management promotion that becomes available. Factors for selection into management include the following: a "Management Qualified" rating, level of education, years of experience in the field, years of experience at the company, and any specific experience relevant to the position.

- Women employees have complained that they have not been nominated to take the test.
- Black/African American employees have complained that white employees pass the test in higher numbers than are Black/African Americans.
- Some workers over 50 believe that, among those who pass the test, only the younger applicants are being rated as "Management Qualified."

Problem 2: Six months ago, as part of a union negotiation, ACorp changed its promotions policy so that the oldest applicant for the job who was "Management Qualified" was to be automatically given the job.

- Black/African American and Hispanic employees, as well as some women, have complained that this is unfair to them.

Problem 3: Tom Smith, an ACorp manager, has started to have trouble sleeping, trouble getting out of bed in the morning, trouble getting any work done. Tom goes to his doctor, who sends him to a psychiatrist, who diagnoses Smith with depression. He requests a month off to try to determine the appropriate level of medication and to begin psychotherapy. The company denies his request and Tom is fired soon thereafter.

Problem 4: Tom's friend and colleague Nelson, who knew about Tom's situation, complained to the Vice President in charge of their division that Tom had stellar reviews, had been a loyal, long time employee, and that he felt Tom was being treated unfairly. Nelson was fired two weeks later.