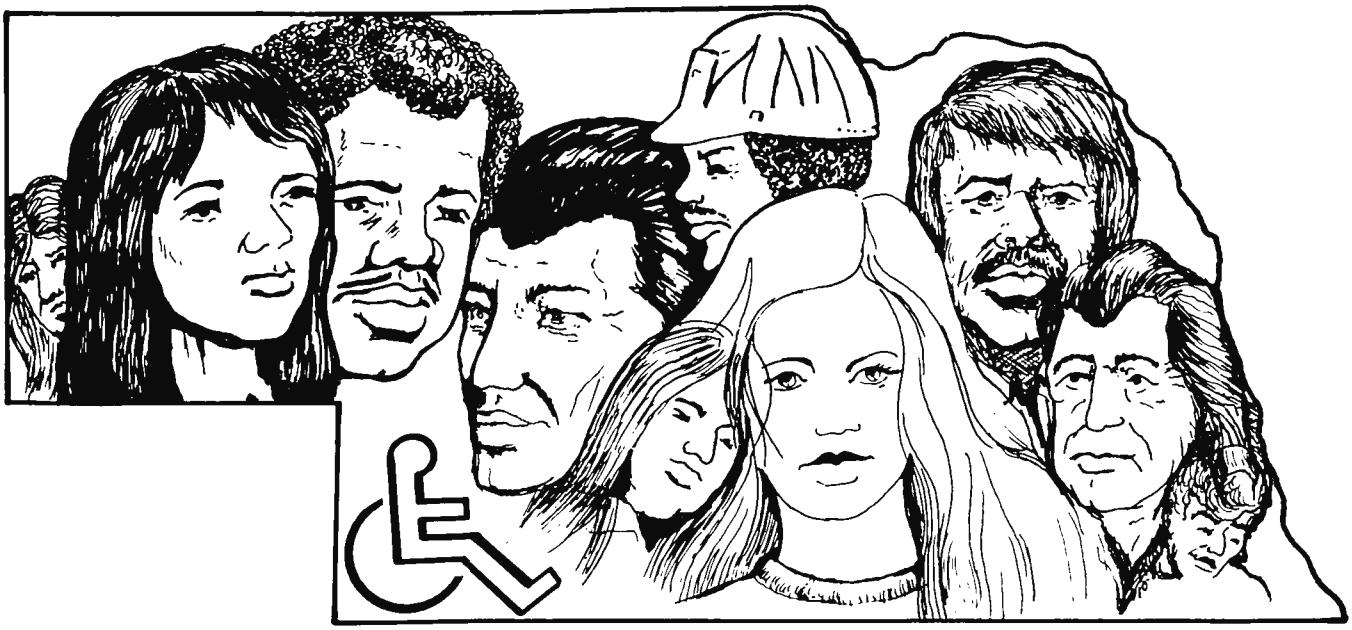
EQUAL EMPLOYMENT



and you

NEBRASKA DEPARTMENT OF LABOR
DIVISION OF EMPLOYMENT

STATE OF NEBRASKA
EQUAL OPPORTUNITY COMMISSION

PREFACE

This guide has been prepared as a quick reference to many of the issues and questions which arise concerning Equal Employment Opportunity and other policies relating to everyday questions. The guide is not intended to be a replacement for the various acts and executive orders which cover this subject matter in detail.

Additional questions or comments regarding the EEO Laws, executive orders and other acts, should be directed to the appropriate agency in your area.

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LOCAL, STATE, AND FEDERAL ANTIDISCRIMINATION LAWS

The first step in complying with the employment discrimination laws is to determine which ones apply to organization. There are parallel antidiscrimination laws on the Federal, State, and local levels. Depending on your location, you could be covered by the antidiscrimination laws of up to three jurisdictions. On the Federal level, the most important statutes and orders are: Title VII of the 1964 Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, the Reconstruction Era Civil Rights Acts, the Rehabilitation Act, the Vietnam Era Veteran's Readjustment Act, and Executive Orders 11246 and 11375.

The State of Nebraska has three statutes that deal with employment discrimination. They are: the Fair Employment Practice Act, which is modeled on Title VII; the Act Prohibiting Unjust Discrimination in Employment Because of Age, modeled on the Federal Age Discrimination in Employment Act, and the Equal Pay Act, modeled on the identically titled Federal Law. Each of these laws is administered by the Nebraska Equal Opportunity Commission. The cities of Omaha, Lincoln and Grand Island also have antidiscrimination ordinances, but only Omaha and Lincoln have agencies with enforcement authority.

The specific jurisdictional elements, coverages, and administrative procedures of Federal, State, and local legislation differ in detail. However, the basic concepts of discrimination are uniform. For that reason, the discussion that follows, although couched in terms of Title VII - the most important Federal statute in terms of its impact and coverage - is generally appropriate to enforcement efforts in State and local jurisdictions as well.

The most important Federal enactment is Title VII of the Civil Rights Act. Here's a brief rundown on it.

1 TITLE VII

The Civil Rights Act covers employers of 15 or more workers if: (1) they are engaged in an industry affecting commerce and (2) they have at least 15 employees for each working day in each of at least 20 calendar weeks in the current or preceding year. (Most employers are covered by the Civil Rights Act.) Unions and employment agencies dealing with these companies are also covered by the Act.

NOT JUST PRIVATE EMPLOYERS
Title VII covers state and local governments and private and public educational institutions. (The 1972 amendments to the Civil Rights Act make special provision for federal employees.) Exempted: bona fide tax-exempt nonprofit membership clubs (not labor unions); religious corporations, associations, educational institutions, or societies (but only with respect to the religion of employees hired for certain jobs); employers of aliens outside the U.S.; Indian tribes and businesses on or near Indian reservations (Indians are allowed preferential treatment).

2 WHAT DOES TITLE VII PROHIBIT?

Employers covered by the Civil Rights Act can't, because of race, color, religion, sex, or national origin (1) refuse to hire an individual; (2) discharge or otherwise discriminate against him or her once employed; or (3) limit, segregate, or classify employees or applicants in any way that would deprive them of employment or adversely affect their status as employees. The Equal Employment Opportunity Commission is the federal agency which ensures compliance with these rules. The ban on discrimination applies to all elements of the employer-employee relationship: hiring, firing, wages, terms, conditions or priviledges of employment. Other prohibitions: discrimination in apprenticeship and other training programs; discrimination in employment advertising; discriminating against an individual because the person made a charge, testifying or participating in an investigation, etc. These considerations also apply to the NFEPA (Nebraska Fair Employment Practice Act). However, the NFEPA also prohibits discrimination based on marital status and disability.

3 WHAT IS DISCRIMINATION?

To prove discrimination, a complainant doesn't have to show an employer's actions were motivated by racial, religious, sex, or ethnic prejudice. For one thing, it would be next to impossible to prove what was going on in someone's mind; and for another, it's the effect of the employer's actions, not his subjective reason for them that counts.

In the leading case of McDonnel/Douglas Corp. v. Green (1973), the U.S. Supreme Court held a black ex-employee who was denied reemployment could make a case of discrimination by showing that he was a member of a protected group (blacks), that he had applied for a job in which he was qualified (he'd held it before), that he had been turned down, and that the job remained open and the company was still looking for applicants to fill it.

Once the claimant shows this, it's up to the company to prove that the refusal to hire was made for good business reasons, and not because of discrimination. If the company can prove this (as it did in the GREEN case), the claimant then gets another opportunity to prove that the company's action was really taken for discriminatory reasons, and that the alleged business reasons weren't the real reasons.

The GREEN case involved a failure to hire, but the principles of the case apply to any employment action. In general terms, a claimant must show he or she was subjected to some adverse employment action (failure to hire or promote, discharge, layoff, etc.) and that others of similar qualifications and in similar circumstances, but of a different race, color, religion, sex, or national origin, were not subjected to the same adverse action. The burden of proof then passes to the employer who must show some legitimate, reasonable, nondiscriminatory basis for the action.

4 THE GRIGGS RULE--YOU CAN DISCRIMINATE WITHOUT MEANING TO

Perhaps the most important case ever decided under Title VII was GRIGGS v. DUKE POWER CO., in which the Supreme Court held that "the Act proscribes not only overt discrimination but also practices fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negros cannot be shown to be related to job performance, the practice is prohibited."

The GRIGGS CASE involved the legality of a company's employment tests. Statistical evidence showed that significantly more blacks than whites failed the tests and were excluded from employment. Since the employer couldn't prove the use of the tests was a "business necessity", the Supreme Court held the use of the tests was an unlawful employment practice, even though everyone agreed that the employer had no intention of discriminating against anyone by using the tests.

The principle, of course, applies not only to tests, but to any employment practice, and not only to blacks, but to any group defined by race, color, religion, sex, or national origin. Any practice that has an adverse impact on a disproportionate percentage of any group is unlawful, unless justified by business <u>necessity</u>.

5 DISCRIMINATION IN HIRING AND PROMOTION

An employer can't fail or refuse to hire or promote any person because of race, color, religion, sex, or national origin. On the other hand, he doesn't have to hire or promote anyone who isn't qualified. Even though an employer's policies are OK, it's a violation to carry them out in a discriminatory manner. If an employer gets his workers from a hiring hall or employment agency without knowing of any discrimination, he isn't violating the law. But, EEOC would probably look with suspicion on this kind of defense.

6 STEREOTYPES

An employer can't base his hiring policies on stereotypes or general opinions about groups. For example, he can't restrict the hiring or promotion of women on the grounds that women in general are better or worse at certain occupations. Only the abilities of the <u>individual</u> applicant can be considered.

7 PERPETUATING PAST DISCRIMINATION

If there's statistical imbalance in the work force due to past discrimination, any practice that tends to perpetuate the pattern is unlawful: a common example would be word-of-mouth recruiting through present (mostly white) employees, or otherwise preferring the families and friends of present employees.

8 PROMOTION

Similarly, in a case where all or nearly all supervisors were white, it

was held unlawful to require the recommendation of an employee's supervisor for promotion. The system, while not intended to be discriminatory, resulted in a disproportionately low percentage of promotions for blacks and thus perpetuated the discrimination of the past.

9 OBJECTIVE AND SUBJECTIVE STANDARDS

In a number of cases, courts have found violations of the law because employers had no objective standards (job analyses, performance ratings, etc.) by which to judge employees for promotion or other employment actions. If everything is left to the subjective judgement of supervisors or others making employment decisions, an assumption of bias, conscious or unconscious, could arise if any minority group is receiving a disproportionately low share of raises, promotions, etc. Of course, if no adverse impact can be shown on any group, then there isn't any discrimination; but the lack of objective standards makes it difficult to counter charges by dissatisfied applicants or employees.

One federal court of appeals has held that subjective criteria were more appropriate for small organizations where management was personally familiar with each employee's work. The use of tests, detailed analyses, etc., by a small concern would be impractical and, perhaps, foolish, the court said; but the company still had to show it hadn't acted from bias--"any such system must be carefully scrutinized for abuse."

10 EDUCATIONAL REQUIREMENTS

The GRIGGS case held that educational requirements (e.g., high school diploma) are subject to the same rule as tests; if they operate to exclude any minority group, they're invalid unless proved to be job-related.

This has been EEOC's position. The Commission has held it unlawful to require a college degree for sales representatives (especially since the sales supervisor didn't have one); to introduce a high school diploma requirement for operator trainees when no such requirement had been found necessary before; to require a high school diploma for acceptance in an apprenticeship program in an area where 56.6% of whites finished high school, compared to 37.6% of nonwhites; or to require a high school diploma for a grocery clerk job.

On the other hand, a federal court of appeals upheld the imposition of a college degree requirement for a lab technician's job at a hospital, even though it led to the firing of a black employee. The court found the statistical evidence wasn't enough to prove discrimination against blacks in general. In addition, the court mentioned that, in setting the requirements for hospital jobs, protection of the public was an important concern.

11 BONA FIDE OCCUPATIONAL QUALIFICATIONS (BFOQ)

The law specifically provides that it's lawful to discriminate on the basis of religion, sex, or national origin, where any of these factors is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise..." However, race or color can NEVER be a bona fide occupational qualication.

12 RELIGION AS BFOQ

Besides the exemptions given religious organizations and educational organizations directed toward the propagation of a particular religion, religion could be a bona fide occupational qualification, when membership in a

certain religion is reasonably necessary to the performance of a job. For example, a company selling religious articles or books might be allowed to insist on hiring sales people of the particular religion involved. But the company couldn't refuse to hire a janitor because of his religion, as it wouldn't be "reasonably necessary" to the operation of the business. (Note: This is a hypothetical example only. No actual cases have arisen. It would be very unusual for religion to be a BFOQ for any job outside a religious organization.)

13 SEX AS BFOQ

The problem of sex as a bonafide occupational qualification has caused more difficulty than any of the other provisions of this section of the law. Questions have arisen because of the physical differences between the sexes, because of various state laws limiting the jobs women are allowed to do and regulating their wages and hours (now invalidated, for the most part), and probably in large part because of the traditional separation of "man's work and woman's work." On several occasions, EEOC has said it will take a very narrow view of this exemption. According to its guidelines, the following factors will not be considered as establishing a BFOQ because of sex:

--Assumptions about employment characteristics of women in general, e.g., they have a higher turnover rate.

--Stereotyped opinions about the sexes, e.g., women are better at assembling intricate equipment but not as good at aggressive selling.

--Preference of employer, employees, clients, or customers.

Women applicants and employees must be judged on the basis of their individual abilities. You can't refuse to hire or promote a woman just because most women or women in general can't do the job. It's unlawful, for instance, to classify jobs as "light" and "heavy" and to exclude women from the heavy jobs; the employer has to decide whether an applicant or employee--male or female--is individually capable of doing the work.

14 PRE-EMPLOYMENT QUESTIONING

EEOC hasn't issued any list of "forbidden questions", since there's no express prohibition of any questioning in the Act. However, its guideline on pre-employment inquiries concerning race, color, religion, or national origin state that: "the Commission's responsibility to promote equal opportunity compels it to regard such inquiries with extreme disfavor... An applicant's race, religion and the like are totally irrelevent to his or her ability or qualifications as a prospective employee, and no useful purpose is served by eliciting such information."

15 PRE-EMPLOYMENT INQUIRIES AS TO SEX

While application forms can ask "Male--Female--" or "Mr., Mrs., Miss", if the inquiry isn't made for discriminatory purposes, EEOC guidelines state: "Any pre-employment inquiry... which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based on a bona fide occupational qualification." For instance, it was held unlawful to ask women if they had "any child care problems," when no such information was requested of men.

16 POST-EMPLOYMENT QUESTIONING

Even after you've hired someone, EEOC will look askance at any questioning

of the employee about race, color, religion, sex, or national origin. Nevertheless, the Commission recognizes that it may be necessary to question employees about race, color, religion, or national origin to satisfy the reporting requirements or "to enable an employer to evaluate his personnel program." A "blind" system of gathering this information is generally preferred.

17 HELP WANTED ADS

Except where religion, sex and national origin is a bona fide occupational qualification, it's unlawful to place a help-wanted ad indicating a preference or specification, or discriminating on any of the proscribed grounds. Since race can never be a bona fide occupational qualification, help wanted ads can never indicate a preference on this ground.

18 "MALE" AND "FEMALE" HELP-WANTED COLUMNS

The EEOC Guidelines say placing ads in separate "Male" and "Female" columns is unlawful, unless sex is a bona fide occupational qualification for the position. Courts have ruled that newspapers aren't employment agencies under the Act, even though they may publish classified ads for help. They can continue to print "Help-Wanted Male" and "Help-Wanted Female" columns. If a newspaper does publish separate columns, employers will have to advertise in both sections or else in the "Help Wanted Male or Female" column.

19 ARREST RECORDS

Statistics show that a much higher percentage of blacks than whites are arrested; this is especially true of "suspicion arrests." EEOC holds it's unlawful to refuse to hire an applicant because of an arrest record. A federal court of appeals (9th circuit) has agreed. (A similar result was reached by a court of appeals (8th circuit) in a case involving public employment, even before public employees were covered by Title VII.)

EEOC has ruled that even asking applicants about arrest records would be a violation, unless the employer could show some justifiable reason for the question.

20 CONVICTIONS

If the applicant or employee has a record of conviction for crime, the problem gets more complicated and the rules less certain. EEOC held a black applicant couldn't be denied a job as a mechanic because of a conviction for gambling. Gambling, said the Commission, wasn't an offense indicating bad moral character and had nothing to do with being a mechanic. And statistics show a much higher proportion of blacks than whites arrested for gambling.

On the other hand, a court said it was OK for a hotel to fire a black bellhop when it found he'd been convicted of theft and receiving stolen goods. The bellhop had keys to guests' rooms and there'd been thefts at the hotel in the past. But in that case the bellhop had been offered a different job and turned it down; the court didn't say whether the employer could have just fired him. So the exact limits on refusal to hire because of an applicant's criminal record aren't settled yet. What crimes will or will not justify refusal to hire? How much difference will the nature of the job make? How much will the number of convictions matter? Or how far in the past can they have occurred? EEOC and the courts will have to pass on these questions as cases arise.

21 RELIGION

The ban on religious discrimination has presented special problems--usually connected with religious beliefs and observances at variance with the customs of the majority. The most common example has been the observance of the Sabbath and other religious holidays on days that are workdays for the majority--e.g., refusal to work Saturdays.

The 1972 amendments to the law, accepting the position stated by EEOC in its guidelines, state expressly that "the term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accomodate an employee's or prospective employee's religious observance or practice without due hardship on the conduct of the employer's business." This means the burden of proof is on the employer. It's up to the employer to show that accommodating employees' religious beliefs would subject the business to undue hardship.

22 NO SPOUSE RULES

It's OK to have a rule against hiring the spouse (or other relative) of any employee, so long as the rule is applied without discrimination as to sex. In other words, you can't hire the husband of a female employee but refuse to hire the wife of a male employee, or vise versa. Thus a company rule that the wife resign when two employees married was unlawful, but when the company changed the rule to allow the couple to decide who would resign, EEOC said it was OK. Two federal courts of appeals have OK'd rules against relatives working in the same department. Under the rule, if newlyweds in a department refuse to split up (by transfer, leave of absence, or resignation), the company can fire the employee with less seniority. A rule against hiring anyone whose spouse worked for a competitor was also OK, if it was applied equally to men and women. One federal court of appeals said a no-spouse rule was unlawful even when statistics showed the rule kept out more women than men (since far more men than women had been employed at the company plants.) The court accepted the company's argument that the rule promoted employee morale and efficiency and met the test of job-relatedness and business necessity. (The U.S. Supreme Court declined to review the decision.)

23 DISCRIMINATORY EFFECT MUST BE PROVEN

The complaint must show, by statistical evidence or otherwise, that the employment practice in question has a discriminatory effect on protected groups. If there's no evidence of any discrimination, the employer doesn't have to justify the practice. Examples: Tests for hiring or promotion that had no discriminatory effects did not have to be validated; an applicant who had the lowest high school grades (and highest absenteeism) of all applicants, black or white, could be refused employment, as there was no showing the use of high school grades led to any discrimination.

24 TERMS AND CONDITIONS OF EMPLOYMENT

The ban on discrimination extends to every facet of the employer-employee relationship: not only wages, promotions, working conditions, layoff, etc. but any fringe benefits arising from the employment relationship. Therefore, discrimination on proscribed grounds is forbidden in any area. Here, for instance, are some decisions

on fringe benefits held to come under the provisions of Title VII.

--Under a system set up by the will of a company's founder, employees elected a Board of Operatives to advise management on employee welfare matters; only white employees were eligible to serve. A federal court held this was unlawful race discrimination.

--A company rented houses to its employees. The housing was racially segregated (as were community facilities, churches, swimming pools, etc.), and the poorest houses were rented to blacks. EEOC ruled the company had violated Title VII and had further violated the Act by selling the houses to the employees for a nominal price to perpetuate the existing system.

--Maintaining segregated paylines for black and white employees, ruled EEOC, was unlawful, as were segregated restroom and locker room facilities.

--Another employer was held to have violated the Act by maintaining segregated locker room facilities, even though employees were free to use either locker room and the segregation was due to custom and employee choice rather than to any action by the employer.

25 EMPLOYMENT TESTING

The issue of employment testing (ability tests, aptitude tests, personality tests, etc.) has received a great deal of attention since the Civil Rights Act was passed. Civil rights groups have charged that most tests are discriminatory and have built-in cultural bias against blacks and other minority groups, especially since these groups, because of discrimination past and present, have been deprived of equal educational advantages. Also, charge the critics, the tests often bear little or no relationship to the jobs they're used for, and there's little or no proof that those who do best on the tests will be best at the job, or vice versa.

EEOC has agreed and has held tests that tend to exclude a disproportionate percentage of any protected group shouldn't be used unless shown to be job-related--either they're direct tests of the job ability, or they've been validated in accordance with EEOC standards.

The guidelines say that any selection procedure that has adverse impact of covered groups must be validated in accordance with the guidelines. But you're given two other options: use of alternative selection procedures, or modification of selection procedures. The alternative procedures should eliminate the adverse impact in the total selection process, should be lawful, and should be as job related as possible.

Modification of selection procedures. There are circumstances when it's not possible for you to use the validation techniques in the guidelines. When this happens, you should use selection procedures which are as job-related as possible and which will minimize or eliminate adverse impact. Here are your responsibilities under the guidelines:

--If you use an unstandardized, informal, or unscored selection procedure which has an adverse impact, you should: (1) try to eliminate the adverse impact; or (2) if feasable, you should modify the procedure so that it's a formal, scored, or qualified measure and then validate it; or (3) you should justify the continued use of the procedure in accordance with the law.

--If you use a standardized, formal, or scored selection procedure and validation isn't appropriate or feasible, you should modify it to

eliminate the adverse impact or justify its continued use.

26 WHAT IS ADVERSE IMPACT, AND HOW IS IT MEASURED?

Adverse impact is a substantially different rate of selection in hiring, promotion or other employment decision which works to the disadvantage of members of a racial, sex or ethnic group. Rate of selection for each group is determined by dividing the number of applicants selected from that group and by comparing the results with the result derived in the same way for the group with the highest selection rate. For example, a user may have had over a six month period 120 applicants (80 male and 40 female) of whom 60 were hired (48 male and 12 female). The selection rate for male applicants was thus 48/80=60%; while that for female applicants was 12/40=30%. In this example, the selection process adversely affected the employment opportunities of females because their selection rate (30%) was only one half that of males (60%). The EEOC uses what is known as the 4/5 or 80% rule.

27 WHAT IS A SUBSTANTIALLY DIFFERENT RATE OF SELECTION?

The guidelines adopt a 4/5 (80%) rule of thumb for guidance and operational use. If the selection rate for a group is within 4/5 or 80% of the rate for the group with the highest rate, the enforcement agency will generally not consider adverse impact to exist. In the prior example, the selection rate for females was 30%, while that for males was 60%; so that the female selection rate was 1/2 or 50% of the highest group and there was adverse impact. If, on the other hand, there were 120 applicants, of whom 80 were male and 40 female, and the user had selected 42 males and 18 females, the selection rate for females would be 18/40 or 45%, while that for males would be 42/80 or 52.5%. Because the selection rate for females as compared to that for males is 45/52.5 or 84.4% (i.e., more than 80% (or 4/5), the difference in impact would not be regarded as substantial in the absence of additional information.

With respect to adverse impact, the guidelines expressly state that differences in selection rates of less than 20% may still amount to adverse impact where the differences are significant in both statistical and practical terms. In the absence of differences which are large enough to meet the 4/5 rule of thumb or a test of statistical significance, there is no reason to assume that the differences are reliable, or that they are based upon anything other than chance.

Two examples will be illustrative. If, for the sake of illustration, we assume that nationwide statistics show that use of an arrest record would disqualify 10% of all Spanish-surnamed persons but only 4% of all Anglo persons, the "selection rate" for that selection procedure is 90% for Spanish-surnamed Americans and 96% for Anglos. Therefore the 4/5 rule of thumb would not indicate the presence of adverse impact (90% is approximately 94% of 96%). But in this example, the sample is large enough to be statistically significant, and the difference (Spanish-surnamed Americans are 2½ times as likely to be disqualified as Anglos) is large enough to be practically significant. Thus the enforcement agencies would consider use of arrest record alone as having an adverse impact.

Similarly, a difference of more than 20% in rates may not provide a basis for finding adverse impact if the numbers are very small. For example, if the employer selected

three men and one woman from an applicant pool of 20 men and 10 women, the 4/5 rule would indicate adverse impact (selection rate for women is 10%; for men 15%; 10/15 or 66% is less than 80%), yet the numbers are so small that a difference in one person hired would show an adverse impact the other way. In these circumstances, the enforcement agency would not infer adverse impact in the absence of additional information.

28 HEIGHT-WEIGHT REQUIREMENTS

Under the Griggs rule, any hiring policy or rule that excludes one group more than another is unlawful unless justified by business necessity. The most common example: Height and weight requirements. EEOC has consistently held that these requirements are discriminatory; and in the case of Dothard v. Robinson, the U.S. Supreme Court agreed.

However, height and weight requirements are permissible if they're nondiscriminatory (Example: A requirement that employees, male and female, maintain a reasonable weight in relation to their height, sex, bone structure, and age; an airline's requirement that flight attendants, male and female, keep below a maximum weight assigned on an individual basis) or if they're justified by business necessity (Example: An airline's height requirement for pilots, where the pilot's seat in the company's planes was so placed that persons below a certain height would have their vision obstructed).

29 THE WEBER CASE

Before 1974, Kaiser Aluminum Corp. hired only experienced persons as craft workers at its Gramercy, La. plant. As a result fewer than 2% of its craft workers were black. (But blacks made up about 39% of the local work force). To correct this situation, Kaiser and the Steelworkers union agreed to set up a training program in which at least half of the trainees assigned would be minority group members. Separate seniority lists were made for blacks and whites. Openings were filled by picking the most senior from each list. So under this system, some black employees were admitted as trainees even though they had less seniority than some white employees who were turned down. Brian Weber, one of the white men who applied for but didn't get admitted to the program challenged its legality. He claimed it discriminated on the basis of race. A federal district court in Louisiana and the Court of Appeals for the Fifth Circuit agreed.

Affirmative Action permitted. Overturning the lower courts' rulings, the Supreme Court said the law doesn't "condemn all private, voluntary, race-conscious affirmative action plans." In passing Title VII, continued the Court, Congress wanted to improve the economic plight of minorities without interfering with private business' freedom of action. When the law says that employers aren't required to make preferences, it means they won't be forced to. But, said the Court, the law doesn't say employers aren't permitted to make voluntary affirmative action efforts to correct racial imbalances. "The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action."

How Bakke differed. Why is the Kaiser plan lawful, while the University of California's system for admitting minority students to a medical school was ruled unlawful in the Bakke case? Unlike Bakke, the present case involves neither state action nor possible violations of the Equal Protection Clause of the U.S. Constitution. And while the Court ordered Bakke admitted to medical school, it didn't

order Kaiser to admit Weber to the training program.

Why the plan was OK. While the Court refused to draw lines between lawful and unlawful, it said Kaiser's plan was OK for a number of reasons. The program's purposes mirrored those of Title VII--to break down past patterns of race bias and to open job opportunities that had been off limits to blacks. Also, it didn't "unnecessarily trammel the interest of white employees." The plan didn't require the firing of white workers nor their replacement with new black hires. Nor did it create an absolute bar to the advancement of whites, since half of those trained will be white. Also, the plan was temporary. It wasn't intended to maintain racial balance, but simply to eliminate a "manifest racial imbalance."

30 THE BAKKE CASE

On June 28, 1978, the U.S. Supreme Court handed down its long-awaited decision in the case of Regents of the University of California vs. Bakke. The Bakke case challenged the validity of a quota system for the admission of minority students to a state medical school. The Supreme Court's decision was expected to settle the issue of quotas and set up rules on whether or not they are valid.

In Bakke, a state medical school at Davis, California, reserved 16 places in its entering class of 100 for minority students. Bakke, a white applicant who was turned down, claims that he had higher grades and test scores than the 16 minority students who were accepted under the special quota and that, except for the quota, he would have been accepted at the school. He filed suit, alleging the quota system violated both Title VI of the Civil Rights Act and his constitutional right to the equal protection of the laws (the medical school was a state school). The federal court of appeals for the 9th circuit ruled: (1) The quota system was unlawful, so Bakke had to be admitted and (2) race could not be considered in deciding which applicants to admit to the school. Both decisions were appealed to the U.S. Supreme Court.

The Supreme Court split three ways. Justice Brennan, writing for one group of four Justices, said that the school's quota system was not unlawful (so Bakke shouldn't be admitted) and that race could be considered in an admissions policy to remedy society's discrimination in the past. Justice Stevens wrote an opinion for another group of four Justices, who said that the admissions system violated Title VI so Bakke should be admitted. These four Justices believed this decision would dispose of the case and said the Court should not decide the constitutional question or the question whether race could ever be considered. Justice Powell cast the swing vote on both issues. He agreed with the Stevens group that the medical school's absolute quota system was unlawful and that Bakke must be admitted; but he agreed with the Brennan group that race could sometimes be considered a factor in admissions policy. However, he differed with Brennan on just when and why.

Since Powell's vote made him the deciding Justice on both issues his opinion became the opinion of the Court. It must be remembered, however, that it is the opinion of only one Justice. This means that any change in the personnel of the Court, or in the fact pattern of later cases that may arise, could lead to a different result.

The Court's opinion, written by Justice Powell, held that the school's policy of reserving 16 places for minorities only was unlawful, because it absolutely

excluded all others and made the decision to admit or not to admit depend solely on the question of race. However, this would not invalidate all consideration of race as a factor. As an example of proper consideration of race, Justice Powell pointed approvingly to the admissions system at Harvard University. Harvard, said Powell, had reasonably decided that diversity in the student body was desirable in the educational process. Accordingly, the University tried to recruit students from all races. In addition, it tried to recruit students from different geographical locations, income groups, and cultural backgrounds, etc. Race, therefore, was included as one factor of many to be considered in reaching a desirable educational goal. No one, however, was accepted or excluded solely on the basis of race.

In striking down the California system, Justice Powell made an important point; he noted there was no evidence the school had ever been guilty of race discrimination in its admissions policy. Disagreeing with Justice Brennan's position, he held that a preferential system of quotas or percentages could not be adopted to remedy past discrimination by society in general. Cases, especially in employment discrimination, where quotas or percentage systems have been approved have always involved discrimination by the particular company or industry upon which the quota was imposed.

31 PREGNANCY AND MATERNITY/SEX DISCRIMINATION

Title VII bans any policy or practice that excludes from employment any applicants or employees because of pregnancy. And according to EEOC, marital status of the applicant or employee doesn't matter. Refusal to hire a woman with illegitimate children is unlawful even if the same policy applies to men; the Commission noted that it's easy for a man to conceal the fact that he has an illegitimate child, but not so easy for a woman.

Under Title VII, a woman can't be fired for becoming pregnant. She must be granted a leave of absence on the same terms and with the same terms and with the same rights to commencement and duration of leave, availability of extensions, seniority, reinstatement, etc., as any other employee on leave due to disability.

EEOC's guidelines make no distinction between married and unmarried women; the rules apply equally. A federal court of appeals (6th circuit) has agreed. It ruled that firing a woman for becoming pregnant while unmarried was a violation of the law. EEOC has also ruled that an employer's policy of granting maternity leaves to married women only was held unlawful. The commission rejected the employer's argument that the policy was "rooted in morality, not sex discrimination."

Termination of an employee for pregnancy, because an employer grants insufficient or no leave for disability is unlawful unless justified by business necessity, as the leave policy has a disproportionate effect on one sex.

An X-ray technician who couldn't work near radiation during her pregnancy should have been given an alternative to forced resignation or unpaid leave, according to EEOC; layoff (with right to recall) or transfer were suggested.

EEOC ruled a school board that granted leave to female teachers to care for small children had to apply the same policy to male teachers.

In Nashville Gas Co. v. Satty, the U.S. Supreme Court held it was unlawful

for an employer to require pregnant employees to take leave of absence and forfeit all previously accumulated seniority, since other employees on leave of absence didn't lose past seniority, and loss of seniority by pregnant employees was clearly an adverse employment action that affected women more than men. The Court approved EEOC's guidelines on this point.

The U.S. Supreme Court held, in the case of Cleveland Bd. of Ed. v. LaFleur, that school boards' rules requiring teachers to take leave at the end of the fourth or fifth month of pregnancy were arbitrary and capricious and amounted to a denial of the teachers' constitutional rights, since there was no rational basis for assuming the teachers couldn't continue to perform their duties satisfactorily. On the same grounds, the Court voided a rule denying the teachers the right to return to work until the next regular school semester following the date a teacher's child is three months old. The Court indicated it might have upheld a rule requiring mandatory leave "at some firm date during the last few weeks of pregnancy," but didn't spell it out.

It's unlawful to provide facilities or working conditions to one sex and not to the other (e.g., seats, separate restrooms, special meal and rest periods). An employer can't refuse to hire women (or men) in order to avoid the cost of complying with the law. Instead, he has to provide the same facilities or benefits for men (or women). If, for some reason of business necessity, he can't provide the same benefits to both sexes, then it's unlawful to provide them to either sex, according to EEOC guidelines.

32 SEXUAL HARASSMENT

Sexual harassment, like harassment based on race, color, religion and national origin, has long been recognized as unlawful. Although it is quite easy to understand how it is unlawful for an employee or supervisor to verbally or physically harass a female employee because of his bias against women in nontraditional employment (or employment in general), when such harassment is purely hostile, it is less easy to define sexual harassment that is less overtly hostile and more enmeshed in matters of sexuality itself.

This overt type of harassment is defined as conduct which has the purpose or effect of substantially interferring with an employee's work performance or creating an intimidating, hostile, or offensive work environment. This definition most clearly corresponds to traditional ideas of the meaning of harassment, although it must be understood that such harassing conduct can be quite offensive even when subtle and well concealed. Sexual harassment, however, is more often directly related to matters of sexuality, and it is this troublesome and pervasive form of harassment that is more often of concern to employees and employers. Such sexuality-related harassment can be defined in two ways. First, it occurs when submission to sexual conduct or advances is an explicit or implicit term or condition of employment. Second, it occurs when submission to or rejection of the sexual conduct or advances is used as the basis for employment decisions concerning the employee who submitted to or rejected the conduct or advances.

It is a general rule of law that the employer is responsible for the actions of its agents. This is applicable in the area of sexual harassment where the employer is strictly liable for sexual harassment by its management/ supervisory personnel. What this means is that it need not be proven that any person in authority knew

of the sexually harassing conduct of an agent or supervisor for the employer to be held liable for that conduct. When the sexual harassment comes from a regular, non-supervisory employee, the law holds that it must be shown that the employer knew or should have known of the sexually harassing conduct for liability to ensue. Acts of a more than limited or isolated nature, however, may satisfy a court that the employer should have known of the conduct and thus produce liability on the part of the employer.

It is not easy to enunciate general rules about sexual harassment law. Determining, for example, where a purely personal relationship ends and sexual harassment begins requires an examination of all the circumstances, including the nature of the sexual advances and the context in which the incidents occurred. This can only be done on a case by case basis. The best advice for employers is to develop strong preventive policies and to take prompt and effective corrective action when required.

33 AGE DISCRIMINATION IN EMPLOYMENT ACT

The Federal Age Discrimination in Employment Act (ADEA) covers employers with 20 employees, unions with 25 members or a hiring hall, employment agencies servicing covered employers and state and local government agencies. Federal government agencies are also subject to the Act.

What's Forbidden. The Act bans discrimination because of age against any persons at least 40 years of age but less than 70. In general, practices that violate the Civil Rights Act if based on race, color, religion, sex, or national origin are also violations of the ADEA if based on age--including advertising using terms such as "young," "recent graduate," etc. Since 1978 the ADEA has been administered by the EEOC.

34 EQUAL PAY ACT

The Federal Equal Pay Act is actually part of the Fair Labor Standards Act--it's an addition to the section on minimum wages. Therefore, FLSA provisions on coverage, administration, and enforcement apply also to the Equal Pay Act. With the exception of executives, administrators, professionals, and outside salespeople, employees exempt from the minimum wage provisions of FLSA are exempt from the Equal Pay Act. Employees exempt only from the overtime provisions of FLSA are covered by the Equal Pay Act.

Basically, the Equal Pay Act provides that men and women must get equal pay for equal work--meaning work of equal skill, effort, and responsibility. Equal doesn't mean "identical"; if the jobs are substantially the same, pay must be equal. Job titles or classifications don't matter; it's the job content that counts.

The law doesn't ban pay differences based on a system of seniority, merit, piecework, or any factor other than sex. But the system must be bona fide--not an attempt to evade the law. It's a good idea to put it in writing. Like the ADEA this statute has been administered by the EEOC since 1978.

35 EXECUTIVE ORDERS 11246/11375

Employers with federal government contracts are covered by the Civil Rights Act on the same basis as other employers. In addition, however, they're subject to Presidential Executive Orders on nondiscrimination in government contracts.

The Orders are administered and enforced by the Labor Department's Office of Federal Contract Compliance Programs (OFCCP).

OFCCP's requirements under Executive Orders 11246/11375 bar discrimination because of race, color, religion, sex, or national origin in hiring. Employment by government contractors and subcontractors is in some ways more stringently covered than EEOC's requirement under Title VII. If you're covered, you'll need to know exactly how to comply with OFCCP's standards.

Who is a "contractor"? Executive Orders 11246/11375 cover not only prime contractors (those who contract directly with the government), but also first- and second-tier subcontractors (a first-tier subcontractor has a contract with a prime contractor for supplies or services affecting the government contract; a second-tier contractor has a contract with a first-tier contractor).

Exemptions. Certain contracts are exempt from the Order's requirements. These include contracts of $10,000 or less; contracts for work outside the U.S.; and contracts exempted in the national interest.

Under OFCCP's Revised Order #4, written affirmative action programs to improve job opportunities for minorities and women are required of federal contractors and subcontractors (outside the construction industry) that have 50 or more employees and a government contract of $50,000 or more. Such affirmative action programs require an analysis of the contractors current workforce (to determine whether and where women or minorities are being underutilized) and the setting of goals and time-tables for corrective action.

36 FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA) generally known as the Wage-Hour Law, is administered by the Wage-Hour Division of the U.S. Labor Department. It applies to most private employers and federal agencies. The extension of the law to most state and local government employees was held unconstitutional.

The law provides that an employer must pay employees a certain minimum wage. The minimum rate became $3.15 an hour on January 1, 1980 and is $3.35 an hour as of January 1, 1981. The Act covers all employees engaged in interstate commerce, in producing goods for interstate commerce, or in activity closely related or directly essential to interstate commerce. Further, if any business enterprise beyond a certain size (measured by annual dollar volume of business) has at least two employees covered under the interstate commerce test, the entire enterprise and all its employees are covered.

Exemptions. However, there are numerous exemptions from the Act, based either on the duties of the individual employees, the nature of the employer's business, or both. Some employees are wholly exempt from the Act, others only from certain provisions, usually the provision for overtime.

37 REEMPLOYMENT OF VETERANS

The Military Selective Service Act (MSSA) contains provisions giving returning veterans certain rights of reemployment at the jobs they had before leaving for service.

These provisions of MSSA are administered by the Office of Veterans' Reemployment Rights, a part of the U.S. Labor Department's Labor-Management Services Administration. The law covers all employers.

Basically, the law gives veterans a right to get their old job back if they complete service satisfactorily and within certain time limits. Reservists called to active duty have the same protection; so do employees who leave for service but are rejected. The law also requires employers to grant leaves of absence to reservists and National Guardmembers for training duty. Veterans must ask for the job back within 90 days after discharge; but the time can be extended by up to a year if they are hospitalized.

"Any position other than temporary" is covered by the law. Veterans entitled to their jobs back include probationary employees, apprentices, trainees, part-time and seasonal workers, laid-off employees, and strikers. The veteran is entitled to the job back even if it means firing a replacement--and even if the replacement is a better employee. If two or more veterans are entitled to the same job under the reemployment law, the one who left first gets it--but the others don't lose their reemployment rights; they may be entitled to some other job.

What a Veteran's entitled to. The veteran is entitled to an old job back (or position of like seniority, status and pay) without loss of seniority. In general, this means being treated as if they'd been continuously employed during the period of military service. They share in any general pay raises (or cuts), are entitled to any automatic promotions they would have had, and are bound by any changes made in union contracts. Trainees or apprentices have to complete their training to become eligible for full status; but when they do, they're entitled to have attained journeyman of other status if they hadn't been away.