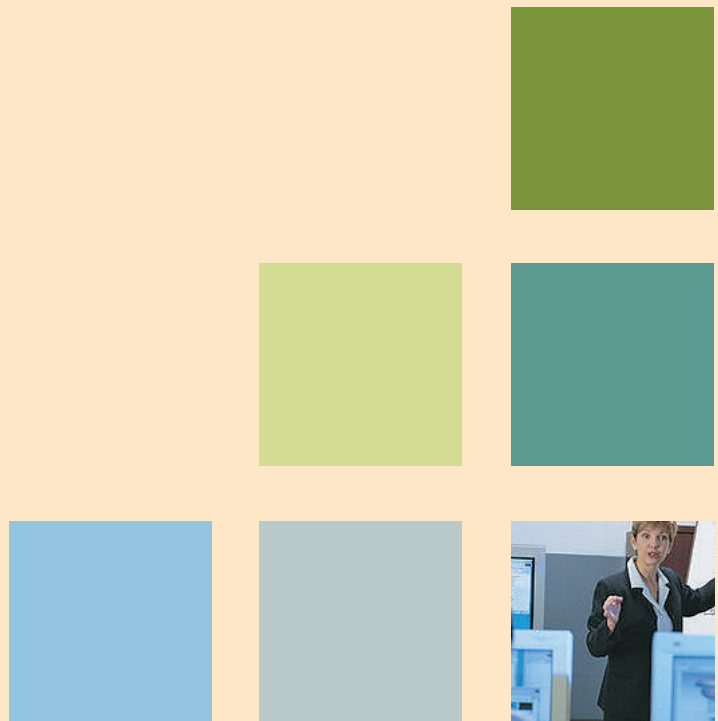




# Employment Law— A Learning Module in Six Segments

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Instructor's Manual



## EMPLOYMENT LAW



## **Instructional Materials and Notes to the Instructor**

### **Module Summary**

This module provides an introduction to employment law with particular emphasis on basic legal concepts and discrimination legislation.

### **Audience**

Undergraduate, introductory class.

### **Length**

Six class periods of 50 minutes each.

### **Learning Outcomes**

At the completion of the module, the student will:

- Understand the legal concepts of employment-at-will, wrongful discharge, agency as applied to employment, and discrimination.
- Know the various employment laws and understand how they are applied in the workplace.
- Understand the process of a discrimination claim and learn procedures and tools used by organizations to decrease the risk of litigation.
- Demonstrate learning through a variety of in-class activities, exams and homework assignments.

### **Teaching Notes and Suggestions**

Each class includes the following instructional material:

1. Outline and text.
2. PowerPoint slides.
3. Assessment questions.
4. Additional reading suggestions.
5. In-class activities.

### **Outline and Text**

The module is designed to be comprehensive and includes a subject matter outline and the necessary text. At the instructor's discretion, the module can be used as a stand-alone curriculum without need for an additional textbook or as a supplement with a comprehensive introductory HR text. Ideally, the text provided for each class session should be read by the students before the class meets.

### **PowerPoint Slides**

The PowerPoint slides follow the material in the text; each slide comes with some explanation and comments for the instructor. The PowerPoint slides can be made available as study material for the students, either by posting them to a web site with student access or by distributing hard copies to students in the class. If students have copies of the slides available for each lecture, it facilitates note-taking and enables them to engage in the class discussion, since they don't have to be as focused on writing everything down.



## Assessment Questions

### True or False Quizzes

Each class includes 10 true or false questions with answers. The questions are based on the text for that class. Depending on how the class is structured, these can be used at the conclusion of each class or compiled for a final exam at the end of the module.

### Discussion or Essay Questions

The module also includes discussion questions that could be used for general discussion at the conclusion of each class or could be answered by students working in small groups who then report the results of the discussion back to the class. They could also be compiled together as a written final exam at the end of the module. Any of the questions could be expanded into a research project for a written activity completed outside of class.

### Additional Reading Suggestions

Each text segment concludes with additional reading suggestions and/or web sites for student research. The additional reading could be assigned before the class session or could be assigned at the end for further research.

### Activities

For each class there are activities that can be used either in-class as time permits or as homework assignments with follow-up discussion during the next class period. Each segment has different class activities that include teaching suggestions and detailed instructions. It is not necessary to use every activity included in the module, as there may not be adequate class time to do so. Choose which activities best fit your personal teaching style and which are most appropriate to your students' needs. Where an activity is applicable to more than one class, it will be indicated in the instructions.



## Class #1 – Employment Law Basics

### Introductory Scenario

The text starts with an introductory scenario, Friday Morning at Coffee Bistro. The fictitious Coffee Bistro was chosen because most students are familiar with a small cafe where they can grab a quick cup of coffee and pastry. The scenario is intended to generate interest in the class material with an HR “drama” that students can relate to. You can use this scenario as the setting for a variety of HR problems that could be discussed throughout the class. The scenario is used again at the end of this class to give students an opportunity to revisit the problem and discuss what should have happened.

### Pre-Module Quiz

Students unfamiliar with employment law often have incorrect assumptions about employer and employee rights in the workplace. The pre-module quiz, “What do you already know?” is designed to explore some of those assumptions and set the stage for learning. It is not graded; it is used at the beginning of the module to generate interest in the topic and to start discussion. Have the students take the quiz early in the class and then put it aside until the end of the module. At the end of the module, ask the students to take the quiz again and compare the results to their first quiz. Students can identify where their first assumptions were wrong; this can be a good discussion point at the end of the module to talk about what was learned.

### Frayer Model <sup>(1)</sup>

**This is an activity that can be adapted to a variety of topics.**

The Frayer Model is a categorization activity designed to help students develop their understanding of concepts. It has been used successfully in classrooms for more than 30 years.

The Frayer Model involves six steps:

1. Identify the concept and name its relevant attributes.
2. Eliminate irrelevant attributes.
3. Give examples.
4. Give examples of what the concept is not (non-examples).
5. Ask students to distinguish between other examples and non-examples given by the instructor and explain why they are examples or non-examples.
6. Ask students to present their own examples and non-examples and discuss why they are or are not examples or non-examples. <sup>(2)</sup>

Using the model, students provide a definition of the concept, list characteristics of the concept, and provide examples and non-examples. The examples they list will help students understand what the concept is and, just as important, what the concept is not. You may assign this either individually or as a small group activity to be done in class, followed by discussion. If there is not enough time for an in-class activity, this could be assigned as homework. In this class, the Frayer Model is used for the employment-at-will doctrine, but the model could be used for other concepts. There are answers provided for each of the four sections of the Frayer Model. These are only suggested answers; students may have other ideas that are also valid.

<sup>(1)</sup> Frayer, D.A., Frederick, W.C., and Klausmier, H.J. (1969). A schema for testing the level of concept mastery (Working Paper #16). Madison: University of Wisconsin, Wisconsin Research and Development Center for Cognitive Learning.

<sup>(2)</sup> Frayer, D.A., Frederick, W.C., and Klausmier, H.J. (1969). A word is a word ..... or is it? Edited by M.F. Graves. 1985. New York: Scholastic.

**Discussion Cases: Wrongful Discharge or Legal Termination?**

There are two scenarios provided with answers. These can be used for in-class discussion, or the scenarios without answers could be distributed to students as an out-of-class writing assignment. Either way, class discussion of the cases is a good way to engage students in problem solving and exchanging ideas.

**Assessment – True or False Quiz and Discussion Question**

The true or false quiz could be presented on PowerPoint slides and used as a whole-class discussion at the end of the class, or they could be used in the traditional testing method. Answers are included for the questions.



## **Class #2 – Agency/Unions/Fair Labor Standards Act (FLSA)**

This class reviews three seemingly unrelated employment law topics. The first, agency, is a continuation of the basic employment law concepts that were introduced in the first class. It is important that students understand the basic principle of agency law: that one person's words or actions (the agent) can create legal liability for the organization they represent (the principal). Take, for example, a manager's use of words in a performance appraisal. "Joe, your work is terrific! I'm looking forward to outstanding evaluations of your work for years to come." The manager's words and actions, however well-meaning, can create significant liability issues for the organization because now Joe may think he has a guaranteed job "for years to come."

The second topic, unions, is covered very briefly in this module. Union law is complex and requires significant coverage beyond the scope of this module. However, a discussion of employment law would be remiss without some reference to unionization.

As with unions, a discussion of employment law without some reference to the third topic, FLSA, would be incomplete. Consequently our discussion here is skeletal at best as this topic would be explored in detail in a module on compensation.

### **Activities**

#### **Union Word Search**

This is a paper-and-pencil activity where students find the words listed in the rows of letters. Words can be in any direction; right-to-left, left-to-right, horizontal, vertical, diagonal and backwards. Finding the words is probably the fun part, but the most learning occurs when students are asked to define the words. It is important that students write the definitions in their own words and not just copy from the text. There is an answer key with definitions included. The solution to the word search puzzle itself is not included.

#### **Debate**

Because this segment of the module discusses FLSA, students can debate the pros and cons of raising the minimum wage. The text includes a handout on the history of the minimum wage. Most students are surprised to see how low the original minimum wage was and how long it has been since there has been an increase in the minimum wage (10 years).

The standard debate format is listed as follows with a 10-minute time limit on all constructive speeches and a 5-minute time limit on all rebuttal speeches.

#### **Constructive Speeches**

First affirmative  
First negative  
Second affirmative  
Second negative

#### **Rebuttal Speeches**

Negative rebuttal  
Affirmative rebuttal  
Negative rebuttal  
Affirmative rebuttal



If you are working within one 50-minute class period, you may not have time for the entire process. The debate can be shortened by reducing time for speeches or by conducting only one round of constructive and rebuttal speeches instead of the standard two. Debate teaches students not only presentation skills, but also the skills to logically organize their ideas and think on their feet. Remind students that it is okay to disagree, as this is the nature of debate; but disagreement is presented respectfully.

## **Assessment – True or False Quiz and Discussion Question**

The true or false quiz could be presented on PowerPoint slides and used as a whole-class discussion at the end of the class, or they could be used in the traditional testing method. Answers are included for the true or false questions.



## **Class #3 – Discrimination**

### **Discrimination Crossword**

This is a standard crossword puzzle format. Be sure to tell students that where the answer has more than one word, all words are connected with a hyphen. Example: Equal-Pay-Act. This could be done in class or as a homework activity.

### **Is This Protected Under Federal Discrimination Law?**

This is a paper-and-pencil activity. Students check off what is protected and what is not. There is an answer key provided. Be sure to remind students that the questions address federal legislation only, and there may be other protected classes within your state or local area. It is also helpful if you can provide students with information on your state laws regarding additional protected classes. Students are often surprised at what is protected and what is not.

### **Assessment – True or False Quiz and Discussion Question**

The true or false quiz could be presented on PowerPoint slides and used as a whole-class discussion at the end of the class, or they could be used in the traditional testing method. Answers are included.





## **Class #4 – Sexual Harassment**

### **You Decide: Is This Harassment?**

This activity returns students to the Coffee Bistro, the location introduced in the first class session. There are several scenarios presented; students must indicate for each one whether Yes, this is harassment or No, leave them alone. Sexual harassment scenarios often generate a lot of discussion, with students sometimes interjecting their own experiences. Depending on the time available, this could be done as a whole-class activity and discussion, or you could divide the class into smaller groups and have each group discuss and answer the scenarios before the class discussion. There are answers provided with the each scenario.

### **True or False Quiz**

The questions could be presented on PowerPoint slides and used as a whole-class discussion at the end of the class, or they could be used in the traditional testing method. Answers are included.



## Class #5 – Other Employment Law Issues

### Debate or Discussion of Controversial Topics

(Debate can be used in a variety of classes at the instructor's discretion.)

This class session often generates controversy because it covers several laws that can be “hot buttons” for students. Students are usually eager to discuss affirmative action or illegal immigration labor issues. These are both topics that lend themselves to good debate. You may want to divide the class into two groups and have one group present the pros and cons of affirmative action and the other group present the pros and cons of illegal immigrant labor. In each instance, ask them to discuss the employer's responsibility. It may be helpful to assign the topics and the groups in advance to allow time for students to research their arguments before the debate.

Please refer to the standard debate format found in Class #2.

**Suggested debate topics:** (Feel free to come up with your own as appropriate.)

- Affirmative action promotes discrimination.
- A guest worker program would be beneficial for U.S. employers.
- Minimum wage is not an effective law for a capitalistic society.

### Employment Law Crossword

This is a review activity. It contains words from several previous class topics. It is presented in a standard crossword puzzle format. Be sure to tell students that where the answer has more than one word, all words are connected with a hyphen. Example: Adverse-Impact. This could be done in class or as a homework activity.

### Jigsaw Activity/Students Teaching Students

(This is another activity that could be adapted to a variety of topics.)

Questions for Jigsaw Activity: One question from each of the employment laws discussed in this segment of the module is included in this activity.

1. Explain the “escalator principle” contained in USERRA.
2. Explain the two-pronged intent of the IRCA.
3. Identify the various categories of people and organizations that must receive notice of an impending layoff under the WARN Act.
4. Identify the qualifying events that would make an employee eligible for COBRA insurance coverage and explain how the qualifying events affect the length of COBRA coverage available to the employee.
5. Identify which organizations are required to have affirmative action plans and discuss the purpose of affirmative action law.



## **Conducting the Jigsaw Activity**

One question from each of the employment laws discussed in this segment of the module is included in this activity. For five questions, you will need 25 students divided up into five groups of five students each. If you have six questions, you will need 36 students divided into six groups of six students. Ideally, the multiplier of student groups is always equal to the number of questions. However, if you don't have the exact number of students, don't let that stop you. The activity can be done successfully when groups are uneven.

In this activity, students start in one group and then move on to another assigned group. If you are working with five questions and have 27 students, you will have two groups each with an extra student who does not move to another group during the exercise.

When you have identified your groups, give each group one of the questions. All groups will start with a different question. As a group they will discuss and agree on an answer to their assigned question. They become the “experts” on their topic. When all groups have answered their question, divide the class into groups again, this time forming new groups with one member from each of the original “expert” groups. You should end with new groups where each student in the group is an “expert” from one of the original groups. The “experts” in the new group will then “teach” the others the answer to his question. When you are finished, all students will have the answers to all questions and each student will have been responsible for teaching his new group the answer to his original question. End with a class discussion of the answers.

## **True or False Quiz**

The questions could be presented on PowerPoint slides and used as a whole-class discussion at the end of the class, or they could be used in the traditional testing method. Answers are provided.



## **Class #6 – EEOC and Best Practices**

Because this is the last class session of the module, it must include any final assessment or wind-up activities to bring closure to the class.

### **Employment Law Alphabet**

This is a simple exercise that is a good review technique. Have the students list the letters of the alphabet vertically at the side of a sheet of paper. Next to each letter, write a word or phrase that they have learned from the employment law module. Some letters are easy and have multiple possibilities, while others will require some creativity. X, Y and Z may be nearly impossible, and student answers usually generate a laugh or two at what they come up with. You can increase the learning of this activity by asking students to define the words. Remind them to write the definitions in their own words, not just definitions from the text. The alphabet activity can be used at any time in most any classroom setting.

### **Vocabulary Scramble**

This is another good review activity and it gets students out of their chairs and moving around. Give students a numbered list of vocabulary words (words only, no definitions). To review the entire module, you could choose words from all six classes. Select at least as many words as you have students in the class. Put definitions on another paper with a letter by each definition. Be sure to scramble the definitions so they are not in the same order as the words. Cut the definitions apart – you will have lots of little strips of paper. In class, distribute the word list to each student. Then pass out the definitions, giving each student at least one little strip of paper each with a definition and its letter designation. Students will have to get up and move around the room to find the definitions for their list of words. When they find the definition, they enter its letter designation on their word list. At the end of the activity, be sure to give them a correct list with the definitions so they have a study guide for the vocabulary. This is a good review activity at any time and can be used early on in a class when you want to get students up and talking to each other.

### **What Do You Already Know? What Have You Learned?**

Go back to the pre-module quiz from the first class. Ask students to take the quiz again and then discuss how their answers are different. Discuss what they have learned about their “assumptions.” This will likely generate a good closing discussion.

### **True or False Quiz**

The questions could be presented on PowerPoint slides and used as a whole-class discussion at the end of the class, or they could be used in the traditional testing method. Answers are provided.

### **Discussion or Essay Question**

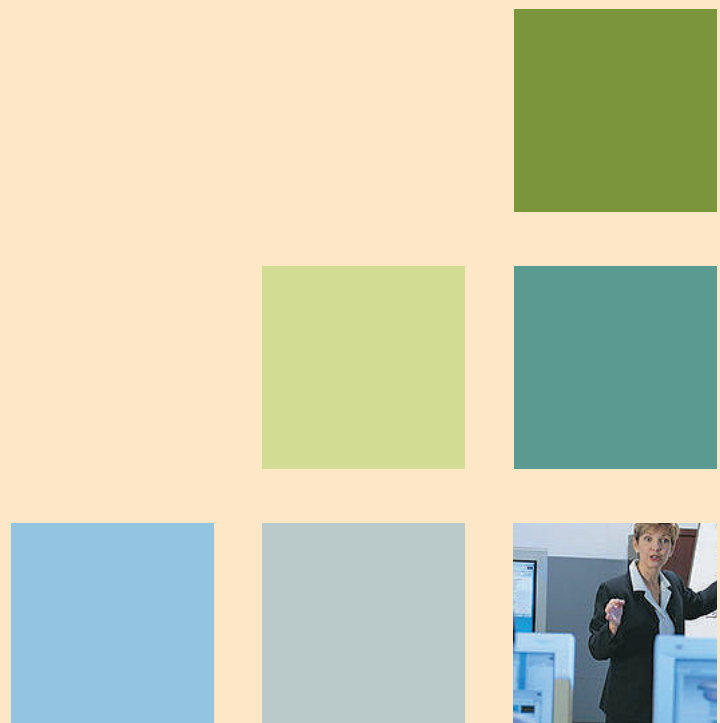
Assume you are the vice president of Human Resources for a large organization. Discuss what you would advise your CEO on how to create a climate of ethics within the organization.



# Employment Law Unit One: Employment Law Basics

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Teaching notes, assessments and activities



## EMPLOYMENT LAW



## Employment Law–Class #1

### Employment Law Basics

#### Instructor Notes

The following teaching notes, assessments and activities accompany the PowerPoint slides for Employment Law Unit 1: Employment Law Basics. Duplicate versions without answer keys appear at the end of this booklet. Instructors may duplicate one copy of each assessment or activity to distribute to each member of the class.

#### Friday Morning at Coffee Bistro

*Note: This introductory scenario starts the discussion and is used again at the end of the module to review learning.*

It is early Friday morning and David, the Coffee Bistro manager, unlocks the door, flips on the lights, and starts getting ready for the morning rush of espressos, lattes and cappuccinos. He is particularly happy this morning because tonight he has a date with Melissa, the new barista that was hired a while back.

The problem, as David sees it, is that Ryan, another Coffee Bistro employee, has been just a little too friendly with Melissa lately—and that really burns David's beans. David has redone the work schedule, assigning Ryan the clean-up shift and cutting back his hours, hoping Ryan will simply quit and get out of David's way, but that doesn't seem to be working. Ryan just keeps hanging in there, despite a lighter paycheck and David's unwarranted criticism.

While David sets coffee to brew and takes milk from the cooler, he worries a little about what today will bring. Tina always worked the early morning shift, but this week she quit to go back to school. He had no choice but to schedule both Ryan and Melissa for today.

"Oh well," David muses, lining up pastry in the display cabinet, "if I see anything funny from Ryan today, I'll just fire him. I don't care what those people at corporate HR say. After all – I'm the boss!"

*What do you think?*

Can David fire Ryan? What does employment law say about David's decision to cut back Ryan's hours and squeeze him out of a job? What is HR's responsibility at Coffee Bistro? What about the ethics of David's behavior? After all – David *is* the boss!



# Employment Law Unit One: Employment Law Basics

## What Do You Already Know?

### True or False Quiz

Please indicate “true” or “false” for each of the following statements.

1. \_\_\_\_\_ Title VII of the Civil Rights Act protects employees from discrimination based on race, color, religion, national origin and sexual orientation.
2. \_\_\_\_\_ The Age Discrimination in Employment Act protects employees aged 40 years old and older from discrimination.
3. \_\_\_\_\_ The Family and Medical Leave Act provides up to 12 weeks of paid leave in any 12-month period for an employee to take care of an immediate family member with a serious health condition.
4. \_\_\_\_\_ “Reasonable accommodation” under the Americans with Disabilities Act means employers must modify a job or the job environment to enable a qualified individual with a disability to perform the essential functions of the job.
5. \_\_\_\_\_ The Civil Rights Act applies to all organizations regardless of size.
6. \_\_\_\_\_ The Equal Employment Opportunity Commission is the federal agency that investigates and enforces employment discrimination law.
7. \_\_\_\_\_ Because of the employment-at-will doctrine, an employer can terminate an employee for cause or for no cause; there are no exceptions.
8. \_\_\_\_\_ Adverse impact may occur in the hiring process when a seemingly non-discriminatory employment policy has a statistically detrimental affect on minority applicants.
9. \_\_\_\_\_ Affirmative action requires the hiring of minority workers, regardless of qualifications, to meet pre-set statistical quotas.
10. \_\_\_\_\_ In most jobs, the employer can require retirement at age 65.

### Answer Key

*Note: all these concepts will be taught throughout the module. Consequently, only the answers to these questions appear here as this quiz is intended as a pre-test. Each subject will be covered in the module.*

1. False
2. True
3. False
4. True
5. False
6. True
7. False
8. True
9. False
10. False



## Class #1 Teaching Notes

### Employment-at-Will

The employer/employee relationship probably started when an early entrepreneur realized that his profits were limited by the amount of labor he could produce with his own hands. If he had more “hands,” he could produce more goods and make more money. Since there was no way of getting extra hands of his own, his solution was to add “hired hands” to fill the needs of his growing enterprise. There were no rules or guidelines for these hired employees, so the early entrepreneur had to figure it out on his own. There were always uncertainties: Once he hired additional people, how long must he keep them employed? Did he have an obligation to them, or could he use their labor as needed and then simply discard them when the job was done?

In an agrarian society, the answer was clear. Employment was generally for a year at a time, as the farmer and the field hand were bound together by mutual need. The field hand would not have abandoned the farmer in the middle of a crop season and conversely, the farmer would not leave the field hand “high-and-dry” during the winter months. Consequently the developing English law of employment established that, in the absence of a contract, an employee was hired for a year at a time.

This unwritten, one-year-at-a-time employment relationship worked well in an agrarian society, but it was altered sharply by the industrial revolution. Workers who left farms and villages for factory jobs in the city found that their employment relationship was much different than it had been on the farm. Industrial workers were just that: workers—not the hired hands of the farms where the worker and farmer knew each other personally and shared a concern for the other’s well-being. During the industrial revolution, employment law shifted from an emphasis on duties and responsibilities to the idea of “freedom to contract.” This meant that factory workers were free to quit whenever they wanted and employers were free to terminate an employee at will. This became the employment norm adopted by the courts.

In the absence of an employment contract, employment became at-will; a consensual relationship that allowed either party to terminate employment whenever they chose. Just as the employee had the right to leave his job at any time, the at-will employer had the right to discharge the employee at any time—for a good reason, a bad reason or no reason. This common law rule of employment is still the law of the land, with every state (except Montana) adopting some form of the at-will concept.

Though the concept has stood for some time, courts and legislatures have recognized that employees actually have little power when it comes to a face-off with a large organization. For early factory workers, freedom to contract may really have meant unemployment and freedom to starve. But the legal system is never static and tries to find balance for both sides. Consequently, employment law has changed significantly in the last century; court decisions have generated a number of exceptions to the strict interpretation – “you can be fired on a whim” – of employment-at-will.

### Exception: Implied Contract

Many people erroneously believe that contracts are long, formal documents written in confusing legalese and signed by all parties involved. Not true at all! Courts consistently enforce implied contracts as binding agreements. Implied contracts are created by the things people (or organizations) say or what they do. For example, before 1980, the Blue Cross/Blue Shield employee handbook indicated that employees could be fired only for just cause and then only after warnings, notice, and other procedures. When, after five years of employment, Charles Toussaint was fired from Blue Cross/Blue Shield without the benefit of the procedures identified in the handbook, the court held that *the employee handbook had created a contract*. Since the 1980 Blue Cross/Blue Shield decision, employers now attempt to protect themselves by including a disclaimer in their employee handbooks that reminds employees that they are employed “at will” and can be terminated at any time and for any reason and that the handbook is not to be considered a contract. (*Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.2d 880, 1980 Mich.)





# Employment Law Unit One: Employment Law Basics

Sometimes it is not even a written policy that gets an employer in trouble, but a verbal promise made by a supervisor that can lead to court action. Many employers are dismayed to learn that oral promises made during the hiring process can become enforceable contracts. When Tom, the production supervisor, tells Shane during the interview process that his new job pays an annual salary of \$35,000, Tom inadvertently told Shane that he was hired for an annual term. When Shane is terminated after 90 days for poor performance, he may question what will happen to the rest of the year that he was promised employment. Tom must remember to quote compensation by the hour or the month and stay away from any implication of a long-term contract.

## **Exception: Public Policy**

Violation of public policy is the most common exception to the employment-at-will doctrine. The public policy exception prohibits an employer from firing a worker for a reason that would violate basic social rights, duties or responsibilities.

Some examples:

Terry is summoned for jury duty and assigned to a trial that lasts several days. Terry's employer is annoyed by Terry's absence and fires him. Terry was terminated for fulfilling one of the duties of citizenship and his termination is unlawful. It is a violation of public policy.

David works for a painting company and his employer orders him to dump his waste paint in an open field behind the warehouse. David refuses and is fired for insubordination (for not following instructions). Dumping toxic substances is unlawful and David was fired for refusing to violate the law, a public policy exception to his employer's right to terminate at will.

Tina is injured in an accident at work and sustains a fractured wrist. When she files a workers' compensation claim, her employer fires her, stating her "claim is raising my insurance rates!" Tina was terminated for exercising her legal right to file a workers' compensation claim for injuries sustained in the workplace.

Though the term "employment at will" implies that employers can terminate employees whenever they choose, if Terry, David or Tina were terminated under the circumstances described above, it would be in violation of public policy and their employers' actions could result in claims of wrongful termination. Employees cannot legally be terminated for exercising their legal rights, performing a legal duty, refusing to violate the law or for whistle-blowing. These are all public policy exceptions to the doctrine of employment-at-will.

## **Exception: Breach of Implied Covenant**

Contract law makes the assumption that participants in a contract are bound by a covenant of good faith and fair dealing. All parties are expected to behave fairly and in a reasonable manner with regard to their contractual rights and obligations. This prohibits one party in a contract from interfering with another party's right to benefit from the contract.

Courts generally view the employer/employee relationship as an implied contract, even in employment-at-will relationships where no actual contract exists. It is reasonable to expect, then, that good will and fair dealing will prevail in the workplace. With this in mind, think back to the Coffee Bistro scenario and David's actions toward Ryan. One could certainly argue that David is engaging in "bad faith" by assigning Ryan lousy shifts and reducing his hours in an effort to get Ryan to quit. If David's actions are successful in forcing Ryan out of his job, Coffee Bistro could be the unhappy recipient of a wrongful discharge lawsuit. Certainly, Ryan has a right, as do all employees, to a workplace characterized by good faith and fair dealing.



## **What About Constructive Discharge?**

You may wonder how an employee could consider a wrongful discharge claim when it is the employee who makes the decision to quit and there is no actual discharge by the employer. Put yourself in Ryan's shoes. David clearly wants him out of Coffee Bistro. If David makes a concerted effort to make Ryan's job so miserable that Ryan finds it impossible to be successful, Ryan may believe there is simply no avenue for him except to quit his job. Ryan may have a case of constructive discharge.

Constructive discharge is considered an involuntary act because it occurs when the employee has no reasonable alternative but to terminate the employment relationship. The legal test for constructive discharge is whether the employer made working conditions so intolerable that no reasonable person could be expected to endure, in particular if the former employer created the intolerable conditions with the specific intent of forcing the employee to quit.

What do you think? It sounds to me like David needs to back off and leave Ryan alone. If he doesn't – the water could get a lot hotter at Coffee Bistro!!

## **Additional Reading**

Arnold, D. G. (2006) The Rights of Employees. *Business Ethics Quarterly*, 16, 3, 415-418.

Dannin, E. (2007). Why At-Will Employment is Bad for Employers and Just Cause is Good for Them. *Labor Law Journal*, 58, 1, 5-16.

Falcone, P. (1999). A Legal Dichotomy? *HR Magazine*, 44, 5, 110.

Salvatore, P., and Halem, D. (2005). How the Law Changed HR. *HR Magazine*, 13, 50, 47-56.



## Employment Law Basics

### True or False Quiz

Please indicate “true” or “false” for each of the following statements.

1. \_\_\_\_ Early English law established that in the absence of a contract, an employee was hired for a year at a time.
2. \_\_\_\_ Early employment law was based on an agrarian society.
3. \_\_\_\_ Employment-at-will is a written contract between an employer and employee that allows either party to terminate the relationship “at-will.”
4. \_\_\_\_ Unionized employees are also at-will employees.
5. \_\_\_\_ Contracts can be implied from oral statements by managers and supervisors.
6. \_\_\_\_ The most common exception to the employment-at-will doctrine is breach of implied covenant.
7. \_\_\_\_ Employees must follow all instructions given by supervisors or they can be legally fired for insubordination.
8. \_\_\_\_ If an employee quits instead of being terminated, they have no claim for wrongful discharge.
9. \_\_\_\_ Because employees might decide to sue when terminated, instead of firing an employee outright, it is better to eliminate their responsibilities and cut their hours to get them to quit. Then they have no basis for a lawsuit.
10. \_\_\_\_ Constructive discharge is considered a voluntary act.

### Discussion or Essay Question

Not all countries practice employment-at-will. In some countries, employers can terminate an employee only “for cause”. In other countries, employers are required to go even further and consider the personal welfare and future employability of the employee before termination. Discuss the pros and cons of employment-at-will. Should employees have more rights to jobs and be terminated only “for cause”?



## Employment Law Basics

### True or False Quiz Answers

1. **True** Early English law established that in the absence of a contract, an employee was hired for a year at a time.
2. **True** Early employment law was based on an agrarian society.
3. **False** Employment-at-will is a written contract between an employer and employee that allows either party to terminate the relationship “at-will.”

*Employment-at-will is an unwritten, implied agreement.*

4. **False** Unionized employees are also at-will employees.

*Union employees are covered by their union contract and therefore are not considered at-will employees.*

5. **True** Contracts can be implied from oral statements by managers and supervisors.
6. **False** The most common exception to the employment-at-will doctrine is breach of implied covenant.

*The most common exception to employment-at-will is violation of public policy.*

7. **False** Employees must follow all instructions given by supervisors or they can be legally fired for insubordination.

*Employees are never required to follow instructions that require breaking the law or engaging in activities that endanger themselves or another employee.*

8. **False** If an employee quits instead of being terminated, they have no claim for wrongful discharge.

*Constructive discharge occurs when an employee is given no reasonable alternative but to terminate the employment relationship. This can result in a legal claim for wrongful discharge.*

9. **False** Because employees might decide to sue when terminated, instead of terminating an employee outright, it is better to eliminate their responsibilities and cut their hours to get them to quit. Then they have no basis for a lawsuit.

*This is a violation of the implied covenant of good faith and fair dealing and may give rise to a claim of wrongful discharge.*

10. **False** Constructive discharge is considered a voluntary act.

*Constructive discharge is considered an involuntary act.*



## Discussion Cases:

### Wrongful Discharge or Legal Termination

#### Scenario #1:

Mary has been with the organization for 14 years. She used to be a star performer, but now she barely keeps up with production quotas—and her re-work numbers are on the rise. Besides her production going downhill, she is sullen and argumentative. Last week, she got into a real tangle with Jack and they both got written warnings with one-day suspensions. This morning, she flew into a rage when Holly misplaced one of the hand tools. The production supervisor says he's just disgusted with the whole thing and is meeting with Mary this afternoon. It looks like Mary may be on her way out the door.

#### Answer:

It is important to note that Mary has been with the organization for 14 years and has a history as a good employee. It appears that something happened that sent Mary into a downward spiral. It may be a problem with a co-worker or her supervisor, or it may be a problem in her personal life that has nothing to do with work. Regardless, someone (possibly from HR, or Mary's supervisor with HR's oversight) needs to have a conversation with Mary about her declining performance. This should be a problem-solving discussion, not a disciplinary action. If the issue is work-related, Mary's issues must be considered and there should be some intervention to solve the issue. If it is a personal problem outside of work, Mary may need some time off (maybe FMLA) or help from the organization's employee assistance program. Mary's issues should be heard and she should be given an opportunity to correct her performance before she is fired.

#### Scenario #2:

Jose runs a delivery business. He has a small fleet of vans and 13 employees plus himself. Jose's sister-in-law, Teresa, is nagging Jose to hire her son, Xavier. Xavier just turned 18, recently dropped out of high school, and has a slew of traffic tickets. According to Teresa, Xavier just needs the routine of a regular job. In order to keep peace in the family, it looks like Jose will have to let Hector go to make room for Xavier. Hector has been with the company since the beginning and has good performance reviews, but he is nearing retirement age. Jose thinks Hector may be getting too old for the job anyway. Jose's going to meet with Hector this afternoon and give him his walking papers.

#### Answer:

Jose is caught between a rock and a hard place. He wants to keep peace within his family and it sounds like Teresa may be on his back until he gives in and hires her deadbeat son. With only 13 employees, Jose's company is too small to worry about Title VII or ADEA issues; however, he's walking on thin ice if he terminates Hector because he is getting too old for the job. Even though the concept of employment-at-will assumes that Jose can terminate Hector at any time or for any reason, the reasoning here indicates a violation of the covenant of good faith and fair dealing, an exception to the concept of employment-at-will. With Hector's personnel file filled with good performance reviews, Jose would have a difficult time defending the termination. His best bet is to keep Hector, send Xavier down the road, and tell Teresa to go bother somebody else.



## The Frayer Model

DEFINITION	CHARACTERISTICS

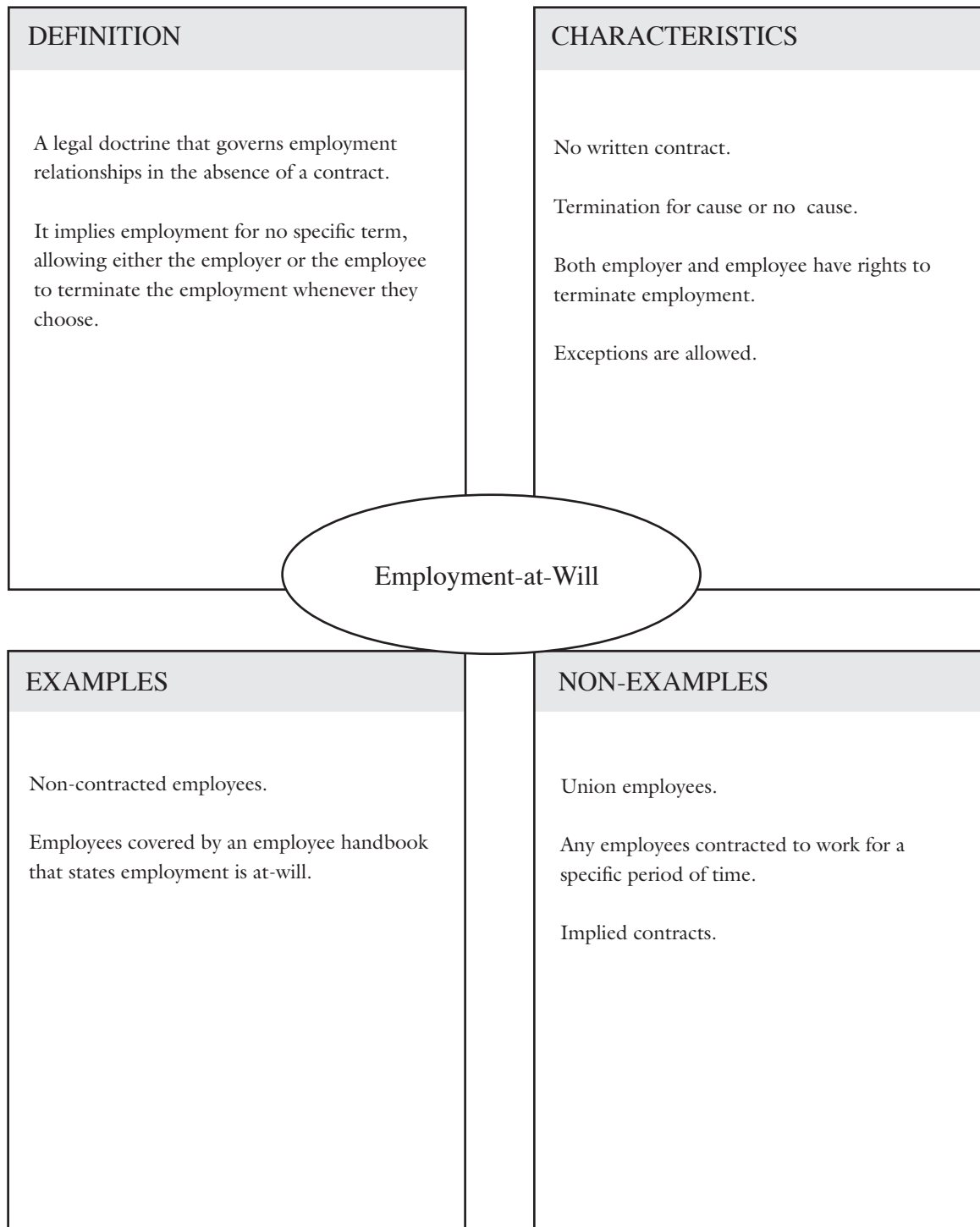
Employment-at-Will

EXAMPLES	NON-EXAMPLES



## The Frayer Model Example

### Employment-at-will Doctrine



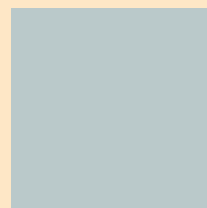
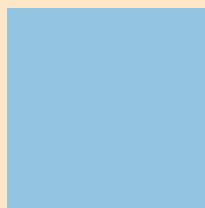
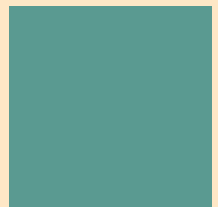
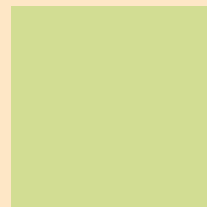
SRM<sup>TM</sup>

SOCIETY FOR HUMAN  
RESOURCE MANAGEMENT

# Employment Law Unit Two: Agency, Unions and the Fair Labor Standards Act

Myrna Gusdorf, MBA, SPHR.

Teaching notes, assessments and activities



EMPLOYMENT LAW





# Employment Law Unit Two: Agency, Unions and the Fair Labor Standards Act

## Employment Law–Class #2

### Agency, Unions and the Fair Labor Standards Act

#### Agency and Employment

The law relating to employment relationships is based on the traditional “master/servant” relationship. The servant works at the direction of the master and engages in work for the benefit of the master. In return, the master compensates the servant for his or her labor. The master is responsible for the servant’s actions because the master chooses the servant, trains the servant in his or her duties, and supervises the servant’s labor.

This traditional master and servant relationship has evolved into the “law of agency” where the agent works for and represents the principal. Think of this in terms of your car insurance. When you meet with an agent, Joe, to contract for insurance on your new car, you know that it is not really Joe with whom you have contracted but with “Acme Insurance,” the organization Joe represents. Joe is the agent and Acme is the principal. If you have a claim against your policy, Joe may help you with the paperwork; but your claim is really against the insurance company, not Joe. Joe is simply the middleman. He speaks for and represents the principal, but he is not the responsible party.

This same principal/agent relationship applies to the typical workplace relationship of employer/employee. If you purchase a pair of shoes that turns out to be faulty, when you return the shoes to the store, it is the store that is responsible for replacement, not the salesperson. Even when you purchase a “special” pair of shoes that Tom, the salesperson, promises will increase your HR exam scores by 50 percent (no studying necessary) providing you wear them on test days—when you fail miserably on your mid-term, it is the shoe store that is responsible for Tom’s false claim, not Tom himself. This responsibility for another’s actions is called *vicarious liability*.

**Vicarious liability** is the imposition of liability on one party for the wrongs of another. Liability may extend from an employee to the employer if the employee is acting within the scope of his or her employment at the time the liability arose. (*Employment Law for Business* © 2001, Dawn D. Bennett-Alexander / Irwin, McGraw-Hill, p. 43)

Why is this important to human resource professionals? Vicarious liability sends a strong message to HR professionals that all employees, especially managers, need training in the scope of their job responsibilities. When a manager makes false claims or engages in inappropriate behavior in the workplace, it is the employer who is responsible for the harm incurred. Remember, in the eyes of the law, the manager **is** the organization.

#### Unions

##### Scenario

Bristol-Wright Inc. is a manufacturer of specialty pet products. Bristol-Wright has approximately 120 workers who earn wages ranging from the minimum wage to \$9.50 per hour. Benefits are minimal at best. Recently, there have been rumblings that employees are unhappy with their wages and benefits and that some employees are talking about union representation. When the unionization talk finds the ears of upper management, a notice is posted on the lunchroom bulletin board that any employee sympathetic to unionization will be terminated immediately.

##### Scenario

Just down the street, Samco Inc. is in the process of a unionization campaign. Employees there have already signed the requisite number of authorization cards and an election is scheduled for next month. There is now intense lobbying among employees to vote “yes” to union representation. Samco management has authorized its supervisors to promise raises and bonuses (verbally only) to employees if the unionization vote is defeated.



## Employment Law Unit Two: Agency, Unions and the Fair Labor Standards Act

Go back in time to the 1930s. When we think about the 1930s, we usually associate the era with the Great Depression and the disastrous economy. The 1930s, however, was an important decade for American workers. It was the beginning of union rights for labor with the passage of the Norris-LaGuardia Act in 1932, which approved the formation and operation of labor unions. In 1935, the National Labor Relations Act (NLRA) detailed procedures to hold bargaining unit elections and established the National Labor Relations Board (NLRB) to administer and enforce the provisions of union law. Prior to legislation, employers controlled union activities through court-ordered injunctions and yellow-dog contracts whereby employees, as a condition of employment, were required to promise not to join a labor union. Legislation in the 1930's prohibited these unfair practices and gave American labor the right to freely organize and to bargain collectively for fair wages, hours and conditions of work.

From the 1930s, union membership grew quickly, topping out in 1983 at 20.1 percent of the U.S. labor force. That trend has changed. According to the Bureau of Labor Statistics, since 1983, union membership has decreased steadily. In 2006, only 12 percent of wage and hour workers were union members. The demographic profile of union members has also changed dramatically. In the early years, a typical union member was a private-sector, industrial worker. Today's union member is more likely to be a white-collar, public-sector employee.

Although union membership is decreasing and the clout of unions has eased, unionization can still have a profound affect on organizations and HR management. What about Bristol-Wright and Samco from our introductory scenarios? Neither company wants to be unionized. Are their efforts to remain union-free lawful practices?

There is a significant body of regulation defining lawful activities in the union arena. Employers must respect employees' rights to unionize and bargain collectively. Any threat to terminate employees sympathetic to a union is illegal, as are promises of increased wages or benefits to employees who do not vote for unionization.

For more information regarding union activities, visit the National Labor Relations Board web site at [www.nlr.gov](http://www.nlr.gov).

### **What Are My Rights as an Employee, Employer, Union?**

#### **The National Labor Relations Act (NLRA)**

The National Labor Relations Act (NLRA) extends rights to most private sector employees to participate in labor unions.

Not all workers are covered under the NLRA. The law specifically excludes from its coverage individuals who are:

- Agricultural laborers.
- Employed in the domestic service of any person or family in a home.
- Employed by a parent or spouse.
- Independent contractors.
- Supervisors. (Supervisors who have been discriminated against for refusing to violate the NLRA may be covered.)
- Employed by an employer subject to the Railway Labor Act, such as railroads and airlines.
- Employed by federal, state or local government.
- Employed by any other person who is not an employer as defined in the NLRA.

Covered employees have the right to form, join, support or assist unions, also known as labor organizations, which may bargain collectively with the employer on the employees' behalf to modify wages or working conditions. Employees also have the right to engage in other protected activities without a union to improve their wages and working conditions. Employees also have



## Employment Law Unit Two: Agency, Unions and the Fair Labor Standards Act

the right to refrain from engaging in these activities or to seek to remove a union from the workplace. (However, a union and employer may, in a state where such agreements are permitted, enter into a lawful union-security clause.) Employees covered by the NLRA are protected from employer and union discrimination, also known as unfair labor practices.

Employers also have rights under the NLRA. The law protects employers from certain activities; for example, labor unions may not limit their productivity and insist that more workers be hired. For more information about covered employers rights under NLRA, read *The NLRB and You – Unfair Labor Practices*, available through the NLRB web site ([www.nlrb.gov](http://www.nlrb.gov)).

Unions are protected under the NLRA from unfair labor practices and are guaranteed the right to organize or attempt to form a bargaining unit in private sector workplaces covered by the law. Unions, chosen as employee representatives, are entitled to engage in collective bargaining with an employer on behalf of employees to modify their wages and working conditions.

### The Fair Labor Standards Act of 1938

In addition to the right to unionize granted to American labor in the 1930s, the same decade spawned legislation that gave American workers a minimum level of income security under the Fair Labor Standards Act (FLSA) of 1938. The FLSA is often referred to as the “wage and hour law” because that is what it defines.

Before the passage of FLSA in 1938, there was no limit to the number of working hours in a day or in a week that employers could require of their employees. In addition, there were no requirements for minimum compensation for an employee’s work. Therefore, an employer could require employees to work for as many hours as they could get out of them and pay employees as little as possible. This potential exploitation of labor was restricted by the FLSA, whose purpose was to establish minimum labor standards on a national level and to eliminate low wages and long working hours.

### FLSA Provisions

- 1. To protect children.** The law prohibits the employment of children less than 14 years of age for most non-farm work. For youths aged 14 and 15, working hours are restricted and labor in hazardous occupations is prohibited. Hazardous occupations are also outlawed for 16- and 17-year-olds. Since the enactment of the FLSA, child labor abuses have not been much of a concern in the United States. However, since the recent growth of the fast food industry, there have been occasional cases of young employees working inappropriate hours and using hazardous equipment.
- 2. To eliminate low wages.** The FLSA established the minimum wage. The original minimum wage was \$.25 per hour. It may not seem like much in today’s terms, but remember, that was 1938. Although increases to the minimum wage are always controversial with employers, Congress has raised the minimum wage numerous times over the years.
- 3. To discourage long workdays.** The FLSA makes extra hours expensive to employers by limiting the workweek to 40 hours and requiring overtime pay at one and one-half times the regular pay for qualified workers who work more than 40 hours per week.

There has always been some confusion on the part of employers (and employees) as to who is qualified for overtime and who is not. The FLSA identifies two categories of employees. Non-exempt employees are covered by the overtime provision of the FLSA. Exempt employees are not qualified for overtime under FLSA.

The FLSA as amended in 2004 identifies exempt employees as employees in the following roles:

- Executive
- Administrative
- Professional employees
- Outside sales employees
- Employees in certain computer-related occupations



## Employment Law Unit Two: Agency, Unions and the Fair Labor Standards Act

Employees whose jobs are not in the exempt categories listed above must be paid at least time and one-half the regular rate of pay for any time worked in excess of 40 hours in one week. Employers must remember that the “exempt” classification is based on comparing actual job duties with the criteria established by the Department of Labor (DoL). Simply using a job title (such as manager) is not sufficient to claim that a job is exempt from overtime pay.

You can find more information on the provisions of the Fair Labor Standards Act at the web site for the U.S. Department of Labor: [www.dol.gov](http://www.dol.gov).

### Minimum Wage History

Effective Date	Minimum Wage/Hour
July 24, 2009	\$7.25
July 24, 2008	\$6.55
July 24, 2007	\$5.85
September 1997	\$5.15
October 1996	\$4.75
April 1991	\$4.25
April 1990	\$3.80
January 1981	\$3.35
January 1980	\$3.10
January 1979	\$2.90
January 1978	\$2.65
January 1976	\$2.30
January 1975	\$2.10
May 1974	\$2.00
February 1968	\$1.60
February 1967	\$1.40
September 1963	\$1.25
September 1961	\$1.15
March 1956	\$1.00
January 1950	\$0.75
October 1945	\$0.40
October 1939	\$0.30
October 1938	\$0.25

Revised – June 2007



## Employment Law Unit Two: Agency, Unions and the Fair Labor Standards Act

### **Additional Reading**

#### **Agency and Vicarious Liability**

Salvatore, P., and Guttman, A. M. (2003). Legal Trends: The Risk of Intentional Torts. *HR Magazine*, 48, 8.

Segal, J. A. (2005). Resolve or Report? Give supervisors detailed directions to help them avoid making wrong turns. *HR Magazine*, 50, 10.

#### **Unions**

Research site: National Labor Relations Board: [www.nlr.gov](http://www.nlr.gov), The NLRB and You – Unfair Labor Practices (PDF).

#### **Fair Labor Standards Act**

Research site: U.S. Department of Labor: [www.dol.gov](http://www.dol.gov).



## Employment Law Unit Two: Agency, Unions and the Fair Labor Standards Act

### True or False Quiz

Please answer “true” or “false” to the following statements.

1. \_\_\_\_ Transferred liability is the legal theory that one party can be legally responsible for the harm done by another party.
2. \_\_\_\_ The laws governing employer/employee relationships are based on the traditional laws of master/servant.
3. \_\_\_\_ Statements made by supervisors to employees can often be considered contracts.
4. \_\_\_\_ Labor and management relations are regulated by the NLRB.
5. \_\_\_\_ Union membership has risen steadily since the 1930s.
6. \_\_\_\_ A privately-owned business does not have to accept unionization of its employees even if employees vote for union representation.
7. \_\_\_\_ Right-to-work laws protect employees from discrimination.
8. \_\_\_\_ Management-level employees are not eligible for overtime payment.
9. \_\_\_\_ The FLSA established regulations protecting child labor in the United States.
10. \_\_\_\_ The purpose of the FLSA was to establish minimum labor standards on a national level and to eliminate low wages and long working hours.

### Discussion or Debate Question

Increasing the minimum wage is controversial and traditionally opposed by business. Discuss the economic impact and identify the pros and cons of increasing minimum wage.



## Employment Law Unit Two: Agency, Unions and the Fair Labor Standards Act

### True or False Quiz Answers

1. **False**. Transferred liability is the legal theory that one party can be legally responsible for the harm done by another party.

*Vicarious liability is the legal theory that one party can be held legally responsible for the harm done by another. The employer is responsible for the harm done by the employee in the course of employment.*

2. **True**. The laws governing employer/employee relationships are based on the traditional laws of master/servant.

*This tradition dates to custom in English common law.*

3. **True**. Statements made by supervisors to employees can often be considered contracts.

*This is why it is so important to understand the manager's and supervisor's responsibilities. Under the law of agency, the manager represents the organization. Therefore, statements made by a manager can sometimes be considered contracts between the organization and the employee.*

4. **False**. Labor and management relations are regulated by the NLRB.

*Labor and management relations are regulated by The National Labor Relations Act, NLRA*

5. **False**. Union membership has risen steadily since the 1930s.

*According to the Bureau of Labor Statistics, union membership reached a high of 20.1 percent of the U.S. labor force in 1983 and has decreased steadily since to only 12 percent of wage and hour workers in 2006.*

6. **False**. A privately-owned business does not have to accept unionization of its employees even if employees vote for union representation.

*Employees have the right to unionize if they choose. It would be considered an unfair labor practice if the employer interfered with employees' rights to unionize or if the employer refused to recognize and bargain with employee representatives who are legally authorized by the NLRB.*

7. **False**. Right-to-work laws protect employees from discrimination.

*Right-to-work laws prohibit requiring union membership as a condition of employment.*

8. **False**. Management-level employees are not eligible for overtime payment.

*Employees properly categorized as exempt under the FLSA are exempt from overtime compensation. This exemption does not cover all management-employees. The exemption is based on the nature of the employee's job duties and not their job title.*

9. **True**. The FLSA established regulations protecting child labor in the United States.

10. **True**. The purpose of the FLSA was to establish minimum labor standards on a national level and to eliminate low wages and long working hours.

*This was done by regulating work hours and establishing a minimum wage.*



## UNION WORD SEARCH PUZZLE

R	I	G	H	T	T	O	W	O	R	K	O	U	T	N
X	Q	N	B	A	N	U	U	I	C	I	N	Z	O	A
M	Y	I	A	X	R	H	O	T	G	I	D	I	N	M
W	B	T	R	O	C	B	C	K	O	E	T	D	D	C
F	W	L	G	N	K	C	I	N	C	A	F	R	M	P
Y	G	A	A	U	N	M	S	T	C	O	P	B	G	A
C	O	S	I	E	E	H	J	I	R	A	L	X	R	K
R	C	G	N	K	O	P	F	J	L	A	A	W	E	L
D	Q	Q	I	P	Z	I	X	F	R	U	T	T	G	C
G	S	R	N	S	T	U	N	I	O	N	U	I	A	B
X	T	T	G	R	T	E	T	Z	B	R	L	O	O	V
S	E	F	E	N	O	I	T	A	I	D	E	M	O	N
F	I	C	Z	N	O	U	J	F	X	L	N	W	B	B
X	E	N	C	I	D	U	J	H	B	X	Q	U	V	V
D	J	K	Q	Q	N	M	H	K	G	K	J	Z	H	G

Find the following words in the puzzle:

ARBITRATION  
BARGAINING  
DECERTIFICATION  
LOCKOUT  
MEDIATION  
RIGHT-TO-WORK  
SALTING  
STRIKE  
UNION  
UNION-SHOP





## Employment Law Unit Two: Agency, Unions and the Fair Labor Standards Act

### Define the Following in Your Own Words:

Arbitration \_\_\_\_\_

Bargaining \_\_\_\_\_

Decertification \_\_\_\_\_

Lockout \_\_\_\_\_

Mediation \_\_\_\_\_

Right-to-Work \_\_\_\_\_

Salting \_\_\_\_\_

Strike \_\_\_\_\_

Union \_\_\_\_\_

Union Shop \_\_\_\_\_



### Answers: Definitions

**Arbitration**– The process of submitting a dispute to an impartial third party for a binding decision. The arbitrator acts as both judge and jury.

**Bargaining**– The process where management representatives and bargaining unit employees meet to negotiate the terms of a union contract.

**Decertification**– The process where union members vote to dissolve their union representation. It is the reverse of the process used to form union representation.

**Lockout**– A management decision to keep union workers out of the workplace and run the organization with management staff or replacement workers.

**Mediation**– The process followed when a neutral third party enters negotiations and facilitates a resolution to a labor dispute. The mediator has no authority to impose a resolution.

**Right-to-Work Laws**– Laws that prohibit requiring union membership as a condition of employment.

**Salting**– The process of getting union organizers hired into a non-union organization with the intent to unionize employees once hired.

**Strike**– An action taken by union members who refuse to work in order to exert pressure on management during negotiations.

**Union**– Employees who join together to deal with their employer regarding workplace issues.

**Union Shop**– An organization that requires all employees to become union members after a specified period of employment.



## Debate Procedure

### Style

The American procedure for debate calls for what is known as “university style debate.” The opening speaker is affirmative (PRO), followed by the negative (CON), the second affirmative, the second negative, and then rebuttal speeches. The sequence of the debate is as follows:

#### Constructive Speeches

First Affirmative

First Negative

Second Affirmative

Second Negative

#### Rebuttal Speeches

Negative Rebuttal

Affirmative Rebuttal

Negative Rebuttal

Affirmative Rebuttal

### Time Limits

There is a ten-minute time limit on all constructive speeches. There is a five-minute time on all rebuttal speeches.

### Speaker's Duties

*First Affirmative:* Defines terms; outlines the entire case, including what their partner will argue; develops the main case; summarizes their own part; and introduces their partner.

*First Negative:* Refutes the definition made by the other side; outlines their entire case, including their partner's argument; develops their main case; summarizes their own part; and introduces their partner.

*Second Affirmative:* Refutes major points made by the first negative speaker; develops their own part of the argument; summarizes their argument.

*Second Negative:* Refutes affirmative's main points; concludes the argument for their side; summarizes the entire case; and compares their side with the other side.

*Rebuttals:* Each rebuttal speech follows the same plan: points out the main points of the opponents' entire case or argument and refutes them one by one; summarizes their conclusions.

SHRM

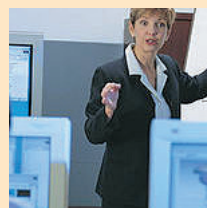
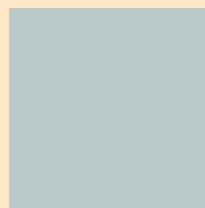
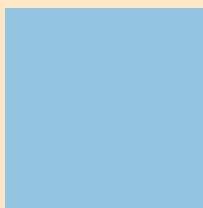
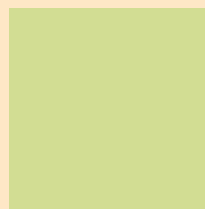
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# Employment Law Unit Three: Discrimination

Myrna Gusdorf, MBA, SPHR.

Teaching notes, assessments and activities



EMPLOYMENT LAW



# Employment Law Unit Three: Discrimination

## Employment Law–Class #3

### Discrimination

#### Discrimination

Employment discrimination can occur in various shapes and forms. When a stated employment policy treats a particular group differently from the rest (“We don’t hire women”), it is clearly discrimination. Such blatant discrimination is unlikely to occur, though, because we all know it is wrong. What is far more common are the more subtle forms of discrimination that can occur in common interactions with employees and customers. These unintentional, discrimination practices are just as illegal as would be a clearly stated discrimination policy.

#### Civil Rights Act of 1866

The Civil Rights Act of 1866 is the oldest federal legislation that affects staffing. It is based on the Thirteenth Amendment to the U.S. Constitution, which outlawed slavery in the United States. It states that all citizens have the same property and contract rights “enjoyed by white citizens”. A 1968 Supreme Court decision broadened the interpretation of this law to cover all contractual arrangements. Since employment and union membership are considered contractual relationships, the law still applies in the employment arena. However, it is most commonly used today in cases of race discrimination in housing. There is no statute of limitations in this act.

#### Equal Pay Act of 1963

The Equal Pay Act prohibits an employer from paying less money to one gender than paid to the opposite gender when both employees do work that is substantially the same. Prior to passage of the Equal Pay Act, it was common for jobs to be segregated according to gender with two different pay scales and with potential employers advertising jobs for “women’s positions” or for “men’s positions”. The Equal Pay Act made such actions illegal.

The law does permit pay distinctions when they are based on the following factors:

- Unequal responsibility;
- Different working conditions;
- Seniority differences;
- Merit pay systems;
- Quantity and quality of production.

Although pay disparities based on gender still exist, violations of the Equal Pay Act can carry significant penalties for employers. In 2004, Morgan Stanley paid \$54 million to settle a sex discrimination suit filed by the EEOC in which the plaintiff claimed the firm had discriminated against her by withholding opportunities for higher pay and promotions (Stites, 2005).

#### Civil Rights Act of 1964 – Title VII

Current discrimination law stems from Title VII of the 1964 Civil Rights Act. Under Title VII, it is illegal for an employer to discriminate in hiring, firing, promoting, compensating, or in terms, conditions, or privileges of employment on the basis of race, color, gender, religion, or national origin.



# Employment Law Unit Three: Discrimination

In 1964, Title VII was landmark legislation that ushered in the era of civil rights and equal employment opportunity. It established the concept of protected classes—those individuals protected by the legal system from discrimination. Many would argue that Title VII is the most significant employment law of our time because it prohibits discrimination in all employment practices. Title VII makes it unlawful to limit or classify employees in any way that deprives them of employment opportunities or hampers their career progression when that classification is based on their protected status.

## Key elements of Title VII

### Title VII, Civil Rights Act of 1964

- Prohibits discrimination in any aspect of employment on the basis of race, color, religion, gender, or national origin.
- Allows all persons access to equal employment opportunities.
- Provides equal access to training.
- Prohibits sexual harassment.
- Prohibits discrimination based on pregnancy.
- Prohibits discrimination in compensation practices.
- Prohibits retaliation against employees who oppose discrimination.
- Created the Equal Employment Opportunity Commission (EEOC).

Title VII covers employers with 15 or more employees. Most federal employment legislation has a minimum threshold number of employees that must be reached before the law applies. If the employer has less than 15 employees, Title VII does not apply. But be careful here. Many states also have civil rights laws with much lower thresholds. For example, the Oregon civil rights law has a threshold of ONE employee, so virtually all employers in Oregon are covered by civil rights law. Check with your state department of labor to be certain what the law is in your state. When state and federal laws are different, you must always follow the law that is most favorable to employees.

### Exceptions

As inclusive as Title VII seems to be, there are still exceptions. The first exception is business necessity. Sometimes an employer has work-related requirements that inadvertently create a hardship on a protected group. Some jobs—firefighters and warehouse workers, for example—require lifting of heavy objects. Though the job application process is open to all, there may be fewer women who are able to pass the lifting requirement. The employer can defend the lifting requirement as job-related and a business necessity even though it has an adverse impact on a protected class of people (women). Adverse impact, also called disparate impact, occurs when a seemingly neutral job requirement has a disproportionately negative affect on a protected group.

The second exception to Title VII is a **Bona Fide Occupational Qualification** (BFOQ). A BFOQ is permissible discrimination in the areas of gender, religion or national origin. It occurs when a specific job requirement, based on a protected class, is reasonably necessary to carry out a job function in the normal operation of a business. For example, a BFOQ in the area of gender would be allowed in the case of a clothing manufacturer who would hire only women for modeling women's clothes. In the area of religion, a religious organization may give preference in hiring to members of their religion or may require that all of its employees be practitioners of their religion. The same applies when an ethnic restaurant wishes to maintain authenticity by requiring all employees to be of the same ethnic origin. A Chinese restaurant that hires only Chinese employees may defend the hiring practice as a BFOQ.



# Employment Law Unit Three: Discrimination

The third exception to Title VII is **seniority**. When employment decisions are made based on an employee's seniority with the organization, it is not considered a discriminatory practice. Employers are reminded that employment decisions based on merit or seniority are well-justified when those decisions can be verified by employment records.

## **Age Discrimination in Employment Act – 1967**

In 1967, Congress passed the Age Discrimination in Employment Act (ADEA). This law originally protected workers aged 40 to 65 from discrimination in the workplace. It was amended in 1978 to protect individuals up to 70 years old and amended again in 1986 to provide discrimination protection for anyone over 40 years old. With limited exceptions, there is no longer an upper age ceiling. So when a 75-year-old (or older) employee wants to continue working, you cannot force him to retire as long as he is meeting the minimum job requirements. ADEA applies to all public and private employers with 20 or more employees.

## **Pregnancy Discrimination Act of 1978**

Passed as an amendment to Title VII of the Civil Rights Act, the Pregnancy Discrimination Act prohibits discrimination in employment based on pregnancy, childbirth or related medical conditions. This law does not require any special treatment of pregnancy by employers. It simply requires an employer to treat a pregnant employee the same as it would treat any other employee with a temporary disability. Under the law, a woman is protected from such practices as being fired, or being refused a promotion or denied a job, simply because she is pregnant or has had an abortion. She cannot be forced to take a leave as long as she is able to work. The same principle applies to benefits; whatever your organization's policy is for an employee on a temporary disability should be your policy for a woman temporarily disabled by pregnancy. It is not recommended that organizations have a separate "maternity leave policy," because that suggests there is something different about maternity from other types of temporary disability leave. The Pregnancy Discrimination Act is a statute that requires equal treatment, not preferential treatment.

## **The Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990**

The Rehabilitation Act of 1973 prohibits employee discrimination based on physical or mental disabilities. Section 503 of the act applies to the federal government and to federal contractors who receive federal grants in excess of \$2,500.

The Americans with Disabilities Act (ADA) went much further in broadening the application of disability discrimination. This law prohibits discrimination against qualified individuals with disabilities. It prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training; and other terms, conditions and privileges of employment. The law defines "an individual with a disability" as "a person who has, or is regarded as having, a physical or mental impairment that substantially limits one or more major life activities and has a record of such an impairment, or is regarded as having such an impairment." Persons with correctable physical limitations, such as high blood pressure or poor eyesight, are not covered under the act.

The ADA requires employers to provide reasonable accommodations to enable the disabled individual to perform the essential functions of the job. This provision in the law generated enormous controversy and trepidation from employers when it was enacted because employers were uncertain about the extent of accommodation required and concerned that the cost of accommodation would be prohibitive, especially for a small organization. Fortunately, most of these concerns have proven unfounded. The law covers employers with 15 or more employees, so small employers are exempt and the law does not require accommodation when it is a "business hardship." Extreme measures to provide accommodation are not required.

To qualify for a position, the disabled employee must be able to perform the essential functions of the job with or without accommodation. This does not mean that the disabled employee must do every task that a fully-abled employee might do, or that they must do the tasks in the same way. The disabled employee, though, must perform the essential functions, with or without accommodation, as this is the minimum level required for job qualification.



# Employment Law Unit Three: Discrimination

A job function may be considered essential if:

- The reason the job exists is to perform the function;
- There are a limited number of employees available to perform the function;
- The function is highly specialized and requires specific expertise or ability.

## The Civil Rights Act of 1991

The Civil Rights Act of 1991 provides damage awards and allows jury trials in cases where the plaintiff is seeking compensatory or punitive damages. However, compensatory and punitive damages are limited and dependent upon the size of the employer's workforce. Under the Civil Rights Act of 1991, the intention of awarding compensatory damages is to make the injured person "whole" by compensating for damaged property, lost wages, medical expenses, etc. Punitive damages are awarded when the plaintiff can prove that the employer acted with malice or reckless indifference to the rights of the employee. Damages are limited to the following:

### Maximum Recovery per Individual

for both Compensatory and Punitive Damages                      Number of Employees

\$50,000--	--	--	15 – 100
\$100,000	--	--	101 – 2 00
\$200,000	--	--	201 – 500
\$300,000	--	--	501 or more

## Additional Readings

Frieswick, K. (Feb. 2007). The ENEMY Within – Companies Fear Employee Lawsuits More Than Any Other Legal Threat. *CFO*, 60-64.

Stites, J. (2005). Equal Pay for the Sexes. *HR Magazine*, 50, 5, 64-69.

Research site: U.S. Equal Employment Opportunity Commission web site ([www.eeoc.gov](http://www.eeoc.gov)).





# Employment Law Unit Three: Discrimination

## True or False Quiz

Please answer “true” or “false” to the following statements.

1. \_\_\_\_ Title VII of the Civil Rights Act protects individuals from discrimination in employment when that discrimination is based on the person’s race, color, sex, religion or national origin. In this context “sex” also refers to sexual orientation.
2. \_\_\_\_ When a job requirement presents an adverse impact on minority populations, the requirement can be defended if it is a business necessity.
3. \_\_\_\_ Older workers beyond the traditional retirement age are protected from age discrimination because there is no upper age limit to the Age Discrimination in Employment Act (ADEA).
4. \_\_\_\_ In order to qualify for hiring, an individual with a disability must be able to perform all the functions of the job.
5. \_\_\_\_ Under the ADA, if accommodating an employee with a disability presents a business hardship, the employer is exempt from making the accommodation.
6. \_\_\_\_ Because pregnancy is also protected from discrimination, it would be wise for employers to establish maternity policies for pregnant employees.
7. \_\_\_\_ The Equal Employment Opportunity Commission (EEOC) as provided for under the Civil Rights Act of 1964 was established to enforce civil rights law.
8. \_\_\_\_ When a state law specifies an employment requirement that is different from federal law, you must always abide by the federal law because federal law supersedes state law.
9. \_\_\_\_ A BFOQ is an exception to Title VII that allows permissible discrimination in the areas of gender, religion or national origin.
10. \_\_\_\_ In order to receive a disability-related accommodation, the employee must verify the disability with evidence of a medical diagnosis or an educational record of such impairment.

## Discussion or Essay Question

### Stereotypes and Discrimination

Consider the following examples of stereotypes taken from actual testimony in court cases:

1. Older employees have problems adapting to changes and new policies.
2. One had to be wary around “articulate black men”.
3. Would not consider “some woman” for the position, questioned plaintiff about future pregnancy plans, and asked whether her husband would object to her “running around the country with men”.
4. If it were his company, he would not hire any black people.

Do you think discrimination is a result of the stereotypes that some people believe? Discuss the affect of common stereotypes on issues of discrimination. Do you see examples of discrimination in your environment? Your community? Your work or your school?



# Employment Law Unit Three: Discrimination

## True or False Quiz Answers

1. **False** Title VII of the Civil Rights Act protects individuals from discrimination in employment when that discrimination is based on the person's race, color, sex, religion or national origin. In this context "sex" also refers to sexual orientation.

*To date there is no protection under federal law for discrimination based on sexual orientation. However, sexual orientation is protected in many communities by state or local regulations, so HR practitioners must be up-to-date on their state and local employment regulations.*

2. **True** When a job requirement presents an adverse impact on minority populations, the requirement can be defended if it is a business necessity.

*In some circumstances, "business necessity" can be a defense against discrimination that presents an adverse impact on a minority group.*

3. **True** Older workers beyond the traditional retirement age are protected from age discrimination because there is no upper age limit to the Age Discrimination in Employment Act.

*With a few exceptions, the law was amended in 1986 eliminating the upper age ceiling for protection against age discrimination.*

4. **False** In order to qualify for hiring, an individual with a disability must be able to perform all the functions of the job.

*A disabled worker is qualified if they can perform the essential functions of the job with or without accommodation. There may be non-essential functions that they cannot perform, but this would not disqualify them from the position.*

5. **True** Under the ADA, if accommodating an employee with a disability presents a business hardship, the employer is exempt from making the accommodation.

*If the necessary accommodation creates a business hardship for the employer, they are exempt from providing the accommodation.*

6. **False** Because pregnancy is also protected from discrimination, it would be wise for employers to establish maternity policies for pregnant employees.

*Pregnancy in the workplace should be treated the same as any other temporary disability. A "maternity" policy in itself may be considered discriminatory because it implies different treatment or special treatment for pregnancy.*

7. **True** The Equal Employment Opportunity Commission as provided for under the Civil Rights Act of 1964 was established to enforce civil rights law.

8. **False** When a state law specifies an employment requirement that is different from federal law, you must always abide by the federal law because federal law always supersedes state law.

*The employer must abide by the law that is most favorable to the employee.*

9. **True** A BFOQ is an exception to Title VII that allows permissible discrimination in the areas of gender, religion or national origin.



## Employment Law Unit Three: Discrimination

*In some circumstances gender, religion or national origin may all be defensible discrimination as a bona fide occupational qualification.*

10. **False** In order to receive a disability-related accommodation, the employee must verify the disability with evidence of a medical diagnosis or an educational record of such impairment.

*There is no requirement for medical or educational record of a disability. Even an employee who is “regarded” as having a mental or physical impairment that substantially limits one or more major life activity is protected under the ADA.*



## Employment Law Unit Three: Discrimination

Is this protected under **FEDERAL** discrimination law?

	Protected	Not Protected
1. Employees with disabilities	_____	_____
2. Alcoholism	_____	_____
3. Illegal aliens	_____	_____
4. Smokers	_____	_____
5. Religious practices	_____	_____
6. Employees under age 40	_____	_____
7. Illegal drug use	_____	_____
8. Pregnant employees	_____	_____
9. Employees in the military	_____	_____
10. Morbid obesity	_____	_____
11. HIV disease	_____	_____
12. Body art – tattoos	_____	_____
13. Sexual orientation	_____	_____
14. Compulsive gambling	_____	_____
15. Cancer	_____	_____



## Employment Law Unit Three: Discrimination

### Correct Answers

Is this protected under FEDERAL discrimination law?

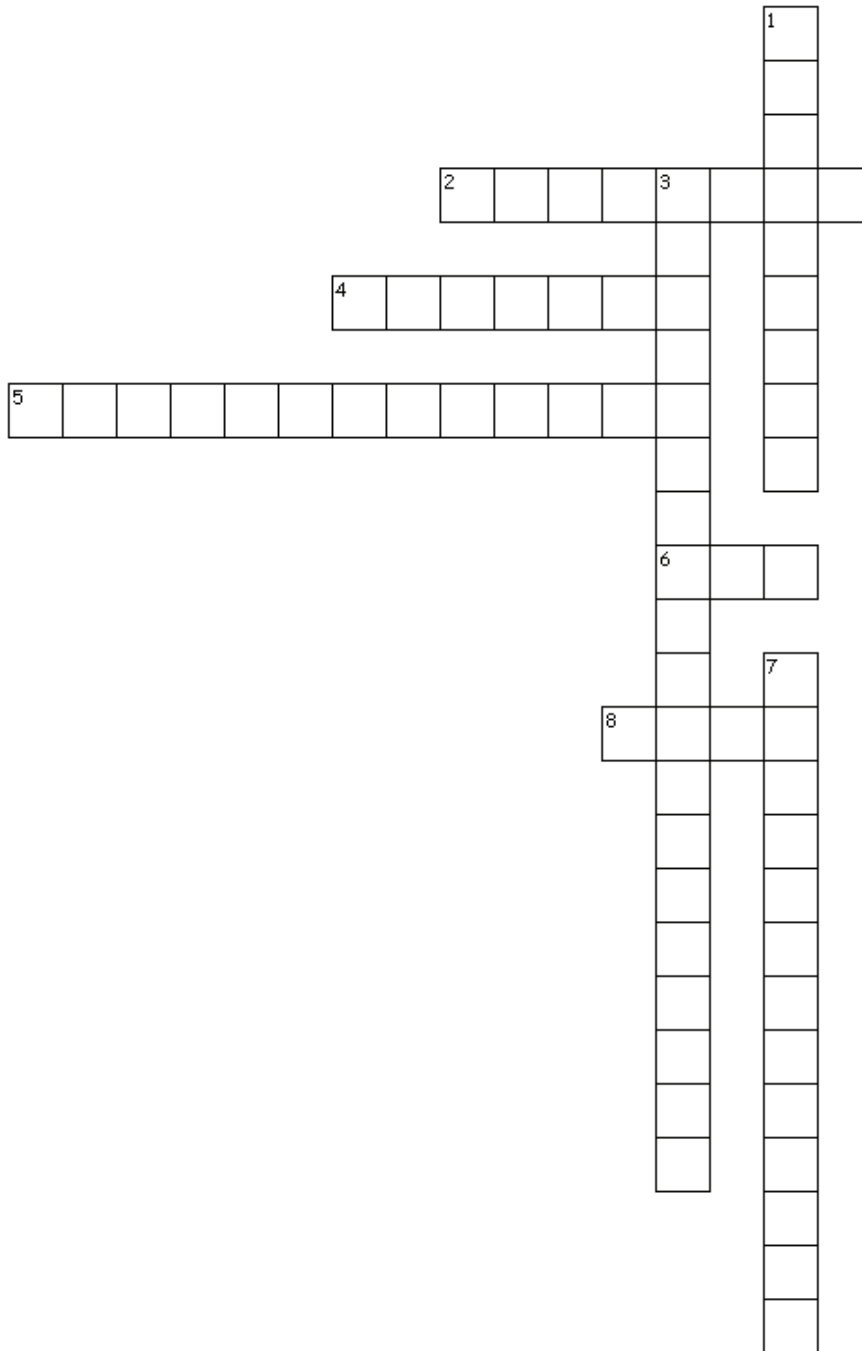
	Protected	Not Protected
1. Employees with disabilities	X	
2. Alcoholism	X	
3. Illegal aliens		X
4. Smokers		X
5. Religious practices	X	
6. Employees under age 40		X
7. Illegal drug users		X
8. Pregnant employees	X	
9. Employees in the military	X	
10. Morbid obesity	X	
11. HIV disease	X	
12. Body art – tattoos		X
13. Sexual orientation		X
14. Compulsive gambling		X
15. Cancer	X	



# Employment Law Unit Three: Discrimination

## Discrimination Crossword

Note: In answers with more than one word, there is a hyphen (-) in the space between words.



### Across

2. Section of the Civil Rights Act of 1964 that makes workplace discrimination illegal when that discrimination is based on a person's race, color, gender, religion or national origin.

4. Financial compensation awarded by courts to the plaintiff in a civil lawsuit.

5. Restructuring the work or the workplace to enable an individual with a disability to perform the essential functions of a job.

6. Statute prohibiting discrimination based on a person's physical or mental disabilities.

8. Permissible discrimination in the areas of gender, religion or national origin.

### Down

1. The length of time an employee has been with the organization compared to other employees.

3. The minimum level of tasks that a disabled employee must perform to qualify for a particular position.

7. Statute prohibiting gender discrimination in compensation.



## Employment Law Unit Three: Discrimination

### Across

2. Section of the Civil Rights Act of 1964 that makes workplace discrimination illegal when that discrimination is based on a person's race, color, gender, religion or national origin.

**Answer – Title VII**

4. Financial compensation awarded by courts to the plaintiff in a civil lawsuit.

**Answer – Damages**

5. Restructuring the work or the workplace to enable an individual with a disability to perform the essential functions of a job.

**Answer – Accommodation**

6. Statute prohibiting discrimination based on a person's physical or mental disabilities.

**Answer – ADA**

8. Permissible discrimination in the areas of gender, religion or national origin.

**Answer – BFOQ**

### Down

1. The length of time an employee has been with the organization compared to other employees.

**Answer – Seniority**

3. The minimum level of tasks that a disabled employee must perform to qualify for a particular position.

**Answer – Essential-Functions**

7. Statute prohibiting gender discrimination in compensation.

**Answer – Equal-Pay-Act**

SHRM

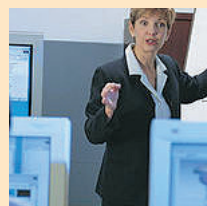
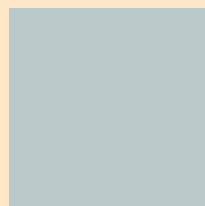
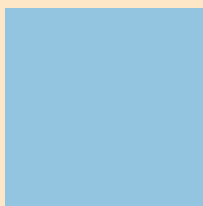
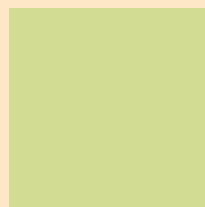
SOCIETY FOR HUMAN  
RESOURCE MANAGEMENT

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# Employment Law Unit Four: Sexual Harassment

Myrna Gusdorf, MBA, SPHR.

Teaching notes, assessments and activities



EMPLOYMENT LAW





## Employment Law–Class #4

### Sexual Harassment

Sexual harassment is one of the most controversial topics of our time. Although the courts have defined many of the legal aspects of sexual harassment, it is left up to employers to set workplace policies and to supervisors to monitor employee behavior and determine what is and what is not sexual harassment.

Not every joke told nor date requested equates to sexual harassment. If two employees are exchanging colorful jokes and neither is offended, or if two employees are involved in a social relationship they both want, this is not sexual harassment. The dilemma for the supervisor is in knowing where to draw the line between comfortable camaraderie and inappropriate behavior.

When mistakes are made, the price is high. Consider the case of Astra USA, a worldwide pharmaceutical company who agreed to pay \$9.85 million to settle sexual harassment claims brought by dozens of Astra employees. You may be thinking this is an extreme example and “it wouldn’t happen in my organization,” but studies indicate sexual harassment is pervasive in the workplace, with fully 50 to 75 percent of female employees reporting having experienced sexual harassment on the job. Though the overwhelming majority of those harassed are women, men are also victims. Of the 12,025 charges of sexual harassment filed with the EEOC in 2006, 15.4 percent of the charges were filed by men ([www.eeoc.gov](http://www.eeoc.gov)). In spite of the training organizations have done since sexual harassment hit the public radar during the Clarence Thomas hearings, it is still a problem for businesses.

If you ask a co-worker why they go to work, they will probably tell you they go for the paycheck. There is certainly truth in that answer, but psychologists remind us that we go to work for reasons other than to just receive a paycheck. The work environment provides us with an opportunity to socialize, make friends, and to communicate with others on a variety of levels. We establish relationships, chitchat about the world, tease each other, and sometimes find romance among our co-workers.

When is teasing and romance okay? When does it cross the line? Bantering with a new employee is part of the socialization process intended to make the new guy feel like one of the gang. It means no harm and the message is one of acceptance to the team. Without this kind of socialization, the workplace can become uncomfortable, where no one is having a good time, the air is heavy with dissatisfaction and stress levels skyrocket. The difficulty for HR is in teaching supervisors where they should draw the line so that acceptable camaraderie does not become a hostile work environment.

### What Is Sexual Harassment?

The courts have identified sexual harassment as **discrimination based on gender**; therefore, sexual harassment is illegal under the Civil Rights Act even though it was not specifically identified under the original provisions of Title VII. The law recognizes two forms of harassment: *quid pro quo* and *hostile environment*. Just like other discrimination laws, sexual harassment is enforced by the EEOC.

#### EEOC Definition of Sexual Harassment:

Unwelcome sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature that occur under any of the following conditions:

1. When submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment.
2. When submission to or rejection of such contact by an individual is used as the basis for employment decisions affecting that individual.
3. When such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.



# Employment Law Unit Four: Sexual Harassment

## Knowing What Is Acceptable and What Is Not Acceptable

While it is easy to define sexual harassment, it is very difficult to apply the definition to a particular case. In cases with very similar facts, court opinions may disagree about whether sexual harassment occurred, sometimes issuing different opinions, particularly in hostile work environment cases where it is more difficult to prove harassment than in quid pro quo situations.

Court cases and administrative rules have defined a “hostile environment” as a work atmosphere in which a *pattern* of offensive behavior occurs. Harassment occurs when the conduct *is sufficiently severe or pervasive as to have the purpose or effect of unreasonably interfering with work performance*. (OAR 839-0550(1)(b))

The courts look at the frequency and severity of the inappropriate behavior and whether a reasonable person in the position of the victim would have thought the environment to be hostile. Generally, a single isolated incident would not be considered a hostile environment unless it is extremely outrageous conduct.

## Quid Pro Quo

Quid pro quo harassment occurs when there is a condition of employment placed on the victim’s agreement to some type of sexual activity. The requirement that an individual date his or her supervisor in order to get a raise or a promotion, or even to keep the job, is a clear case of quid pro quo. It always requires an exchange: “I’ll do this for you, if you do that for me.” Only individuals with supervisory authority over a worker can engage in quid pro quo harassment because there has to be an imbalance of power for this exchange to occur. Since the supervisor has authority and sets the conditions of employment, the supervisor is in a key position to ask for favors.

For example:

Supervisor David tells Mary she’ll get a raise if she sleeps with him.

Supervisor Alice threatens to cut Intern Mark’s hours if he refuses to date her.

In both cases there is a **condition of employment** placed on the victim by the harasser. Clearly, this is quid pro quo harassment; and because employers are responsible for the actions of their managers, employers are always liable when quid pro quo harassment occurs.

## Hostile Environment

Hostile environment harassment is more difficult to pinpoint. It can take many forms and does not require any kind of exchange or condition of employment. It can be any action of a verbal or physical nature that creates an intimidating, hostile or offensive environment that interferes with an individual’s work performance. It can be verbal, physical and even visual. An occurrence of hostile environment can be inappropriate touching, demeaning jokes, or suggestive images posted in the workplace.

For example:

Jerry, Lisa’s supervisor, repeatedly comments on her figure and clothing despite Lisa’s objections. Jerry says he’s “just paying her a compliment.”

Every Monday morning, Ben shares his “dirty joke of the week,” usually one he heard at his Saturday night poker game. Other employees laugh, but Mary walks away and says nothing.



## Employment Law Unit Four: Sexual Harassment

When “Mary says nothing” or when Jerry claims “it’s just a compliment,” it is easy for management to ignore the behavior and assume that this is just friendly banter and no corrective action is needed. Unfortunately, ignoring inappropriate behavior puts the employer and the supervisor at risk. When no corrective action is taken, it opens the door to a potentially costly lawsuit. At the very least, it sends a message to employees that the behavior is acceptable.

With harassment claims litigating for millions of dollars, the liability risk to the employer is enormous. All organizations, regardless of their size, must have policies and procedures in place to prevent harassment and to address it when it occurs. All employees must be trained in the organization’s sexual harassment policy and must understand that harassing activities can lead to discipline up to and including termination. HR must ensure that the policy is communicated to all employees and must train managers about how to handle inappropriate behavior.

An organization’s sexual harassment policy must be in writing. A verbal statement from management will not substitute for a clearly written policy. If there are employees with limited English skills, the policy should also be available in their native language.

At a minimum, the sexual harassment policy should:

1. Define what constitutes harassment and state that it will not be tolerated. Clearly articulate your organization’s zero-tolerance policy.
2. Provide a comprehensive list of categories of prohibited conduct by any of the organization’s employees.
3. Establish a complaint procedure for harassment victims. This should identify the appropriate persons to contact to file a complaint. There must be a reporting channel that bypasses the employee’s supervisor in the event the supervisor is the alleged harasser.
4. Clearly specify the responsibilities of all employees, giving particular attention to managers and HR employees, to minimize the incidence of sexual harassment.
5. Clearly state what action will be taken if a determination of workplace harassment is made after a thorough investigation.
6. Provide a clear, separately-stated commitment to periodic management education and employee awareness programs that emphasize the organization’s concern for the seriousness of the issue.

All employees must receive training on what constitutes sexual harassment and the organization’s sexual harassment policy. Management staff should also receive training on how to identify sexual harassment and how to intervene in harassment situations, even when a complaint has not yet been filed. The training program should be a part of new employee orientation and should be repeated periodically for all employees.

### Additional Readings

Casellas, G. F., and Hill, I. L. (Fall 1998). Sexual Harassment: Prevention and Avoiding Liability. *SHRM Legal Report*.

Greenwald, J. (2007). Employers Play Third Wheel in Office Romances. *Business Insurance*, 1, 36.

Sompayrac, J., and Helms, M. M. (2007). Did You Hear the One About the Dumb Blonde Who Hired an Attorney? Can Telling Dumb Blonde Jokes Constitute Sexual Harassment? *Employee Relations Law Journal*, 32, 4, 66-75.

U.S. Equal Employment Opportunity Commission web site ([www.eeoc.gov](http://www.eeoc.gov)).



### Discussion Case: Sexual Harassment at ColorTime Painting

ColorTime Painting recently hired Rachael for their west-side painting crew. Eric, crew supervisor for ColorTime, had never hired a woman painter before; but Rachael had lots of experience and came highly recommended from another paint contractor. Eric decided to give her a try. After all, gender discrimination is illegal, isn't it? Unfortunately, it has only been a few weeks and some of the men are already complaining about her. They say she doesn't pull her weight. She won't go up the ladders to paint the high spots; she won't help unload the paint; and she doesn't clean up at the end of the day. "Besides," one of them said, "I got no problem working with women, but she's a lousy painter!"

Rachael has complained to Eric that the men refuse to work with her. "How am I supposed to know which job we're working on," she said, "when they won't give me the day's schedule? Everyone else gets it the day before and I don't get it at all. When we get to the job, my paint is always loaded at the back of the truck under all the five-gallon buckets so I struggle to get it unloaded while they all stand around and snicker, making cracks about a woman in a man's job. Worse yet, yesterday when I went to get my lunch cooler from the back, someone had written *GO HOME* on the side of it with a black permanent marker! You've got to do something, Eric, I'm tired of the harassment and their abuse."

Eric groaned silently to himself. "I should have known better than to hire a woman," he thought. "What a mess. Now I have to let Rachael go, and I'm never going to hire another woman. The paint industry is just no place for women."



## Employment Law Unit Four: Sexual Harassment

### **Discussion Case: Sexual Harassment at ColorTime Painting Answer**

Call out the lawyers; a sexual harassment lawsuit is on the way. Someone needs to monitor the behavior of these employees out on the job. Where's the supervisor? If Eric fires Rachael, it will look like retaliation for her harassment complaint—and she may have a strong case for wrongful discharge. It sounds like ColorTime needs discrimination and harassment training for all employees and certainly training for supervisors on how to handle inappropriate employee behavior.

Somebody needs to get this gang under control! If Rachael truly is a “lousy painter” and isn’t pulling her weight, that is a performance issue which needs to be addressed the same as it would be for any other employee who is not meeting standards. But that may be the least of their problems. Unless things change and change quickly, ColorTime is about to explode!



# Employment Law Unit Four: Sexual Harassment

## True or False Quiz

Please answer “true” or “false” to the following statements.

1. \_\_\_\_ The Civil Rights Act is not a civility code; it does not prohibit simple teasing, offhand comments, or isolated incidents that are not extremely serious.
2. \_\_\_\_ Harassment complaints must go through the EEOC before a private lawsuit is filed.
3. \_\_\_\_ Asking for sexual favors in exchange for a favorable condition of employment is an example of physical sexual harassment.
4. \_\_\_\_ A single, isolated incident is all it takes to be considered hostile environment harassment.
5. \_\_\_\_ If the victim requests confidentiality from the supervisor and requests that no action be taken, the supervisor need not report the harassment to HR.
6. \_\_\_\_ When an employee claims to be the victim of harassment, it is appropriate to transfer that employee to another department.
7. \_\_\_\_ To protect their rights to legal action, the victim of sexual harassment must complain to the harasser and to the organization before taking legal action.
8. \_\_\_\_ Employers may argue that they are not liable for sexual harassment if an employee did not take advantage of available reporting or remedial measures to complain about incidents of sexual harassment.
9. \_\_\_\_ A hostile environment can arise through conduct based on race, color, age, national origin, disability or veteran’s status.
10. \_\_\_\_ An occurrence of consensual sexual relations between individuals precludes either party from making a future claim for sexual harassment.



# Employment Law Unit Four: Sexual Harassment

## True or False Quiz Answers

1. **True** The Civil Rights Act is not a civility code; it does not prohibit simple teasing, offhand comments, or isolated incidents that are not extremely serious.

*Harassment does not violate federal law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age 40 or older, disability, or protected activity under the anti-discrimination statutes. Thus, while teasing and offhand comments may be inappropriate, they are not harassment under the law unless they are "so objectively offensive as to alter the conditions of the victim's employment."*

2. **False** Complaints of harassment must go through the Equal Employment Opportunity Commission before a private lawsuit is filed.

*The victim of harassment can bypass the EEOC and directly file a civil suit if they prefer.*

3. **False** Asking for sexual favors in exchange for a favorable condition of employment is an example of physical sexual harassment.

*A request for sexual favors as a condition of employment is a verbal form of quid pro quo harassment.*

4. **False** A single, isolated incident is all it takes to be considered hostile environment harassment.

*Generally, a single, isolated incident would not be considered hostile environment unless it is extremely outrageous conduct. The courts look to see whether the conduct is both serious and frequent.*

5. **False** If the victim requests confidentiality from the supervisor and requests that no action be taken, the supervisor need not report the harassment to HR.

*When an employee informs a supervisor about alleged harassment but asks that the matter be kept confidential and no action taken, a conflict may arise between the employee's desire for confidentiality and the organization's duty to investigate and correct harassment. Inaction by the supervisor could lead to increased employer liability. While it may seem reasonable to let the employee determine whether to pursue a complaint, the organization has a duty to act promptly and correct harassment.*

6. **False** When an employee claims to be the victim of harassment, it is appropriate to transfer that employee to another department.

*It is the responsibility of the organization to immediately undertake measures to ensure that further harassment does not occur. Appropriate measures may be to make scheduling changes to separate the parties, transferring of the alleged harasser, or placing the alleged harasser on non-disciplinary leave. The victim of harassment should not be involuntarily transferred because such measures could constitute unlawful retaliation.*

7. **False** To protect their rights to legal action, the victim of sexual harassment must complain to the harasser and to the organization before taking legal action.

*An employee alleging sexual harassment must give the employer an opportunity to correct the situation before filing a lawsuit or a complaint with an administrative agency. However, there is no requirement that the victim confront the harasser.*

8. **True** Employers may argue that they are not liable for sexual harassment if an employee did not take advantage of available reporting or remedial measures to complain about incidents of sexual harassment.



## Employment Law Unit Four: Sexual Harassment

*When organizations have policies and procedures in place to prevent and correct harassment, the courts expect the alleged victim to give the employer the opportunity to remedy the situation by utilizing the employer's complaint process. An affirmative defense is created by the employer when there is a complaint process available and the alleged victim does not utilize the process.*

9. **True** A hostile environment can arise through conduct based on race, color, age, national origin, disability or veteran's status.

*Prohibited harassment under federal law is not limited to sexual harassment but can extend to any aspects of an individual's protected status.*

10. **False** An occurrence of consensual sexual relations between individuals precludes either party from making a future claim for sexual harassment.

*In order to constitute harassment, sexual advances must be unwelcome. Just because sexual contact was welcome at one time, does not mean that it is still welcome. The co-worker romance-gone-bad may be the HR professional's biggest nightmare. Previous agreement to sexual contact does not negate an employee's rights to protection from sexual harassment, nor does it discharge the organization's responsibility for the current unwelcome behavior.*





## Employment Law Unit Four: Sexual Harassment

### You Decide—Is This Harassment?

Congratulations! You have just been promoted to supervisor at Coffee Bistro. In honor of your new position, you deserve a little celebration. Mix yourself a tall double mocha latte with extra whipped cream and sit a spell while you think about that extra 50 cents an hour you'll see on your next paycheck.

Oh! Sorry to bother you. Now that you're the supervisor, there are some people issues at Coffee Bistro that need to be resolved.

### You Decide—Is This Harassment?

1. You've hired a new barista, Melissa. She's attractive and single. Your other day shift barista, Mark, also single, has asked her out on a date. Should you intervene?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

2. Melissa said no but Mark asked her out again. Still, no one is complaining. Is this harassment?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

3. What if Mark is Melissa's immediate supervisor? She keeps saying no but Mark is persistent and asks her out again. Is this really a problem? Guys ask for dates all the time; if you're not persistent, you never get the girl, right? Is this harassment?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

4. Tom has been with you for years. He's a great barista and an asset to the organization with his outgoing personality. He affectionately calls the women in the Bistro his "girls" and will occasionally give one of them a hug. This seems to be stress relief for everyone in the cramped workspace. The atmosphere actually improves when Tom is at work and everyone smiles. This isn't a problem, is it?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

5. You recently hired a new team member, Sarah. Yesterday, Sarah came to you complaining that she didn't like being referred to as one of Tom's "girls," and when she asked you to talk to Tom, you explained that it is just the way Tom is. He doesn't mean any disrespect and besides, everyone else enjoys Tom's camaraderie. Sarah just needs to get used to him. Right?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.



## Employment Law Unit Four: Sexual Harassment

6. Edward is a longtime customer. He stops by Coffee Bistro every morning for his regular skinny vanilla latte with a double shot. He's always been friendly with the women at the Bistro and granted, sometimes he does go a bit too far with his comments. Normally they just ignore him, so you have had no need to worry. Today, though, he said something to Melissa that made her blush and afterward, she was agitated and had difficulty completing her work. You saw her talking to one of the other women on staff, and now she has come to you saying that Edward had really gotten out of line this time and she doesn't want to make his coffee any more. You explain to her that he is a customer, not an employee, and you cannot control the behavior of non-employees. Besides, the customer's always right. Aren't they?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

7. We finally solved the Edward problem and things seem to be going smoothly. Today, though, a young man came to the Bistro drive-up; and while Lisa, our new team member, rang up his cappuccino, he said something outrageous and threatened Lisa in a way that left her trembling after he was gone. He was here only a few minutes and you have never seen him before. Is Coffee Bistro responsible for what happened?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

**So – how'd you do??** Right now, you may be thinking, "This is too hard; I don't ever want to be the Bistro supervisor." Don't worry. There is a lot you can do to deal with those difficult people. You just need to know your responsibility to your employees and to your organization.



### You Decide—Is this Harassment? Answers

1. You've hired a new barista, Melissa. She's attractive and single. Your other day shift barista, Mark, also single, has asked her out on a date. Should you intervene?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

*According to research from the Bureau of National Affairs, nearly one third of all romances begin at work with between 6 and 8 million Americans entering into such relationships every year. Dating is not illegal and it is not harassment. Harassment occurs when the behavior is unwelcome. As long as the behavior is welcomed by both Melissa and Mark and they are behaving professionally while at work, there is no problem. In fact, this may actually be your lucky break; some studies indicate romance at work actually increases productivity because each party works harder in an effort to impress their love interest.*

2. Melissa said no but Mark has asked her out again. Still, no one is complaining. Is this harassment?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

*It may or may not be. Individuals have refused dates multiple times and there is no problem. It could be the start of something, though. You should keep a close eye out here.*

3. What if Mark is Melissa's immediate supervisor? She keeps saying no but Mark is persistent and he asks her out again. Is this really a problem? Guys ask for dates all the time; if you're not persistent, you never get the girl, right? Is this harassment?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

*Because Mark is Melissa's supervisor, you have a perfect set-up for quid pro quo harassment. You need to nip this before it grows out of control. Courts hold employers strictly liable when a supervisor engages in quid pro quo harassment. Don't wait for Melissa to complain; you'd better talk to Mark today.*

4. Tom has been with you for years. He's a great barista and an asset to the organization with his outgoing personality. He affectionately calls the women in the Bistro his "girls" and will occasionally give one of them a hug. This seems to be stress relief for everyone in the cramped workspace. The atmosphere actually improves when Tom is at work and everyone smiles. This isn't a problem, is it?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

*It sounds like Tom is a nice guy and may not mean any harm. Do not be fooled into thinking that as long as everyone smiles and no one complains, it is okay. People come to work as adults and they expect and deserve to be treated as such. Referring to female staff as "girls" diminishes them and diminishes their work. Though many will not complain, especially if they like Tom, it is possible some are offended but reluctant to rock the boat with a complaint. The same is true regarding the hugs. Be sure to tell Tom how much you appreciate his outgoing personality and the 'spark' he adds to the Bistro but remind him to call the women staff by name just as he would the men and to please leave the hugs at home.*



## Employment Law Unit Four: Sexual Harassment

5. You recently hired a new team member, Sarah. Yesterday, Sarah came to you complaining that she didn't like being referred to as one of Tom's "girls," and when she asked you to talk to Tom, you explained that it is just the way Tom is. He doesn't mean any disrespect and besides, everyone else enjoys Tom's camaraderie. Sarah just needs to get used to him. Right?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

*Oh no! You should have dealt with Tom before now. Do not disregard Sarah's complaint or tell her she just needs to get used to Tom. You have an official complaint of harassment and you must address the issue with Tom. When you talk to Tom, discuss the situation in terms of his behavior, not that Sarah complained. Do not make Sarah the heavy; the problem is Tom's behavior and not Sarah's complaint. Blaming Sarah for complaining can appear to be retaliation against her for speaking up and that just adds to your legal problems. She has the right to work in an atmosphere free from harassment and the law protects her from retaliation for exercising her right to seek correction of the problem.*

6. Edward is a longtime customer. He stops by Coffee Bistro every morning for his regular skinny vanilla latte with a double shot. He's always been friendly with the women at the Bistro and granted, sometimes he does go a bit too far with his comments. Normally they just ignore him, so you have had no need to worry. Today, though, he said something to Melissa that made her blush and afterward, she was agitated and had difficulty completing her work. You saw her talking to one of the other women on staff, and now she has come to you saying that Edward had really gotten out of line this time and she doesn't want to make his coffee any more. You explain to her that he is a customer, not an employee, and you cannot control the behavior of non-employees. Besides, the customer's always right. Aren't they?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

*Employers must provide employees with a workplace that is safe and free from harassment. Employers are liable for harassment by a non-employee if the employer knew or should have known of the conduct, unless the employer takes immediate and appropriate corrective action. To lessen your liability, you must address the problem immediately. As the Bistro supervisor, you can't pretend that you didn't know about Edward; this sounds like it has been going on for some time. It is time to talk to Edward. At the very least, as the supervisor, perhaps you should wait on Edward in the future, instead of subjecting your staff to his inappropriate behavior. If Edward cannot be managed in this way, then you must tell Edward to find his morning "cup-a-Joe" somewhere else.*

7. We finally solved the Edward problem and things seem to be going smoothly. Today, though, a young man came to the Bistro drive-up; and while Lisa, our new team member, rang up his cappuccino, he said something outrageous and threatened Lisa in a way that left her trembling after he was gone. He was here only a few minutes and you have never seen him before. Is Coffee Bistro responsible for what happened?

/\_/ Yes – This is harassment.

/\_/ No – Leave them alone.

*You cannot control a chance encounter from the public. There is nothing you can do about the young man but you can do something about Lisa. She needs support and reassurance. She may need to leave her shift and go home for the day or spend some time talking to another, trusted employee. For a period of time, she may need a change in duties where she is not required to wait on the public. Your responsibility here is to repair the damage done to Lisa and make sure your staff is trained on managing hostile or angry customers.*

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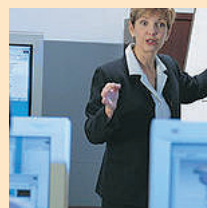
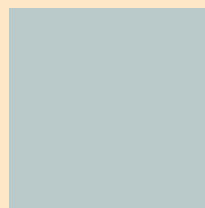
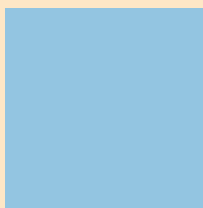
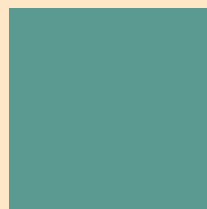
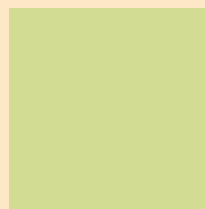
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# Employment Law Unit Five: Other Employment Law Issues

Myrna Gusdorf, MBA, SPHR.

Teaching notes, assessments and activities



EMPLOYMENT LAW



## Employment Law–Class #5

### Other Employment Law Issues

#### **Affirmative Action/EO 11246 – 1965**

Affirmative action was created in 1965 when President Johnson signed Executive Order 11246. Affirmative action applies to federal agencies and federal contractors and prohibits discrimination in employment because of race, creed, color or national origin. In 1968, the word “creed” was changed to religion, and sex discrimination was added to the other prohibited areas. The law requires employers to take proactive steps to ensure equal opportunity employment of applicants and equal opportunity treatment of employees during employment.

An affirmative action program (AAP) is a process developed by organizations to demonstrate that workers are employed in proportion to their representation in the organization’s relevant labor market. Affirmative action programs may be required by the EEOC for organizations found to have a history of discrimination. The AAP is put in place in an attempt to correct the imbalance created by past discrimination. Other organizations voluntarily implement an AAP, establishing goals for the hiring of minorities and women.

#### **Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)**

The economic and social changes that characterized the 1980s brought about significant changes in employment law. This was a decade of huge corporate profits brought about by mergers and hostile acquisitions that resulted in the terminations of a significant number of employees. To soften the blow, if that is possible for an employee without a job, employers changed their vocabulary. Mass layoffs were described in terms of “downsizing”, “rightsizing”, “smartsizing”, or sometimes just “restructuring”. For some, it was even more impersonal; employers took the human element out entirely and simply listed jobs as “surplused”. No matter the term, the result is the same: unemployment for large numbers of workers.

To make matters even worse for the unemployed, the 1980s was also a time of rapidly increasing health care costs. When workers lost their jobs, most lost their employer-provided health insurance. It became a crisis of unemployed and uninsured. Congress responded by passing the Consolidated Omnibus Budget Reconciliation Act of 1985, commonly called COBRA.

There is no federal law that requires employers to provide health insurance to employees. However, when an organization has 20 or more employees and does provide health insurance, COBRA requires that an employee who loses health insurance coverage as a result of a qualifying event be given the opportunity to continue their employer’s insurance coverage for themselves and their dependents. Coverage can be extended from 18 to 36 months depending on the nature of the qualifying event. The employee must elect COBRA benefits within the required time period and must pay the full cost of insurance plus a possible administrative fee up to 2 percent. An exception applies in the case of an employee who is terminated due to gross misconduct.

The duration of COBRA coverage depends on the type of qualifying event. COBRA benefits extend for 18 months for employees who are terminated or lose their jobs due to a reduction in hours. If disabled employees lose their jobs due to a reduction in hours, COBRA benefits may be extended to 29 months. Thirty-six months of coverage is available to dependents if their coverage is lost due to divorce or death of the employed spouse. Dependent children may also obtain COBRA coverage for 36 months when they lose eligibility status under their parent’s coverage. Most commonly, COBRA coverage ends when employees or dependents become eligible for medical insurance from a new employer or qualify for Medicare coverage.



## **Worker Adjustment and Retraining Notification Act (WARN) of 1988**

The second major employment law emerging from the 1980s was the Worker Adjustment and Retraining Notification Act of 1988. Like COBRA, this law was passed in the wake of corporate downsizing that left many workers unemployed with little or no warning. The worst-case scenarios were those employees who left work in the evening thinking all was well, only to return the following morning to find the plant closed, their jobs lost, and the facility for sale by the new owner.

Sudden unemployment is difficult for any employee, but it can also devastate an entire community. When a major employer shuts down and hundreds of employees lose their jobs, it creates an economic downturn that ripples through the entire business community. Many small businesses and service industries are likely to suffer as well, and many may not be able to “hold out” until times get better.

The WARN Act gives employees and communities some “cushion” in the event of a mass layoff or a plant closing by requiring employers to give at least 60 days’ notice before the event occurs. The intent is to give displaced workers time to search for new jobs and hopefully reduce the negative effect of the job loss. In addition to notifying the affected workers, if there is a union involved, the union must be notified as well as state agencies for dislocated workers and the chief-elected official of the local government where the closing or layoff is to occur. The WARN Act applies to employers with 100 or more full-time employees or a combination of full-time and part-time employees that would be the equivalent.

## **Immigration Reform and Control Act – 1986**

The Immigration Reform and Control Act, passed by Congress in 1986, was intended to curtail the flow of illegal immigrants coming into the United States seeking employment. The law requires all new employees to verify proof of identity and proof of the right to work in the U.S. It was assumed that undocumented workers would have difficulty with verification and therefore could not obtain employment. The logic was that if they could not get jobs, illegal immigrants would stop coming into the country. Although it is impossible to accurately track the numbers of illegal workers coming into the U.S., there is little evidence that IRCA has had any effect in slowing the flow of illegal immigration.

The second purpose of IRCA is to prohibit discrimination against job applicants on the basis of national origin or citizenship. The law requires that within three days of hiring, the new employee must complete the required I-9 form and provide their employer documentation that verifies identity and the right to work in the U.S. The law includes employer penalties for hiring illegal aliens, including civil and criminal penalties for employers who knowingly hire illegal workers.

## **Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994**

USERRA provides employment protection to reservists and National Guard members. Under USERRA, military personnel are entitled to return to their civilian employment after military service. An employee returning from military duty is entitled to reemployment in the same job position that he or she would have reasonably attained if not for the absence of time in military service. This “escalator principle” is intended to protect service personnel from being penalized by losing pay or a promotion as a result of the time spent on active military duty.

USERRA applies to virtually all employers, public or private, regardless of size. It protects military personnel against discrimination in all areas of employment or in benefits of employment, including job retention and advancement.

## **Additional Reading**

Allen, Z. (June 21, 2007). Labor Ponders Guest Worker Issue. *New York Amsterdam News*, 98, 26, 4.

Davila, S. (2007). The Immigration Quandary in the U.S. *Financial Executive*, 23, 6, 64.

Herbst, M. (August 15, 2007). Immigration Rules: An Economic Disaster? *Business Week Online*, 10.



## True or False Quiz

Please answer “true” or “false” to the following statements.

1. \_\_\_\_ Affirmative action requires employers to use hiring quotas to ensure equal opportunity employment of applicants.
2. \_\_\_\_ An affirmative action plan is put in place in an attempt to correct the imbalance created by past discrimination.
3. \_\_\_\_ Affirmative action contains an “escalator principle” intended to move minority populations into management positions in organizations with 25 or more employees.
4. \_\_\_\_ Federal law requires employers with 20 or more employees to provide health insurance to their full-time employees.
5. \_\_\_\_ COBRA requires that employees who lose insurance coverage as the result of a qualifying event be given the opportunity to continue their employer’s health insurance coverage for themselves and their dependents.
6. \_\_\_\_ The WARN Act requires employers to give 90 days’ notice to employees and community agencies in the event of a mass layoff or a plant closing.
7. \_\_\_\_ The Immigration Reform and Control Act of 1986 had one purpose, and that was to curtail the flow of illegal immigrants coming into the U.S. seeking employment.
8. \_\_\_\_ Under USERRA, an employee returning from military duty is entitled to reemployment in the same job position that he or she would have reasonably attained if not for the absence of time in military service.
9. \_\_\_\_ Under COBRA, employees must pay the full cost of their health insurance plus an additional 5 percent administrative fee.
10. \_\_\_\_ The WARN Act applies to employers with 50 or more employees.





## True or False Quiz Answers

1. **False** Affirmative action requires employers to use hiring quotas to ensure equal opportunity employment of applicants.

*The use of hiring quotas is not an appropriate method of administering affirmative action.*

2. **True** An affirmative action plan is put in place in an attempt to correct the imbalance created by past discrimination.

*If an employer has been found guilty of past discrimination by the EEOC, the EEOC may order that employer to implement an affirmative action plan as a method to correct the effect of past discrimination.*

3. **False** Affirmative action contains an “escalator principle” intended to move minority populations into management positions in organizations with 25 or more employees.

*There is no “escalator principle” in affirmative action.*

4. **False** Federal law requires that employers with 20 or more employees provide health insurance to their full-time employees.

*There is no federal law that requires employers to provide health insurance benefits to their employees.*

5. **True** COBRA requires that employees who lose insurance coverage as the result of a qualifying event be given the opportunity to continue their employer’s health insurance coverage for themselves and their dependents.

6. **False** The WARN Act requires employers to give 90 days’ notice to employees and to community agencies in the event of a mass layoff or a plant closing.

*The WARN Act requires 60 days’ notice in the event of a mass layoff or plant closing.*

7. **False** The Immigration Reform and Control Act of 1986 had one purpose, and that was to curtail the flow of illegal immigrants coming into the U.S. seeking employment.

*The IRCA has two purposes. The first purpose is to curtail the flow of illegal immigrants coming to the U.S. seeking employment. The second purpose is to prohibit discrimination against job applicants on the basis of national origin or citizenship.*

8. **True** Under USERRA, an employee returning from military duty is entitled to reemployment in the same job position that he or she would have reasonably attained if not for the absence of time in military service.

9. **False** Under COBRA, employees must pay the full cost of their health insurance plus an additional 5 percent administrative fee.

*The administrative fee charged to participants under COBRA is limited to 2 percent.*

10. **False** The WARN Act applies to employers with 50 or more employees.

*The WARN act applies to employers with 100 or more full-time employees or the combination of full-time and part-time employees that would be the equivalent.*



## **Jigsaw Activity: Students Teaching Students**

### **Questions for Jigsaw Activity**

There is one question from each of the employment laws discussed in this segment of the module:

1. Explain the escalator principle contained in USERRA.
2. Explain the two-pronged intent of the IRCA.
3. Identify the various categories of people and organizations that must receive notice of an impending layoff under the WARN Act.
4. Identify the qualifying events that would make an employee eligible for COBRA insurance coverage and explain how the qualifying events affect the length of COBRA coverage available to the employee.
5. Identify which organizations are required to have affirmative action plans and discuss the purpose of affirmative action law.

### **Conducting the Jigsaw Activity**

For the five questions, you will need 25 students divided up into five groups of five students each. If you have six questions, you will need 36 students divided into six groups of six students. The multiplier of student groups is always equal to the number of questions. (4 questions = 16 students divided into 4 groups of 4 students.)

In this activity, students start in one group and then move on to another assigned group. If you are working with five questions and you have 27 students, you will have two groups each with an extra student who does not move to another group during the exercise.

When you have identified your groups, assign each group one of the questions. All groups will start with a different question. As a group, they will discuss and agree on an answer to their assigned question. They become the “experts” on their topic. When all groups have answered their question, divide the class into groups again, this time forming new groups with one member from each of the original “expert” groups. You should end with new groups where each student in the group is an “expert” from one of the original groups. The “experts” in the new group will then “teach” the others the answer to his or her question. When you are finished, all students will have the answers to all questions and each student will have been responsible for teaching his or her group the answer to the original question.



## Employment Law Crossword

Note: In answers with more than one word, there is a hyphen (-) in the space between words.

### Across

1. The federal agency that investigates and enforces discrimination law.

2. Harassment that occurs when agreement or rejection of inappropriate contact is made a term or condition of that individual's employment.

5. Individuals protected from employment discrimination.

8. One who is authorized to speak for or to act in place of another person.

9. Permissible discrimination allowed in limited circumstances.

### Down

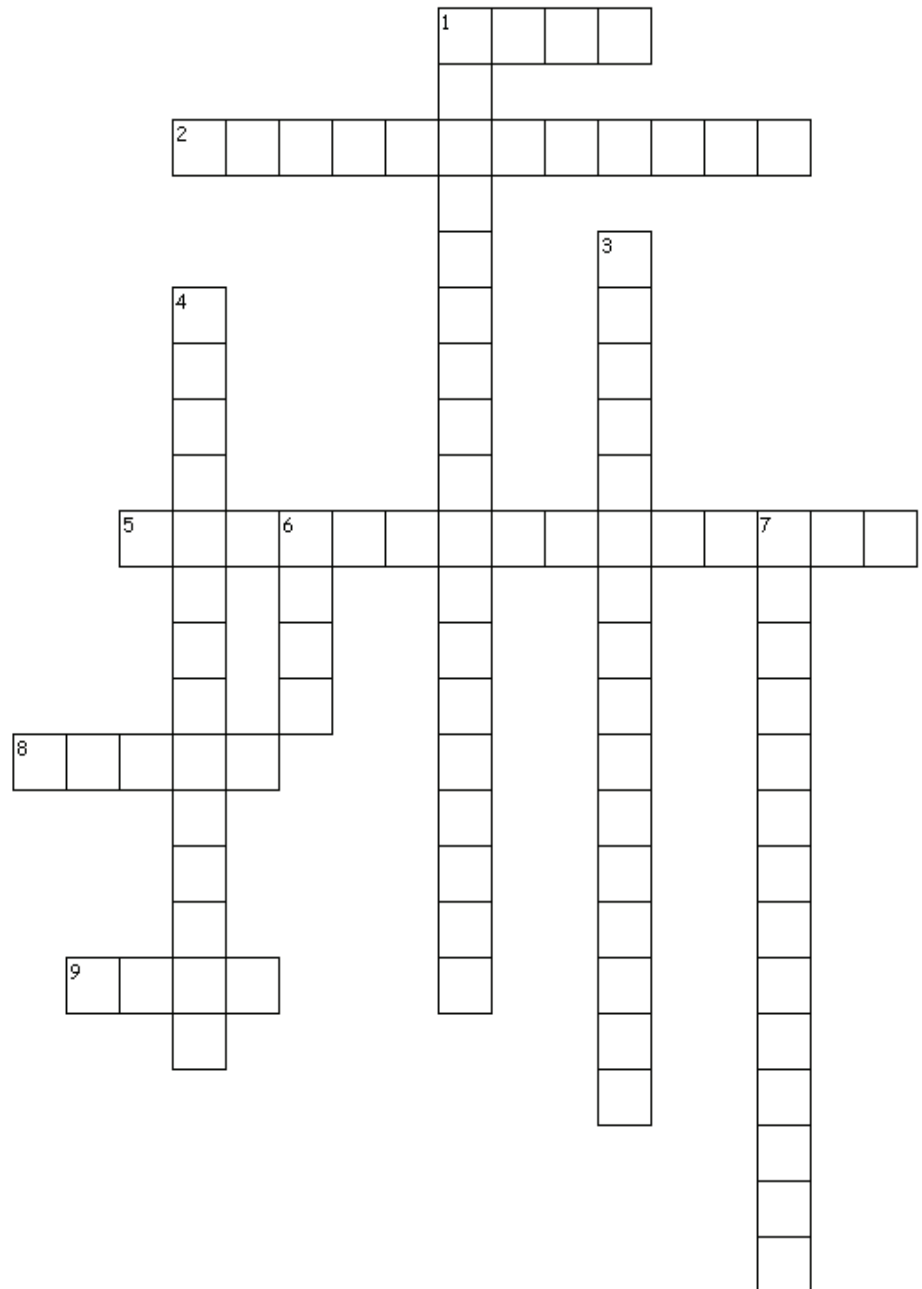
1. The legal doctrine that allows the employer to terminate employment for cause or for no cause.

3. Legislation prohibiting discrimination in employment.

4. Placing someone at a disadvantage and treating them differently from other individuals.

6. A breach of legal duty that causes harm or injury to another person.

7. A condition that occurs when a seemingly neutral employment policy creates a disadvantage to a protected class of individuals.





## ANSWERS

### Employment Law Crossword

#### Across

1. The federal agency that investigates and enforces discrimination law.  
**EEOC**
2. Harassment that occurs when agreement or rejection of inappropriate contact is made a term or condition of that individual's employment.  
**Quid-Pro-Quo**
5. Individuals protected from employment discrimination.  
**Protected-Class**
8. One who is authorized to speak for or to act in place of another person.  
**Agent**
9. Permissible discrimination allowed in limited circumstances.  
**BFOQ**

#### Down

1. The legal doctrine that allows the employer to terminate employment for cause or for no cause.  
**Employment-at-Will**
3. Legislation prohibiting discrimination in employment.  
**Civil-Rights-Act**
4. Placing someone at a disadvantage and treating them differently from other individuals.  
**Discrimination**
6. A breach of legal duty that causes harm or injury to another person.  
**Tort**
7. A condition that occurs when a seemingly neutral employment policy creates a disadvantage to a protected class of individuals.  
**Adverse-Impact**

SHRM

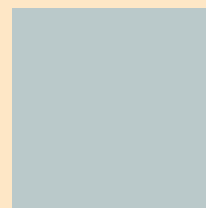
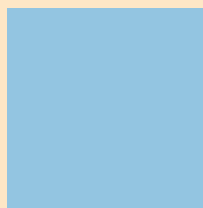
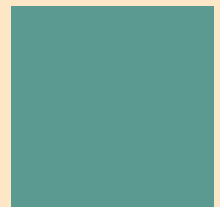
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# Employment Law Unit Six: EEOC Process and Best Practices

Myrna Gusdorf, MBA, SPHR.

Teaching notes, assessments and activities



## EMPLOYMENT LAW



## **Employment Law–Class #6** EEOC Process and Best Practices

### **The EEOC**

The Equal Employment Opportunity Commission (EEOC), created by Title VII of the Civil Rights Act, is the federal authority charged with enforcement and administration of discrimination law. When a complaint is filed, an EEOC action is initiated. Charges must be filed within 180 days of the incident; however, the time may be extended to 300 days if a state or local agency is involved in the case. Sometimes the claim is filed under the 1866 Civil Rights Act because this law has no statute of limitations. More than 75,000 discrimination complaints were filed with the EEOC in 2006 ([www.eeoc.gov](http://www.eeoc.gov)).

When a charge is filed, the EEOC attempts a no-fault settlement by inviting the accused organization to settle with the claimant with no admission of guilt. Most claims are settled at this stage. If a settlement is not reached, the EEOC will investigate the claim. After investigating, the EEOC director will issue a “probable cause” or “no probable cause” statement. If the investigation determines probable cause, the EEOC will attempt conciliation with the organization. If conciliation fails, the case will then be reviewed for litigation. Only a small number of the original cases filed will ever be litigated by the EEOC. In considering litigation, the EEOC will consider the following:

1. The number of people affected by the alleged practice.
2. The amount of money involved.
3. Possible other charges against the same employer.
4. The type of charge involved.

If litigation is recommended, the case is turned over to the EEOC general counsel. If litigation is not pursued through the EEOC, a right-to-sue letter is sent to the party filing the original charge.

This ends the EEOC involvement in the case. But whether or not an aggrieved employee goes to the EEOC, they can always hire a private attorney and file a civil suit against the organization. Because only about 1 percent of claims filed through the EEOC are actually litigated through the EEOC, many individuals opt from the beginning for a private civil suit.

An even greater number of cases are resolved through mediation or some form of alternative dispute resolution. This avoids the costly court process and resolves the issue quickly. For cases that do weave their way through the court system, legal fees and restitution to victims can leave organizations reeling with price tags in the millions. Even without an expensive court trial, most incidents end with the organization paying a settlement to the victim. It can be a very costly price for situations that, in most cases, could have been avoided by well-trained supervisors, well-managed policies and vigilant HR.



## Best Practices—How Can We Minimize Organizational Liability?

Where there are people working together there will be employment issues. HR's best defense is to ensure the organization is prepared. Preparation accomplishes two things:

1. Prevents discrimination, and
2. Creates an affirmative defense in the case that discrimination does occur.

It is absolutely necessary that organizations take reasonable care to prevent and promptly correct discrimination or harassing behavior. The first element of an affirmative defense requires that HR have in place anti-discrimination policies, a complaint procedure, and a process for investigating and managing a complaint when it occurs. The victim has an obligation to report the offending behavior as outlined in the organization's complaint procedure. Therefore, it is imperative that the organization have a safe process where the victim can report inappropriate behavior without fear of retaliation or loss of confidentiality. Thus, when harassment occurs, if an employer has exercised reasonable care (by having a corrective process in place) and the victim unreasonably fails to take advantage of the process, the organization may not be liable for the harassment.

## What Can HR Do?

Be sure the organization has a **clear anti-discrimination and sexual harassment policy** and that employees are trained in that policy. The policy must define harassment; clearly state that it is not tolerated and that all complaints will be investigated; and that wrongdoers will be disciplined or fired. In the event of an occurrence, HR must conduct an investigation and take remedial action.

**Establish a reporting procedure.** In a large organization, the HR department is an appropriate place for reporting. In a smaller organization, employees need more than one reporting route. Suggesting that employees report incidences of discrimination or harassment to their supervisors may not be enough. Remember, in quid pro quo harassment, the most common perpetrator of harassment is the supervisor, so there must be someone else available that employees can trust. It is also suggested that both genders be represented in the reporting route because sometimes women do not like reporting harassment to men and men will often not report harassment to women.

**Train employees.** Most organizations focus their training specifically on sexual harassment. While sexual harassment training is certainly important, it is equally important that employees understand all aspects of discrimination and organizational liability. At least once a year, disseminate the policy in writing and conduct training sessions covering what constitutes discrimination and harassment and reminding employees that they have a right to a workplace free of discrimination. Provide examples of what is and what isn't harassment. Ensure that your employees know the complaint procedure and remind them that reporting is confidential and they should be encouraged to use the reporting procedure when necessary.

Ensure that supervisors and managers receive training separate from employees. Besides general discrimination issues, their sessions should also include information about how to deal with complaints. Hiring managers should receive training on appropriate interviewing and hiring practices, and all individuals involved in conducting performance appraisals should be trained in the process. Expect to update and repeat training as policies and people change.

**Monitor the workplace.** HR must know what's going on. Monitor behavior and talk to staff. Keep lines of communication open. Be sure that HR is an approachable department. Deal with issues immediately. Do not look the other way and hope the problem will cure itself; it won't. Most lawsuits are filed when employee complaints are brushed aside or ignored by management. If a complaint is made, HR must conduct a prompt, thorough and impartial investigation, and undertake swift and appropriate corrective action where necessary.



Ensure that the organization has a well-crafted **employee handbook** that is approved by legal counsel. It should contain an employment-at-will clause that is acknowledged by employee signature. Expect to update it periodically as the organization grows and changes.

Perhaps the most important thing an HR department can do is to work with management to create an organizational **culture of ethics**. Establish an ethics policy. Train employees in ethical decision-making and enforce sanctions against unethical behavior. This must be supported by top management who must be willing to “walk the talk.” If top management is cheating or the organization has a practice of dumping environmental waste out the back door, you cannot expect employees to behave any better. To be successful, ethics and good practices must start at the top.

### Additional Readings

Barber, D. S., J.D. (2007). Train Employees to Avoid Legal Claims. *Lodging Hospitality*, 8, 36.

Moushon, M. A., and Garrett E. A. (2007). Preventing wrongful discharge: Know your facts. *Nursing Management*, 38, 6, 18, 20, 62.

Segal, J. A. (2007). Unlimited Check-Writing Authority for Supervisors? *HR Magazine*, 52, 2, 119-124.

[www.eeoc.gov/charge/overview](http://www.eeoc.gov/charge/overview) EEOC'S Charge Processing Procedures.





## True or False Quiz

Please answer “true” or “false” to the following statements.

1. \_\_\_\_ For an issue to be considered by the EEOC, a discrimination complaint must be filed within 300 days of the incident.
2. \_\_\_\_ If the EEOC investigation determines probable cause, the next step is to attempt conciliation with the employer.
3. \_\_\_\_ Most claims filed through the EEOC are actually litigated by the EEOC.
4. \_\_\_\_ Most claims are resolved through mediation or some other form of alternate dispute resolution, eliminating the cost and time involved in litigation.
5. \_\_\_\_ The first element of an affirmative defense requires that HR have in place anti-discrimination policies; a complaint procedure; and a process to investigate and manage a complaint when it occurs.
6. \_\_\_\_ The victim of harassment can go directly to the EEOC to file a complaint and has no obligation to report the offending behavior through the organization’s complaint process.
7. \_\_\_\_ Most organizations focus training on sexual harassment.
8. \_\_\_\_ The most common perpetrator of quid pro quo harassment is the victim’s co-worker.
9. \_\_\_\_ Organizations should have a well-crafted employee handbook but it is not necessary to include an employment-at-will clause.
10. \_\_\_\_ The EEOC was created by Title VII of the Civil Rights Act.



## True or False Quiz Answers

1. **False** For an issue to be considered by the EEOC, a discrimination complaint must be filed within 300 days of the incident.

*Charges must be filed with the EEOC within 180 days of the incident; however, the time may be extended to 300 days if a state or local agency is involved in the case.*

2. **True** If the EEOC investigation determines probable cause, the next step is to attempt conciliation with the employer.

3. **False** Most claims filed through the EEOC are actually litigated by the EEOC.

*When a charge is filed, the EEOC attempts a no-fault settlement by inviting the accused organization to settle with the claimant with no admission of guilt. Most claims are settled at this stage.*

4. **True** Most claims are resolved through mediation or some other form of alternate dispute resolution, eliminating the cost and time involved in litigation.

*Most claims are resolved through alternative dispute resolution. Only a small number of the original cases filed will be litigated by the EEOC.*

5. **True** The first element of an affirmative defense requires that HR have in place anti-discrimination policies; a complaint procedure; and a process to investigate and manage a complaint when it occurs.

6. **False** The victim of harassment can go directly to the EEOC to file a complaint and has no obligation to report the offending behavior through the organization's complaint process.

*The victim has an obligation to report the offending behavior as outlined in the organization's complaint procedure. If the victim unreasonably fails to take advantage of the process, the organization may not be liable for the harassment.*

7. **True** Most organizations focus training on sexual harassment.

*The most common training in organizations is sexual harassment and safety training.*

8. **False** The most common perpetrator of quid pro quo harassment is the victim's co-worker.

*Quid pro quo harassment occurs when a condition of employment is based on the employee's agreement to inappropriate activity. Consequently, the most common perpetrator of quid pro quo harassment is the victim's supervisor.*

9. **False** Organizations should have a well-crafted employee handbook but it is not necessary to include an employment-at-will clause.

*The employee handbook should contain an employment-at-will clause that is acknowledged by the employee's signature.*

10. **True** The EEOC was created by Title VII of the Civil Rights Act.

*The EEOC was provided for under the Civil Rights Act of 1964.*



## Discussion or Essay Question

Assume you are the vice president of Human Resources for a large organization. Discuss what you would advise to your CEO on methods to create a climate of ethics within the organization.

## In-Class Activities

Because this is the last class in the employment law module, you will want to use activities that review the material and bring closure to the class. The Employment Law Alphabet enables students to have fun while reviewing the material covered in all six classes. The “What Have I learned?” activity goes back to the first class in the module and will generate discussion on what students have learned in the course compared to what they knew coming in.

## Employment Law Alphabet

A _____	Affirmative action
B _____	Bona fide occupational qualification
C _____	COBRA
D _____	Discrimination
E _____	Escalator principle
F _____	Federal law
G _____	Government
H _____	Health care
I _____	Immigration Reform and Control Act
J _____	Job functions
K _____	KSA – Knowledge, skills and abilities
L _____	Layoff
M _____	Mediation
N _____	National origin
O _____	Organization
P _____	Protected classes
Q _____	Qualifying event
R _____	Right to work
S _____	Seniority
T _____	Termination
U _____	Unions
V _____	Vicarious liability
W _____	WARN Act
X _____	No discrimination based on sex
Y _____	Yellow-dog contract
Z _____	Zero-tolerance policy



## What Have You Learned?

### True or False Quiz

Please answer “true” or “false” to the following statements.

\_\_\_\_ 1. Title VII of the Civil Rights Act protects employees from discrimination based on their race, color, religion, national origin and sexual orientation.

**Correct Answer: FALSE** – Title VII of the Civil Rights Act protects employees from discrimination based on race, color, religion, sex and national origin. It does not provide discrimination protection based on sexual orientation.

\_\_\_\_ 2. The Age Discrimination in Employment Act protects employees aged 40 years old and older from discrimination.

**Correct Answer: TRUE** – The ADEA protects employees 40 years and older.

\_\_\_\_ 3. The Family and Medical Leave Act provides for 12 weeks of paid leave in any 12-month period for an employee to take care of an immediate family member with a serious health condition.

**Correct Answer: FALSE** – The 12 weeks of leave provided for by FMLA is unpaid leave.

\_\_\_\_ 4. Reasonable accommodation under the Americans with Disabilities Act requires modifying a job or the job environment to enable a qualified individual with a disability to perform the essential functions of the job.

**Correct Answer: TRUE** – The ADA does not require an employer to provide accommodation if the accommodation presents a “business hardship” nor does it require accommodation for an employee who is not qualified to do the essential functions of the job. If the employee is qualified and the accommodation needed is reasonable, the employer is required to provide what is necessary to accommodate the employee.

\_\_\_\_ 5. Title VII of the Civil Rights Act applies to all businesses regardless of size.

**Correct Answer: FALSE** – Title VII of the Civil Rights Act applies to employers with 15 or more employees.

\_\_\_\_ 6. The Equal Employment Opportunity Commission is the federal agency that investigates and enforces employment discrimination law.

**Correct Answer: TRUE** – The EEOC is the enforcement agency for discrimination law.

\_\_\_\_ 7. Because of the employment-at-will doctrine, an employer can terminate an employee for cause or for no cause; there are no exceptions.

**Correct Answer: FALSE** – There are a number of exceptions to the employment-at-will doctrine primarily in the areas of public policy, contract law and tort law.

\_\_\_\_ 8. Adverse impact may occur in the hiring process when a seemingly non-discriminatory employment policy has a statistically detrimental affect on minority applicants.

**Correct Answer: TRUE** – Employers must monitor employment policies to ensure that policies that appear neutral do not unintentionally create a negative impact for minority populations.



\_\_\_\_\_ 9. Affirmative action requires the hiring of minority workers, regardless of qualifications, to meet pre-set statistical quotas.

**Correct Answer: FALSE** – While many people mistakenly believe affirmation action requires hiring quotas, the Supreme Court has struck down the use of quotas as a discriminatory hiring practice. Regarding qualifications, affirmative action does not require the hiring of individuals whose qualifications do not meet minimum standards of performance.

\_\_\_\_\_ 10. In most jobs, the employer can require retirement at age 65.

**Correct Answer: FALSE** – With minimum exceptions, the ADA protects employees from compulsory retirement at any age, providing the employee can continue to meet the minimum required performance levels for the job.