Proving You Value Diversity
Equal Employment Opportunity Law

Congress and most states have passed laws that require equal employment opportunity (EEO) by prohibiting discrimination. Most of the federal discrimination laws apply to companies with 15 or more employees. The age discrimination law applies to companies of 20 or more employees. Both apply to U.S. citizens working abroad for U.S. owned or controlled companies.

Most states have discrimination laws that apply to companies with fewer employees; California law applies to companies with 5 employees, and New York and New Jersey laws apply to one-employee companies.

Equal employment opportunity means giving people a chance to succeed. It's a law that codifies the fundamental principle of fairness.

Sometimes we forget why certain laws were passed. The federal Civil Rights Act was originally proposed by President Kennedy in 1963. That year, civil rights activist Medgar Evers was murdered, and four young girls died in the bombing of a Birmingham church. That was the year of Martin Luther King, Jr.'s "I have a dream" speech at the March on Washington.

In 1963, discrimination against African Americans and other minorities was rampant. They did not have equal education. When they did, they were not hired equally. When they were hired, they were not paid equally, they were not promoted equally and they were harassed.

The law was introduced in Congress in 1963, but it languished there amid political debate. Then on November 22, 1963, President Kennedy was assassinated. Five days later, Lyndon Johnson gave his first address as President before both houses of Congress. He challenged Congress to pass the law as a "living memorial" to President Kennedy. It passed within a few months, to become the Civil Rights Act of 1964.

The law attempts to achieve equal employment opportunity for all by prohibiting discrimination.

"Discrimination" Means Treating Differently

"Discrimination" means to treat people from one group worse than people from a different group. Here, we will concentrate on discrimination that affects a person's job opportunities.

Whenever you choose between two or more people, you literally are discriminating. But not all discrimination is illegal. If you are interviewing and hiring, you will interview a lot of people but only hire one. There's a potential discrimination case. If you pay people differently for doing the same job, you have a potential discrimination case.

If you treat people differently whenever you make any of these decisions, you have a potential discrimination case:

--hiring applicants
--paying employees
--choosing subordinates for training programs
--evaluating employees' performance
--disciplining employees
--making job assignments
--deciding who to promote
--picking employees for layoff
--terminating employees.

Discrimination is proven by comparing the way people from different groups are treated. For example, if a person who is Black complains of race discrimination because he wasn't hired, he must show that a non-Black got the job. If another Black was hired, that's not race discrimination. Discrimination is shown by comparing how members of *different* groups are treated.

You sometimes hear people say, “It’s illegal to discriminate against women,” or "It's illegal to discriminate against minorities." That's true but it's not the whole truth. It is illegal to discriminate on the basis of sex. It's just as illegal to discriminate against men as it is against women. It is illegal to discriminate on the basis of race. It's just as illegal to discriminate against whites as it is against people of color.

Sometimes, the idea that whites are protected is referred to as “reverse discrimination,” but in fact all races are fully protected by the law.

EEO means equal treatment, It doesn't require you to give favorable treatment to anyone. It allows you to hire, promote and pay the best people you can find -- as long as "best" is not defined in a discriminatory way.

EEO is sound business practice. By definition, "discrimination" means you are not hiring or promoting people who are the best qualified. That doesn't make sense.

In the year ending September 30, 2007, the EEOC received nearly 83,000 discrimination charges. The EEOC obtained nearly $350 million in monetary relief for employees through enforcement and litigation combined. And, in the year ending September 30, 2008, the federal agency that oversees government contractors, the Office of Federal Contract Compliance Programs, announced it had recovered more than $67 million that year from federal contractors for victims of employment discrimination. And at least one state appeals court has held that a company who discriminates is also engaged in unfair competition. Unlawful discrimination is not only wrong, it's not good business.

Discrimination Is Proven Two Ways

There are two ways employees can prove discrimination.

The first type is called "disparate treatment" or intentional discrimination, because you appear to be intentionally treating one group worse than another. For example, if you ask applicants, "What is your religion?" and then refuse to hire anyone who says Jewish, you are discriminating on the basis of religion. Compared to other religious groups, such as Christians, Jews are being excluded.

Even if no illegal questions are asked, intentional discrimination still can be proven. You don't have to ask someone's race, you can see it. If people of color apply but aren't hired, it appears you are discriminating on the basis of race, unless you can prove that every time minorities applied, you hired non-minorities who were more qualified.

Disparate treatment cases involve all aspects of the employment process, including hiring, promotions, layoffs and termination. A person who is prejudiced will try to use any of these opportunities to discriminate. Disparate treatment also includes sexual harassment and harassment of other groups.

The second way discrimination is proven is through "disparate impact" -- even though all your employment criteria are non-discriminatory, the impact of your employment practices excludes one group as compared to others. This type of discrimination is more subtle and is illegal even if it is unintentional.

An example of disparate impact is a job requirement that on its face is not discriminatory, but which has the effect of excluding certain groups. For example, if you will not hire people under 5'6", that requirement has the effect of excluding women, Hispanics and Asians, who tend to be shorter than Black and White males and may also have the effect of excluding people with disabilities.

In disparate impact cases, employees are not required to prove much in order to get to trial. All they have to prove is that, statistically, one group is worse off than another. Then the company must prove it had a *job-related reason consistent with business necessity* for the decision that led to the result.

An example would be hiring only people over 5'6" as flight attendants, because they must be able to reach equipment at that height during emergencies. Your decision must be job related and necessary to achieve business objectives in order to avoid a disparate impact claim.

Standardized, multiple-choice tests, such as civil service exams and pre-employment screening tests, frequently have a disparate impact on minorities. As a result, Uniform Guidelines were adopted by the federal government covering virtually every type of test.

DISCRIMINATION LAW

After Congress passed the Civil Rights Act of 1964 (also known as Title VII) it passed other laws against discrimination. These include the Age Discrimination in Employment Act, the Pregnancy Discrimination Act and the Americans with Disabilities Act. As a result, most employees and job applicants are protected from discrimination on the basis of these classifications:

Race & Color
National Origin
Sex
Pregnancy
Age 40 or over
Citizenship
Religion
Disability

RACE & COLOR DISCRIMINATION

All races are covered by the law. Whites, Blacks, Asians and Native Americans (including Native Alaskans) are protected from race discrimination by Title VII. Asians include natives of India, Pakistan and the Pacific Islands such as Hawaii, Samoa and the Philippines.

Race discrimination cases today often reflect subtle forms of bias. A 1990 case illustrates this. A Black woman was the top-ranked contract analyst at Texaco. Over time, however, her performance deteriorated. Her supervisor did not criticize her because he was afraid she would charge him with discrimination. He did give criticism to white employees who performed poorly.

During this time he filled out two performance appraisals for her. In both, he rated her "satisfactory." In fact, he was not satisfied with her performance, but he gave her these reviews because he didn't want to go through the trouble of putting her on a performance improvement plan, as required by company policy.

Eventually, she became the lowest-ranked analyst. Then, Texaco had a reduction in force. She was picked for layoff because of her poor performance. She sued for race discrimination and won. The Court of Appeals found that because she was not given accurate feedback on her performance, she was denied the opportunity to improve.

Another example is a case decided by the U. S. Supreme Court in 1988. Clara Watson, who is Black, was hired by the bank in 1973. After three years, she was promoted to drive-in teller. Four years later, she applied for the job of supervisor of lobby tellers. A white male was promoted instead. Then she applied for supervisor of drive-in tellers, but a white female got the job.

For the next year, Ms. Watson worked informally as the assistant to the new supervisor of lobby tellers. When he left, she applied for his job. It was given to the woman who had been drive-in teller supervisor.

She applied for the drive-in job. It was given to another white male. She sued for race discrimination.

The U. S. Supreme Court ruled in her favor. The court noted the company did not have *any* precise or formal criteria to back up these decisions. Instead, the managers relied on their subjective judgment of who would do a better job. This not only is illegal, but also doesn't make much business sense.

Discrimination based on skin color is a rare but growing area of legal action, trebling from 413 claims in 1994 to 1,382 claims in 2002. In 2003, the EEOC announced it had settled a color discrimination suit involving a dark-skinned black employee who was called "tar baby" and "black monkey" by his lighter-skinned black supervisor, who also told him to bleach his skin. The employer paid $40,000 for those hurtful remarks. According to scholars, intra-racial discrimination goes back to the days of slavery in the US, when slaves with lighter skin tones were favored for easier jobs inside the house, while those with darker skin worked outside in the fields. Whether the people involved are of the same or different race, color discrimination is always illegal and unfair.

Racism was rampant at the time the Civil Rights Act was passed. Since then, great strides have been made in eliminating discrimination. Today, more companies are going beyond just complying with the law. Instead, they value the cultural diversity of their workforces.

NATIONAL ORIGIN DISCRIMINATION

It is illegal to discriminate because of national origin, the country where people or their ancestors are from.

Persians (Iranians) and Hispanics who are of the white race, are covered under the national origin classification, as are people from Russia, South Africa and every other country. Telling Polish and Italian jokes, for example, can be national origin harassment.

Accent on Communication

Communication is an essential requirement for a healthy business. In a few cases, you may have a legitimate business reason for not hiring someone with a very heavy accent. For example, in a customer service or receptionist position, you want someone who is able to be understood by everybody.

For the vast majority of jobs, you can't discriminate against people with accents, unless you absolutely can't understand them. As a manager, you do have the right to be able to communicate with your employees. But document the communication problems. In fact, have another manager or personnel representative as a witness.

If you inherited employees you can't understand, there are some steps you can take. First, discuss it privately with the individual employees. Tell them, "I have a very difficult time understanding you. I am going to do all

I can to try to understand you. I'd like to ask you to do everything you can to make it easier for me." Suggest they take their time when talking so you can understand them. Encourage them to enroll in accent reduction classes. These courses are taught at local colleges and in adult education programs. But don't do what one manager did: He gave an employee an ultimatum to improve her accent in a week, then fired her. That cost the company $12,000 in damages.

Communicate in writing to prevent misunderstanding. Ask for help from other employees who are bilingual. You could take a course in their language, although it's not required by law.

Can the employees be transferred because they can't learn to communicate with you, the manager? If they won't have a loss in pay, benefits or career growth, it is safe to transfer them. Demoting or terminating employees who can't communicate with the boss is an open question.

English-only rules, which have been upheld by the U.S. Supreme Court in one case, are permissible to prevent work disruption, provide customer service, or other business needs. However, there is rarely a business necessity for not allowing employees to speak among themselves in their own languages while working or during breaks. According to the 2000 Census, approximately 45 million Americans—17.5% of the population, speak a language other than English at home.

All of us have a national origin. Each of us is proud of our roots. The national heritage of others should be respected.

SEX DISCRIMINATION

Men and women must be treated equally.

"Equal pay for equal work" has been the law of the land since the Equal Pay Act of 1963. The purpose of the law is for women and men to be paid the same for doing the same job.

Although it sounds simple, equal pay is not always easy to put into practice. The biggest issue is how to define "the same job." The law says for women and men to receive equal pay, their jobs must be of equal skill, effort and responsibility. The jobs do not need to be identical, but they must be substantially similar.

After her male supervisor retired, a woman was promised a raise and new job title if she'd take on some of his duties. She agreed, but the raise

and promotion never materialized. When she complained, she was suspended for a week. She kept doing her ex-boss's job without the extra pay or new title, and when she complained again, she was put on probation and then fired. She sued under the Equal Pay Act, claiming that even though she didn't have the same title as the former supervisor, she was doing substantially the same work that required substantially the same responsibility, skill, and effort, and in a 2005 federal appellate decision, the jury's $105,000 verdict in her favor was affirmed.

You are allowed to pay more to a man who is doing the same job as a woman if you have a "bona fide seniority plan." In other words, if it is your policy to give annual raises, naturally employees with more seniority will be paid more.

You also can pay extra for experience when hiring a new employee. If you hire two new employees at the same time, it is expected you will pay more to the one with more experience, male or female, because they bring more to the job.

You can't pay based solely on the applicant's salary history. Some companies won't pay applicants more than 15% more than their last salary. This approach discriminates against women. That's because as of 2004, women employed full time make 76.5 cents for every dollar earned by a man. While women engineering graduates get about the same starting salary as their male classmates, after 15 years they are earning nearly $20,000 less. Setting salaries based on salary history or salary expectations perpetuates this discrimination.

The Concept of Comparable Worth

Since the Equal Pay Act only applies when men and women are performing the same jobs, it affects very few women. Most women work in female dominated professions like nursing, teaching, and clerical. There are no "men's jobs" in these fields to compare to women's.

The concept of "comparable worth" was designed to address this problem. Its purpose is equal pay, not for equal jobs, but for jobs of comparable value.

The value to the company of every job can be measured. These values are computed by compensation specialists, industrial engineers and industrial psychologists. These values then can be compared.

In one study, the value to the employer of a secretary's job was equal to a painter's, yet (male) painters were paid 37% more than (female) secretaries. To establish comparable worth, the secretaries would receive higher and more frequent salary increases until they were equal to painters.

Comparable worth is a concept that has been adopted by only a few local governments for their own employees, but it is not required by law. Employees have argued that the EEO laws should be interpreted to require comparable worth. As of this writing, the courts have not agreed.

Stereotyping is Illegal

Once you hire women (or minorities) you might have some preconceived ideas about them. Almost everyone has some preconceptions about one group or another. Our stereotypes probably are unconscious; they even may be well-meaning. But stereotyping is a subtle form of discrimination. It is so subtle, in fact, that for years it was not recognized as the basis for a discrimination lawsuit.

That changed in 1989, when the U. S. Supreme Court decided the case of *Price Waterhouse v. Hopkins.* Ann Hopkins was one of 88 candidates for partnership in the Big Eight accounting firm. She brought more business to the firm than any other candidate. But she was not chosen for partner. The firm said she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have your hair styled, and wear jewelry." The partners complained that she used too much profanity "for a lady." One said she needed "a course in charm school."

The Supreme Court said these comments showed that stereotyped views of women were being used as criteria for partnership. This was illegal, since by all legitimate business standards, she was an excellent employee.

If stereotyped comments have been made, they will be used to prove your intent to discriminate. Even good-natured joking or teasing can be used as evidence. For example, calling the women in the office "honey" or "girls" is not enough for a discrimination lawsuit. But if a woman is denied a promotion, these comments prove women were not treated the same as men.

Stereotypes about how men, women, older workers, or people of other races behave can color a manager's behavior towards them. For instance, a supervisor who believes that a woman will probably get

emotionally upset and cry if he tells her that her performance is not up to expectations not give her the feedback she needs to improve. If the same supervisor gives critical feedback to his a male employee because he thinks he will “take it like a man”, the supervisor is giving the man, but not the woman, essential information that may mean the difference between job success and termination.

Stereotyping also affects training opportunities. One company offered two in-house training programs for their clerical staff. One was blue-print reading. It was a prerequisite for becoming a technician and led to an engineering career path. The other class was time management for secretaries. It led to a dead-end, secretarial job.

The manager of the mailroom let only men take the blue-print reading course and only women take the time management course. The company was sued for sex discrimination and lost.

Men are protected against discrimination based on stereotypes about who is a “real man.” A 2001 federal appellate decision involved a man who worked as a waiter in Mexican restaurant. Apparently he is heterosexual, but his supervisor and co-workers barraged him with insults every day, calling him "her," "girl," "whore," or saying he "walked like a woman." In ruling that the waiter could sue for sexual harassment, the court relied on the Price Waterhouse case, finding that harassing a man because he does not live up to a societal stereotype of virility is every bit as illegal as discriminating against a woman who is perceived not to be “feminine” enough.

In some ways, men are hamstrung by gender stereotypes even more than women. Quiet, shy, and reserved men are often marginalized in the workplace. Men who want to take time off to raise their children receive far less societal support than stay-at-home moms. Women have long complained that male sports chatter at work excludes them, but men who aren’t sports fans know they don’t fit in, either, and, according to management consultant Holly English, feel even “more isolated than the women, (who, after all, aren’t expected to talk about pitching substitutions and defense strategies.)”

Perhaps less obvious is the "glass ceiling" that prevents women and minorities from entering top management. In 2008, more than half of white-collar managers and professionals were women, but women held just 15% of Fortune 500 board seats. As increasing numbers of minorities, women and individuals with disabilities, with qualifications comparable to their peers, move into management and other key positions, “glass

ceiling" corporate management reviews are designed to ensure that they do not encounter artificial barriers to further advancement into mid-level and senior corporate management. In a corporate management review, special attention is given to developmental and selection processes and practices for advancement into mid- and upper-level corporate management positions, and treatment in such positions. According to a 2000 U. S. Labor Department report, women aren't given the same opportunities as men. As speaker Nido Qubein put it, "In our society we have a double standard: we judge men on the basis of potential and women on the basis of performance."

The Labor Department has threatened to yank the contracts of federal contractors and subcontractors if they don't give women and minorities the training and experience needed for advancement. In the year ending September 30, 2008, the Office of Federal Contract Compliance Programs (OFCCP) completed 4,333 compliance evaluations. OFCCP also completed 41 Corporate Management Compliance Evaluations, also known as "Glass Ceiling" audits.

Sex discrimination was added to the original Civil Rights Act in 1964 by a Southern Congressman who was trying to kill the bill. No one, he thought, would support a bill that gave equal rights to *women*.

Much to his surprise, the five women Representatives adopted his idea as their own, and quickly forced its passage. Despite this inauspicious start, John Naisbitt and Patricia Aburdene in *Megatrends 2000* listed women in the workforce as one of the 10 most influential trends of the 21st century.

PREGNANCY DISCRIMINATION

A special form of illegal sex stereotyping is pregnancy discrimination. This is prohibited by U. S. law, as well as by some state laws.

You can't discriminate against pregnant women. If a pregnant applicant or employee is the most qualified for the job, you must hire or promote her. You cannot assume she will take a leave of absence and you can't ask whether she intends to take one.

The only time you might be able to refuse to hire a pregnant employee is if the job is temporary, or has a short-term requirement, for example, completion of a short project or extensive orientation training program. If an employee's attendance is critical during the first 6 months of the job, you should ask all applicants about their ability to work for that period of time.

Just like other disabled people, pregnant employees must be reasonably accommodated if they request light duty. Light duty might include changing working hours during the early part of the pregnancy in order to accommodate morning sickness, and allowing an employee to sit rather than stand to ease foot swelling and backaches.

Fetal Protection Policies

You might be tempted to prohibit pregnant women from working in hazardous jobs, or force them to take light duty. This is illegal pregnancy discrimination according to a 1991 decision by the U. S. Supreme Court.

The case involved a company that makes batteries using lead. Lead is a known carcinogen. It is particularly toxic to fetuses and ovulating women, and there is some evidence that it injures the sperm of men. As a result, the company refused to allow women of childbearing years to work in the area where the batteries were made, unless the women could prove they'd been sterilized.

Some of the employees brought suit claiming this was illegal pregnancy discrimination. The Supreme Court agreed. It said you cannot prohibit women from jobs because they are pregnant, even if they might have a miscarriage or a child with birth defects.

The court said some women, for economic or other reasons, are willing to take the risk. They are allowed to make that decision for themselves. You can't make it for them.

From a human standpoint, this seems like a terrible decision. How would you feel if you allowed one of your employees to work with hazardous substances, and her child was born with a severe birth defect?

From a legal perspective, it's almost worse. If a child is born with birth defects, can you be sued? The Court *assumed* you couldn't be, if you follow the procedures outlined below. But there is no guarantee. In fact, many lawyers believe this Supreme Court case will cause numerous suits in the future.

Even if you aren't sued directly for injuring the unborn child, you could be dragged into a lawsuit. For example, let's say a pregnant employee insists on working with hazardous chemicals. Let's also assume that, while she's pregnant, she and her husband divorce. The child is born with a birth defect. The husband could sue the wife, on behalf of the child, for

child endangerment. Your records could be subpoenaed, and you would be asked to testify.

Or what if the District Attorney decided to charge the mother with criminal endangerment of her child? This approach has been taken with the mothers of crack babies. Again, you would be involved in the case.

Lastly, the Supreme Court seemed to say that if employers followed all OSHA regulations, they couldn't be sued. Most experts disagree. But in any event, it certainly is true that if you *don't* follow OSHA rules, you will be sued and you definitely will lose.

> ***Practical pointers:*** You can't prevent pregnant employees from working with toxic substances. But you can take a number of steps to decrease the likelihood of a lawsuit.
>
> You can offer an alternative to the pregnant employee. If she accepts, that solves the problem. For example, you can make arrangements to have other employees (even you) take over the hazardous functions. You can transfer her, if there is no loss of pay, benefits or career growth. In fact, if the employee's doctor demands she not be exposed to these substances, you are required to reasonably accommodate her.
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> If a pregnant employee wants to work in a dangerous area, you may be able to require her to sign a waiver and indemnification. This waiver notifies her that she will be working with toxic materials, that her unborn child could be affected and that she has been advised by you not to work in the area. She also agrees to indemnify you if you are sued, and she herself agrees not to sue for injuries to her child. (She would be entitled to Workers' Compensation for any injury to herself.)
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> Waivers may not be binding. You are asking the mother to waive the rights of her child. Legally, she may not be able to do that. However, a waiver may discourage her from suing.
>
> As a practical matter, you should require all employees to sign such a form, not just pregnant ones, because that may be considered pregnancy discrimination. Also, sometimes women become pregnant without knowing. And some toxics are equally hazardous to men's reproductive capabilities. You should have every employee, male and female, sign one.

The bottom line is that employers, more than ever, must be extremely careful about maintaining a safe and healthy workplace, not only for employees, but also for their unborn children.

The unborn children of pregnant employees are our future. Treating mothers with respect and due regard for their dignity is only right.

FAMILY LEAVE

The Family and Medical Leave Act of 1993 requires companies with 50 or more employees to give an employee time off if the employee or spouse has a baby, if the employee becomes seriously ill, if the employee's child, spouse or parent is seriously ill and requires the employee's help, or if the employee adopts a child or takes a foster child into the household.

A serious illness is one that requires hospitalization, or continuing care by a physician. An employee is entitled to take time off for a new child (including adopted or foster child) whether or not the child is ill.

Employees can take leave after they've been employed for one year. The leave is unpaid (although employers can pay if they want). During the leave the employee's benefits continue. The leave is up to 12 weeks a year. If medically necessary, the leave can be taken intermittently; for example, one day off a week, one hour off per day, or one week off per month. A leave cannot be denied because it creates an undue hardship on the company.

In 2008 the FMLA got its first significant update since its enactment in 1993. There are now provides two additional leave entitlements under the FMLA: (1) military caregiver leave and (2) qualifying exigency leave. Military caregiver leave requires employers to provide up to 26 weeks of unpaid leave in a 12-month period to the spouse, son, daughter, parent or next of kin of a service member injured in the line of duty. Caregiver leave is available to families of Regular Army, Navy, Marine Corps, Air Force, and Coast Guard personnel, as well as National Guard and Reserves troops. During that single 12-month period, caregiver leave is combined with regular FMLA leave and the total cannot exceed 26 weeks. Caregiver leave, like traditional FMLA, can be taken on an intermittent or reduced schedule basis, as medically necessary.

The 2008 law also allows an employee who has a spouse, son, daughter, or parent in the National Guard or Reserves to take some or all of the regular 12 weeks of unpaid FMLA leave in 12 month period due to a

"qualifying exigency" resulting from the family member's active military duty (or call to active duty) in support of a federal contingency operation. This does not include State call-ups to active duty.

What's a qualifying exigency? The new rules define them as:

1. Short-notice deployment – to address any issues that arise due to the fact that service member received a week's notice or less of the deployment;

2. Military events and related activities – to attend any official ceremony, program, or event related to the service member's active duty; or to attend family support or assistance programs and informational briefings sponsored by the military;

3. Child care and school activities – to arrange for alternative childcare; to provide childcare on an urgent or immediate basis; to enroll or transfer a child to a new school; and to attend meetings with school staff that are made necessary by the service member's active duty or call to active duty;

4. Financial and legal arrangements – to make or update financial or legal arrangements; and to act as the service member's representative in obtaining, arranging or appealing military benefits;

5. Counseling – to attend counseling sessions related to the service member's deployment or active duty status;

6. Rest and recuperation – to spend up to five days with a service member who is on short-term R&R leave;

7. Post-deployment activities – to attend ceremonies and reintegration briefings for a period of ninety days following the termination of the service member's active duty status; and to address issues arising from the death of a service member; and

8. Any other activities that the employer and employee agree qualify as an exigency.

A 2008 amendment to the FMLA added not only a new qualifying reason for leave—"any qualifying exigency" related to a family member being called to wartime military duty—but also a new leave entitlement. Eligible employees who are the spouse, child, parent, or nearest blood relative of a service member who has incurred a serious illness or injury while on active duty are permitted to take 26 weeks in a 12-month period

to care for the injured service members. The injury or illness must make the serviceperson unable to perform the duties of his/her office, grade, rank, or rating. Both the active duty and caregiver leave can be taken on an intermittent or reduced leave basis, as medically necessary. Employees taking military caregiver leave get a maximum of 26 weeks for all types of FMLA leave in a 12-month period.

AGE DISCRIMINATION

People age 40 or over can't be discriminated against in favor of younger people. Federal law doesn't prohibit age discrimination against people under 40, but some states do, including New Jersey and Wisconsin.

Age discrimination cases are popular with employee's lawyers. The reason: big money damages are awarded in age cases. Why? Most judges and jurors are over the age of 40. They can relate to an older person who claims discrimination. Older people generally make more money, so their losses are higher. And their front pay often will be awarded until they reach retirement age.

Age discrimination is different than sex and race discrimination in one important way. In race and sex cases, you must compare how one person was treated to someone in a different group (e.g. males vs. females). But in age cases, you can compare people of the same group (over 40) as long as one is significantly older than the other.

Let's say two people apply for a job. One applicant is 41, the other is 49. The 49 year old is more qualified, but the 41 year old gets the job. That's age discrimination, even though they both are in the same group (over 40).

Now assume a 42 year old applies for the job, has the best qualifications, but the 41 year old still gets the job. Is that age discrimination?

Where do you draw the line? According to the regulations, there should be at least five years difference between the person who gets the job (or other favorable treatment) and the person who doesn't. But there may be exceptions to this rule.

Managers say, "How do we know the ages of applicants? It's not on the application." Usually the difference in age is obvious. Most cases involve people in their 50's and 60's replaced by people in their 20's or 30's.

"You're Overqualified"

A complaint frequently made by older workers in the job market is being told, “You’re overqualified.” This statement, when made in an interview, could be grounds for an age discrimination lawsuit. Courts have said overqualified is a code word for "too old."

Consider the process you go through before you interview an applicant. You receive applications and resumes. You eliminate the candidates who, on paper, do not appear qualified for the job. Then you call in the rest for interviews.

You know the qualifications of every person before you see them in the interviews. If some are in fact “overqualified,” you would not have asked them for interviews in the first place. The interviews are the first time you see the applicants and how old they are. If at that point you say the applicant is overqualified, it sounds like an excuse.

Being overqualified also does not sound like a legitimate business reason for not hiring an applicant. Don’t you want the best qualified person for the job? If you get them at a bargain, so much the better.

Some managers argue that an applicant who is clearly overqualified for the job would not be happy in a lesser position. Maybe so, but let the applicant make that decision. If you describe the duties, responsibilities, working conditions and pay, and the applicant still is interested, you should hire him or her as the most qualified person.

Don't Make Assumptions

Another requirement that could discriminate against older applicants is the college degree. Every job description, advertisement and posting should read "degree or equivalent experience." Every resume and application should be carefully reviewed to see if the candidate has equivalent experience.

A manager hired a young woman in her 20's, with a BA degree, instead of a man in his 50's with 30 years of experience. The manager said that the younger person's knowledge was more current. That is a legitimate business reason for picking her if current knowledge is a significant requirement of the job. But in this case, the job involved maintaining old technology. The young woman had never even taken a class in it. That looks like age discrimination.

When it comes to training programs, you must consider an older worker just as you would a younger one: on the basis of legitimate business reasons. You can't assume the older worker will retire soon. Your *assumption* about how long your employees will stay is not a legitimate business reason. For all you know, it is more likely that a younger worker will leave before an older one. On the other hand, if employees tell you they're planning to leave, you don't have to put them in training programs. Base your decisions on facts, not assumptions.

Older workers often are victims of layoff when companies cut jobs. If the company's only criterion for picking people for layoff is high salary, that tends to adversely impact older workers, since salary goes up with seniority. For that reason, courts have said that you can't pick employees for layoff solely because their salaries are high.

Even if layoff criteria are legitimate, if they aren't applied consistently, there may be age discrimination.

Early Retirement

There is no mandatory retirement age in the United States. With exceptions for airline pilots, military and law enforcement personnel, and top executives, it is illegal to require employees to retire. If employees want to work until they're 100 or older, that's up to them. They are entitled to work as long as they can.

If they can't perform, you can dismiss them. But as long as they perform, you have to consider them for promotion, training and pay increases just like anyone else.

Companies sometimes offer early retirement programs in order to trim budgets and avoid layoffs. Early retirement programs are legal, and do not discriminate on the basis of age, if they are voluntary. To prove a program is voluntary, you must show that:

(1) The employee had a true choice between early retirement or keeping the job. Of course, you can't guarantee an employee won't ever be laid off or terminated. But saying to employees, "Take early retirement or you'll be fired," is not giving them the opportunity to make voluntary decisions.

(2) The employee was not discriminated against in other ways. If an employee is frequently asked about retirement plans, called "senile" or

often referred to as “the old man,” he can claim the early retirement program was used to get rid of him.

(3) The employee was not required to make a quick decision. Employees considering early retirement should be allowed to consult with their attorneys, financial advisers and families. It can take weeks to get all of the information necessary to make a truly informed, voluntary decision.

There are additional technical requirements. Talk to your company's personnel or legal department before offering early retirement.

As the baby boom becomes the age wave, fewer young people and more older ones will be in the workforce. In *The Age of Unreason*, Charles Handy forecasts that few people will fully retire in the future. He believes many of us will work part-time for life.

The future is here. Now is the time to value employees who are older for their experience and wisdom.

CITIZENSHIP

You can’t discriminate against qualified applicants because they are not citizens if they are authorized to work in this country. A "green card" (they aren't even green these days) for permanent residents is one type of valid work permit. There are other classifications that allow people who are immigrants to work in the U.S.

Your employment application should ask, "Are you legally entitled to work in this country?" This question must be asked of all applicants, even if they don't appear foreign. Otherwise, you are discriminating on the basis of national origin.

The only time you can refuse to hire workers because they are not U.S. citizens is if the job requires citizenship, either because of required clearances, or to handle certain federal information and data. The federal government doesn't give security clearances to non-citizens. That's discrimination, but it's not illegal. This law doesn't apply to the government.

Immigration Reform and Control Act

The purpose of the Immigration Reform and Control Act (IRCA) is to preserve jobs for people legally entitled to work. It accomplishes this by punishing employers who hire illegal aliens. IRCA also prohibits

discrimination on the basis of national origin or citizenship against aliens who are legally allowed to work in the U.S.

IRCA requires you to verify that every new employee you hire has the legal right to work in the U.S. This is done by filling out a form called the I-9.

Every new employee is required to fill out the I-9. Employees must prove they are eligible to work in this country through one of two ways:

(1) by showing a valid work authorization card from the Immigration and Naturalization Service, or

(2) by proving citizenship.

A common misconception is that only aliens granted with "green cards" are allowed to work. That is not true. Political refugees, and aliens with labor certifications are also eligible to work in the U.S., as well as aliens with E-1, E-2, F-1, H-1B, H-2, H-3, J-1, L-1, O-1 or TN visas.

E visas are for foreign supervisors, executives and those with specialized qualifications whose companies have substantial amounts of trade or investment in the US. Under a 2002 law, spouses of E visas are also eligible for work authorization.

F-1 is a student visa. Foreign students with F-1s can get a 12-month work authorization after graduation.

H-1B status is for "specialty workers" with at least a bachelor's degree. Nationally, high-tech companies are the leading employers of such workers, especially systems analysts and programmers. H-1Bs last for 3 years, and can be renewed for another 3. To get an H-1B visa for a worker, the employer must submit a Labor Condition Application to the Department of Labor, attesting that it is paying the foreign worker at or above the local prevailing wage for the job, that hiring the foreign worker will not adversely affect U.S. workers, and that there is no strike or lockout in effect. H-2s are similar, for temporary jobs lasting less than a year.

H-3 visas are for trainees who cannot get necessary training at home, and who will ultimately work in their own countries. J-1s are similar, and also allow students to work in the U.S. for up to 18 months after completing training.

L-1 visas are issued to intra-company transferees. The applicant must have worked for at least a year outside the U.S. for the same employer (or

a corporate parent, subsidiary, or affiliate) as a manager, executive or another position requiring highly specialized knowledge of the company's business. L-1s are issued for 3 years, and can be renewed for another 2 or 4 years, depending on the worker's position.

The North American Free Trade Agreement (NAFTA) created a new visa category, the TN, for certain professional occupations. It is similar to the H-1B, but issued for one year at a time, and can be renewed indefinitely. O-1 visas are available only for individuals with "extraordinary ability" in science, the arts, education, business, or athletics, and only on a substantial showing of that person's extraordinary ability.

Employees can prove they are citizens by showing a U.S. passport (even if it is expired) or a certificate of naturalization. A birth certificate also can be used. If you do accept a birth certificate, make sure it is a certified copy. It should have an official government stamp, either in purple ink or embossed.

New employees have three days to fill out the I-9 forms. If they have lost the documents needed to prove eligibility, they have 18 days to obtain duplicates. But if the copy doesn't arrive within that time, you must fire the employee. To avoid this problem, it is best not to bring on a new employee until the I-9 is complete.

Many employers send the I-9 forms to new employees along with their offer letters. The offer letter should state, "This offer is contingent upon your proof of eligibility to work in this country. Enclosed is a form I-9 for this purpose. Please fill out the form and bring the originals of the requested documents on your first day of work."

The I-9 form must be kept at the site where the employee works. It's a good idea to keep all the I-9's in one file. That way, if you are audited by the government, you will have the forms in one place and won't expose the private information in employees' personnel files to the government auditor.

The I-9 must be kept as long as the employee works for the company. After the employee leaves, the company must keep the form either: for three years after the employee's date of hire, or one year after the employee's date of termination, whichever is longer.

You must fill out an I-9 form for all new employees - even if you have known them your whole life and know they were born in the U.S. If you only require "obvious foreigners" to fill out the form, you can be found guilty of discrimination.

IRCA also prohibits discrimination in hiring. All things being equal, an employer is allowed to choose an American citizen over a non-citizen. Most employers are allowed to consider factors such as an upcoming expiration date of a foreign candidate's H-1B or other work visa, and the cost and time needed for a visa application as legitimate business reasons for hiring a U.S. citizen instead. But for certain employers, including those with more than 15% H-1B employees, if the non-citizen is objectively more qualified for the job, he or she must be hired.

Some employers have a legitimate business reason for hiring citizens only. For example, if a Department of Defense security clearance is necessary for the job, the government may require citizenship. Export control laws limit disclosures of high technology information to some foreign nationals of seven countries: Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. In most cases however, you cannot discriminate on the basis of citizenship.

The U.S. is fortunate to attract the best people from countries all over the world. Equal treatment for immigrants benefits us all.

RELIGION DISCRIMINATION

People of every religion, including atheists, are protected from discrimination because of their beliefs. You can't refuse to hire or promote someone because of their religion, or do as one manager did, hire all your employees at your church. In a 2006 federal appeals case, the court upheld an employer's decision to allow religious sayings to be posted in a worker's cubicle, so long as the worker did not discuss religion with a co-worker who had objected to such discussions.

Religious expression by employees raises complicated issues. Tastefully displaying a religious item at one's work station may be permitted. Proselytizing fellow employees, reading holy books aloud, or denouncing other's religions are not acceptable behavior. However, if the accommodation would cause the employer an undue hardship, it is not "reasonable" and does not have to be made.

Religious devotees also must be reasonably accommodated in order to practice their religion. This is one of the exceptions to the rule about treating employees consistently. Reasonable accommodation means that you treat some people better than others because of their religion.

For example, you can't require an employee to take off a turban in order to meet your dress code. Turbans are required to be worn at all

times by members of the Sikh religion, in the same way that yarmulkes are worn by Orthodox Jews.

You must allow employees a reasonable amount of time off to follow religious observances, with or without pay, just as you would allow other employees time off for personal reasons.

You also must accommodate the schedules of employees who can't work on Saturdays or Sundays for religious reasons.

If you have never required employees to work on weekends, you can't list that as a job requirement. It is not a true requirement and tends to discriminate against people on the basis of religion.

What happens if suddenly you need employees to work Saturdays for a month or two? You have several employees whose religion prohibits work on Saturdays. They can't work other days because there is no supervision. Can you fire them? Probably not.

If the Saturday work is required for only a limited time, reasonable accommodation means you will just have to allow them to be exempt from the requirement. If Saturday work will be required from now on, then you might be able to justify terminating them or transferring them into another department. But there is no guarantee that you won't get sued.

You can refuse to hire new employees who can't work on Saturdays if it will be required for the foreseeable future. A medical laboratory won a federal appeal in 2006 by proving that it would be an undue hardship to hire a phlebotomist who could not work the required two Saturdays per month for religious reasons. The court reasoned that: "Quest enforced the Saturday work requirement with respect to all employees. It asserted that making an accommodation for [the applicant]'s religious needs would result in unequal treatment of the other employees and negatively affect employee morale. Moreover, Quest's policy of "floating" phlebotomists among its own patient service centers meant that it could not accommodate [the applicant] by assigning him only to those medical practices for whom Quest provided clinical testing that were not open on Saturdays."

Other employees may complain you are giving religious employees favorable treatment. The answer is you are, and you will treat them the same way as soon as they convert.

The U. S. was founded on religious freedom. Today, there is strong support in the law for freedom of religion at work.

Know the Government Agency Procedure

The U.S. Equal Employment Opportunity Commission (EEOC) enforces the federal laws against discrimination. State laws are enforced in a similar manner by state fair employment agencies.

The EEOC gets involved when one of your employees makes an appointment. The employee must file a complaint with the agency before suing. The employee has either 180, 240 or 300 days to file a complaint, depending on your state. Complaints under state law must be filed within one to three years, again depending on the state. Federal government employees have only 30 days to file.

Once the employee files, the investigator sends out a Request For Information. The company must respond to every allegation made by the employee and provide more general information. For example, if a woman claims she wasn't promoted, the company may be asked about promotions denied to other women in other jobs.

The company usually is given 30 days to respond. After the company responds, in most cases the complaint goes to the bottom of the stack to await processing. It's not unusual for a case to sit for a year before the investigation begins.

Eventually, the investigator will talk to witnesses for both the employer and the employee, review the manager's documents about the event and read the company's response to the Request for Information.

Investigators are required to be impartial. They do not work for either side, even though they hear the employee's side of the case first.

The investigator finishes fact-finding, and then decides whether there is "reasonable cause" to believe the employee suffered discrimination.

If there is no cause to find discrimination, the EEOC issues a "Right to Sue Letter." With this letter, the employee has the right to file a lawsuit in federal court within 90 days. Once it's filed, the company should receive notice of the lawsuit within 120 days.

If the EEOC finds there is cause to believe discrimination occurred, the EEOC's lawyers will represent the employee in any suit against the employer. At that point, many companies believe it is wise to settle out of court.

MILITARY/VETERAN STATUS

Every American schoolchild learns about the Minutemen, the colonial farmers who laid down their plows and picked up muskets in defense of liberty, returning to their fields when the fighting was over. In fact, this is the way Americans have fought virtually every major conflict. Noncareer volunteers and draftees, along with on-call reservists, have been essential to the security of America for over 350 years.

The concept of citizen-soldier is alive and well in twenty-first century America. The United States has relied on an all-volunteer force for more than twenty-five years. Since the early 1990s, as the Cold War ended, reliance on the reserve components to perform "real world" missions has increased.

Federal law protects military veterans and reservists from discrimination in employment. The first such protection was part of the Selective Training and Service Act of 1940, and has continued as the law was amended as part of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. Further amendments were prompted by the as the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The USERRA bars employers from denying employment, re-employment, retention, promotion or any employment benefit to anyone on the basis that the person is a member of, has applied to join, is a veteran of, or performs service obligations for the military. However, if the employer can prove it would have taken the same action even if the person were not a veteran, reservist, etc, it has a defense. As established by the appellate courts, valid non-discriminatory reasons for refusing to hire, promote, etc. a reservist or veteran include: job misconduct, lack of qualifications, fraud and misrepresentation.

USERRA requires employers to allow workers to take leave for military service, and bars any negative job action as a consequence. While a worker on military leave may elect to use vacation or other accrued paid time off, the company cannot force the worker to use that leave time. Further, time spent in uniform must be given full years-of-service credit in the employer's pension plan, and the employee retains the same seniority and seniority-based rights and benefits that would have been attained if employment had not been interrupted by military service.

With very few exceptions, all employees taking a military leave are entitled to be reinstated, either to their old job or to an equivalent position. Using a concept known as the "escalator" principle, USERRA regulations issued in 2005 require that the returning veteran be put in the

job the veteran would have if he or she had remained employed continuously during the military leave.

And, military service changes the at-will employment relationship. Under USERRA, a worker who has been on military leave for more than 30 days can't be fired without cause. If the leave was between 30 and 180 days, this protection lasts for six months; if the worker was on active duty for more than 180 days, you can't fire without cause for one year. While "cause" is not defined in the statute, a 2005 federal court said that the term should "be liberally construed and strictly enforced for the benefit of those who left private life to serve their country", and that the employer bears the burden of proving "cause". In that case, a returning veteran who had been terminated in a cost-cutting move four months after returning to work was awarded nearly $400,000 in back pay and front pay.

At the end of 2005, the Department of Labor issued regulations that made it clear that the employer must prove "cause", and that dismissing a returned veteran for conduct that violates known work rules is allowed. For instance, in a 2006 federal appeals case, the court upheld an employer's right to fire a returning veteran who arrived late for work and left early without permission, missed scheduled conference calls, acted inappropriately to customers and co-workers--engendering complaints about her behavior and professional attitude from several of the latter. The court noted that there was extensive pattern of unprofessional misconduct, well documented by the employer, and reported to management from a wide variety of co-workers and other sources.

As of January, 2009 there have been no appellate decisions about whether a company's financial difficulties constitute sufficient "cause" for termination under USERRA, and the federal district courts are in conflict on the issue. While several trial judges have ruled in favor of employers, a reservist was awarded $400,000 in back pay and front pay in a 2005 case when he was fired as part of a general reduction in force that was done after the employer had suffered net losses in seven consecutive quarters.

In 2008 the EEOC issued a Q&A guide on workplace issues caused by service-related disabilities. USERRA requires employers to go beyond their ADA obligation to accommodate disabilities by making reasonable efforts to help a returning veteran who can no longer perform his/her old job to become qualified for a new job by providing training or retraining.

Almost every state has statutes that provide similar or greater protection than that given by the USERRA. The scope of these laws varies

from state to state. Some merely afford reemployment protection to state and local government employees, while others, such as Maine, actually criminalize an employer's refusal to allow time off for military duty. Many states, including California, have statutes that prohibit a broad range of discrimination against service.

Other EEO Laws

So far, we've covered the U. S. laws that prohibit discrimination. Some states, counties and cities prohibit discrimination on other grounds. See chart on p. 3-30. These include:

MARITAL STATUS

It is illegal in many states to discriminate against married, single, divorced and widowed persons because of their marital status. An example is a layoff where a single woman is chosen for layoff rather than "a man with a family to support."

PARENTHOOD / FAMILY RESPONSIBILITIES

Several states and the District of Columbia bar discrimination against parents or others with family responsibilities.

Executive Order 13153, issued in 2000, added "status as a parent" to the list of categories for which discrimination is prohibited in federal civilian Executive Branch employment.

In 2007 the EEOC issued new guidelines to eliminate unlawful discrimination against working moms, dads, sons, daughters and other family caregivers. While there is no federal law prohibiting discrimination based on parental status, caregivers are protected under the Americans with Disabilities Act and the Family and Medical Leave Act, and the EEOC said it wanted to give examples of how stereotypes and assumptions about working mothers and fathers, grown children who take care of elderly parents, or employees who have disabled dependents can lead to lawsuits for discrimination and harassment under existing laws.

Cases asserting family responsibility discrimination have grown by 400% since 1996, according to a study done by the University of California. Of nearly 1,000 cases filed nationwide, 80 had verdicts or settlements at or over $100,000, and 10 of those were more than $1,000,000. The largest was a 2002 jury award of $11.65 million to an Illinois man who was retaliated against for taking time off to care for his elderly parents. (The case was settled in 2003 for an undisclosed sum.)

The EEOC guidelines give nearly 20 examples of family responsibility discrimination. For instance:

- Denying women with young children the same opportunities for travel and promotion given to men with young children;
- Reducing a woman's work responsibilities after she assumes full-time care of her granddaughter based on the assumption that she will no longer want to work overtime;
- Reassigning a new mother to less-desirable projects based on the assumption that she is now less committed to her job;
- Denying a new father leave to take care of his infant son, when a new mother would have been granted leave;
- Limiting a pregnant worker's job duties based on stereotypical ideas about pregnancy, and not because of a legitimate medical restriction;
- Refusing to hire the parent of a disabled child, based on the assumption that care giving responsibilities will make the worker unreliable.

What this means to you: Employers who want to be proactive can add parental and caregiver status to their company's anti-discrimination policies. In addition, managers and supervisors should be trained to spot and avoid intentional or unintentional harassment and discrimination against parents and caregivers.

HEIGHT & WEIGHT

The District of Columbia and a few states, including Wisconsin and Michigan, protect people from height and weight discrimination or discrimination based on personal appearance. People who are obese due to eating disorders, glandular conditions or other medical reasons, may be covered under the disability laws. So may people with growth disorders.

SEXUAL ORIENTATION

Discrimination against gay men, lesbians, bisexuals and other sexual orientations is illegal in many places. The Surgeon General has said there is no medical evidence that sexual orientation can be changed. Sex discrimination laws do not protect gays.

As of January, 2009, twenty states and the District of Columbia prohibit discrimination by public and private employers on the basis of sexual

orientation: California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington and Wisconsin. Twelve more states ban discrimination against gays, lesbians and bisexuals in state or public employment: Alaska, Arizona, Delaware, Indiana, Kansas, Kentucky, Louisiana, Michigan, Montana, Ohio, Pennsylvania, and Virginia.

Executive Order 13087, issued in 1998, prohibits discrimination based on sexual orientation in federal Executive Branch civilian employment. The Office of Personnel Management states: "As the Nation's largest employer, the Federal Government sets an example for other employers that employment discrimination based upon sexual orientation is not acceptable."

Cities and counties are passing local ordinances when state legislatures are not. As of January, 2009, nearly 200 cities and counties have ordinances that ban discrimination and harassment based on sexual orientation.

Heterosexism and Homophobia in the Workplace

Heterosexism is assuming everyone is heterosexual. An example of heterosexism is asking someone if they are married or single. Heterosexual privilege is something that people who are heterosexual are allowed to do in the workplace but gay, lesbian and bisexual people who are in the closet can't do. Examples are putting pictures of one's loved ones on the desk, making personal phone calls, kissing good-bye when dropped off at work, talking about weekend activities.

According to gay rights consultant Brian McNaught, what gay people want heterosexual people to know is:

1. We didn't choose our orientation.
2. We can't change our orientation. According to pioneering sex researcher Albert Kinsey, gay men "cured" of homosexuality who did not engage in any homosexual behavior and who had been married for years routinely engaged in homosexual fantasies.
3. We can change our behavior. Many gay people get married, have children, and try to convince themselves they are not gay. Is this fair to them, their spouses and children?
4. We can't live a lie by staying in the closet.

What gay people want employers to do:

1. Have policies preventing discrimination and harassment.
2. Give us the same benefits as married co-workers.
3. Include us in company events. Not only does that mean we can invite our same-sex partners to events, but we can dance together, hold hands, lightly kiss or do anything else our heterosexual co-workers do.

McNaught says we should give ourselves, whether heterosexual or homosexual, the permission to be who we are. It's okay for heterosexual people to look away if gay people kiss. It's understandable if they feel uncomfortable, because our society has not educated us about this fact of life. It's also okay for people who are gay, lesbian or bisexual to stay in the closet. But all of us should open ourselves to the goal of stretching our boundaries to include new ways of perceiving our co-workers.

GENDER IDENTITY

Employers, legislatures and courts are expanding protections against harassment and discrimination to cover the transgendered: transsexuals, cross-dressers, intersexed people and others who fall outside the traditional notions of gender identity.

Although federal law has banned sex discrimination since 1964, federal courts of appeal have uniformly held that Congress did not intend that the term "sex" include transsexuals. However, state and federal courts and state legislators have started to recognize that sex discrimination can involve gender stereotypes about so-called "masculine" or "feminine" traits. In a federal appeals case in 2005, a pre-operative transsexual man alleged that his promotion to sergeant in the Cincinnati Police Department was revoked in part because he lived as a man at work, but as a woman off duty. The jury agreed, finding that he was the victim of sexual stereotyping, and awarded him $320,000 in damages. The trial judge added $25,000 in court costs and nearly $530,000 in attorneys' fees, all of which was affirmed on appeal.

As of January, 2009, gender identity is a protected characteristic in California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

The Human Rights Campaign has provided some guidelines for management understanding of transgender employees:

- ✓ Gender nonconformity is an expression of natural human diversity, which has occurred throughout history—although it has often been suppressed and continues to be misunderstood. Today, modern medicine has expanded personal choice in this area, so this aspect of human diversity is becoming more visible.
- ✓ Employers should not casually discard the investment they have made in a transgender employee. Consider the employee's experience, history and overall record.
- ✓ Workers who are valued and treated with respect are more loyal and committed to their jobs. By treating the transgender employee with respect and understanding, you build that trust and commitment. Moreover, other employees watch how management treats particular workers, and make decisions about loyalty to the team and the employer based on what they see. Fairness matters.
- ✓ Bear in mind that this employee likely has thought long and hard about coming out as transgender. This is not a decision people reach without much soul-searching.
- ✓ Initial appearance and demeanor issues tend to resolve themselves with time. Management concerns about adverse customer and coworker reactions should be evaluated in light of this fact.
- ✓ There is no evidence that allowing an employee to transition will open the floodgates to nonconformity. Developing an appropriate management process, however, will make it easier next time, if there is a next time.

SMOKERS' RIGHTS

About half the states ban discrimination against employees or applicants who smoke cigarettes. Some states protect users of any "legal substance". These laws were a reaction to rising anti-smoking sentiment around the country. Employers sought to reduce health insurance costs by requiring workers to be smoke-free. The American Civil Liberties Union and the tobacco industry led drives in the state legislatures to protect workers who smoke.

But, even in states that recognize smokers' rights, workers have to obey laws and ordinances protecting their co-workers' rights to a smoke-free workplace.

LAWFUL ACTIVITIES OUTSIDE WORK

A recent trend in the states is to prohibit discrimination against employees for their activities outside of work. Some states protect only the "use of lawful substances or products," for example, alcohol. Other states protect any lawful activity. In one case, for example, a legal secretary was fired because his second job was as an exotic dancer. Under the lawful activity law, he would be protected.

Valuing People with Disabilities

The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) was passed by Congress in 1990. It covers companies with 15 or more employees. Some states have laws prohibiting disability discrimination by smaller companies or covering more conditions than federal law.

The law protects people who suffer from a permanent impairment of a major life function, like walking, seeing or breathing. It does not cover minor or temporary disabilities.

The ADA covers virtually every type of disability:

- physical disabilities, including people in wheelchairs, blind and deaf;
- medical conditions, such as cancer, AIDS, chronic fatigue syndrome and stress;
- mental illnesses, like schizophrenia, bipolar disease and manic depression;
- developmental disabilities such as learning disorders, dyslexia, retardation and Down's Syndrome;
- rehabilitated alcoholics and drug addicts.

The law also applies to people who have a history of being disabled. For example, a woman manager who had breast cancer returned to work with the disease in remission. She was not disabled. But her boss said she would never get anywhere in the company because she was "weak." This is discrimination based on her history of disability.

People who are mistakenly perceived as being disabled also are protected. For example, an employer might assume that people who are obese can't keep up the pace. This is an assumption based on stereotypical perceptions. If an employer discriminates on this basis, it probably is illegal under the ADA.

Similarly, if an employer believes an employee is using drugs, but in fact the employee is not, that employee is perceived as disabled and is protected under the ADA. Accusing an employee of taking drugs puts the employee in a protected category.

Finally, people who are related to or take care of people with disabilities are covered.

For the first 18 years of its existence, the ADA - the world's first human rights law for people with disabilities - was dramatically narrowed in the courts, leaving employees with epilepsy, diabetes, mental illness, cancer, and other disabilities unprotected from discrimination. The Supreme Court has generally exempted from the law's protection those with partial physical disabilities or impairments that can be treated with medication or devices such as hearing aids. Thus, someone who takes medication to control epilepsy or diabetes was no longer considered disabled.

However, the ADA Amendments Act of 2008 clarifies the intent of Congress and reverses the "judicial activism" that has resulted in more than 95% of employment-related ADA cases being dismissed on summary judgment. The bill directs the courts toward a more generous application of the ADA's definition of disability, making it clear that Congress intended the ADA's coverage to be broad and to cover anyone facing discrimination because of a disability.

Chief sponsors of the bill included Rep. James Sensenbrenner (R-Wis.) and Senator Tom Harkin (D-Iowa). The bill was praised by the AARP and disability rights activists, as well as by the U.S. Chamber of Commerce.

What you should do: Assume anyone with a disability, even if it is fully treatable with medication, is "disabled" under the ADA, and work with the employee on any requests for reasonable accommodation. Treat all employees consistently and fairly, and you will avoid most claims for disability discrimination.

Not Disabled, Not Protected

Congress chose to exclude people with certain kinds of disabilities from the law's protection, such as:

current users of illegal drugs
food handlers with communicable diseases
gamblers, kleptomaniacs and pyromaniacs

Also not protected are people who pose a danger to others. For example, people with contagious diseases are not required to be employed if they will infect others.

Courts look at two factors in judging whether an employee poses a danger to others. First, how is the disease transmitted? In the case of AIDS, it is communicable only through the exchange of bodily fluids. In most workplaces, bodily fluids are not exchanged. The disease can't be

transmitted to co-workers. Tuberculosis, on the other hand, is communicable through the air after many months of exposure to an infected person. The likelihood of infecting co-workers is much greater.

The second issue is how long is the carrier infectious? In the case of tuberculosis, it's communicable for a relatively short period of time. It might be reasonable to give time off on medical leave. On the other hand, a person who is HIV positive always is infectious.

If there is a reasonable probability someone at work will become infected, you can refuse employment. If there is no such probability, but only fear based on misinformation, you can't discriminate.

No Stereotypes Allowed

The spirit of the ADA says don't make assumptions about what a person with a disability can or can't do. Instead, ASK.

Don't judge people until you know them. In interviews, you can ask people who are disabled only about their ability to do the job. If they say they can do the job, don't assume they can't. Take them at their word, test them or hire them on a temporary basis.

Job Descriptions are Essential

You must hire a person with a disability only if he or she is the best qualified and he or she can perform the essential functions of the job.

The "essential functions" are the tasks the employee who holds the position *must* be able to perform. If the position exists in order to perform the function (fast, accurate typing for a typist, for example) then it is essential. If the task makes up a large portion of the job it is essential.

There may be some functions that an employee never or rarely performs, but they are still essential. For example, firefighters must be able to carry adults out of burning buildings. They are the only people in our society hired to do this, so it's an essential function. Yet a firefighter may never actually have to do it.

Rewrite all job descriptions (or write job descriptions for the first time) so they indicate the essential functions of each job. Job descriptions written before advertising job openings will help you win discrimination claims. If you don't write job descriptions, the employee's performance appraisal may be presumed to show all the essential functions.

By writing accurate job descriptions and using them in the hiring process, you will protect yourself from a discrimination suit. You also will make a better hiring decision no matter who you pick.

Reasonable Accommodation Required

Employees who are disabled also must be reasonably accommodated. A "reasonable accommodation" is a change you make in a job's requirements so a person with a disability can do it.

You should offer a reasonable accommodation as soon as you realize an employee is disabled and needs help to perform the job. According to the government regulations, the manager should "initiate an informal, interactive process" with the person who is disabled in order to learn what accommodation is appropriate. In other words, ASK. It all comes back to not making assumptions.

Reasonable Accommodation

Some ways you may be required to reasonably accommodate people with disabilities:

buy equipment
modify structures
restructure jobs
schedule part-time work
rewrite tests
provide readers and interpreters
expects employers to go in order to hire people with disabilities.

Managers should remember that if an employee has an obvious disability, there may well be a duty to accommodate, even though the employee never raises the issue. In 2008, a federal appeals court affirmed a jury award of $900,000-- plus nearly $650,000 in attorneys' fees and court costs--to a former pharmacy assistant with cerebral palsy whose impairment obviously affected his gait and speech, but who never had asked for a reasonable accommodation. In addition, the pharmacy manager was held personally liable for aiding and abetting disability discrimination under state law.

People in wheelchairs can be accommodated by building ramps over stairs. A person who is blind can be given an optical character reader to scan printed materials. An employee who is deaf can use networks and

TTY telephones. Indeed, due to rapid advances in technology, many physical limitations can be overcome at work.

Jobs must be restructured so people with disabilities can perform them. But you don't have to restructure out the essential functions of the job. For example, let's say you have two shipping & receiving clerk positions in the warehouse. The jobs are identical. The clerks are required to open the doors when a shipment arrives, open and unpack boxes, check the items against the packing list and purchase order, inventory the items in the computer, and stock the shelves by driving a forklift and lifting up to 50 pounds to a height of 6 feet.

A person in a wheelchair might be able to do all of these functions except lifting over 4 feet. A reasonable accommodation would be to restructure these two jobs, so that an applicant in a wheelchair could do one of them.

Giving employees part-time work schedules also may be required to reasonably accommodate. But you also can pay them part-time wages. In contrast, if you hire a reader or interpreter for employees who are deaf or blind, that cost can't be deducted from their pay.

Reasonable accommodation of other disabilities takes different forms. A person with cancer may require chemotherapy, and a person with kidney disease must undergo dialysis. They are able to work most of the time. Reasonable accommodation might require they be given off one day a week for treatment.

When employees have AIDS, reasonable accommodation might require you to give them some leeway in taking their disability leaves in bits of time, rather than all at once. That's because people with AIDS can become ill frequently with colds, pneumonia, bronchitis and other infections. They might be at work for three weeks, then out for a week. They should be allowed to use their sick days and disability leave for those weeks as they come up.

At a minimum, employees with disabilities are allowed 12 weeks a year for leave, taken in any increment that is medically necessary: one hour a day, one day a week, or one week a month. See the section on the Family Medical Leave Act.

Although not required by law, some companies allow employees to bank their accrued sick leave and donate it to co-workers who need it.

If disabled employees don't accept accommodation, they are no longer protected by the law. For example, one company had an employee who was hard of hearing, but she refused to wear a hearing aid. As a result, she couldn't perform all of her job duties. She could be dismissed.

Recovering alcoholics and rehabilitating drug addicts also must be reasonably accommodated. If they need to attend a treatment program, the company must allow reasonable time off. But their addictions should not be accommodated. Current abusers aren't covered. If they can't do the job, don't show up for work or are frequently tardy, you can fire them the same as other non-performers.

In 2008, the EEOC issued official guidance on applying performance and conduct standards to employees with disabilities. Employers will find that this guidance clarifies a lot of ADA issues in a way that is straight-forward and makes business sense.

Here is a sample of some of the questions and answers from the EEOC:

Q: If an employer gives a lower performance rating to an employee and the employee responds by revealing she has a disability that is causing the performance problem, may the employer still give the lower rating?
A: Yes. Reasonable accommodation does not require that the employer tolerate poor performance or withhold disciplinary action, including termination. The employer does not have to cancel a PIP (performance improvement plan) because reasonable accommodation never requires excusing poor performance or its consequences.

Q: If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?
A: Yes, if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. Certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, destruction of property, and insubordination. Employers may require that employees show respect for, and deal appropriately with, coworkers, clients and customers.

Q: What should an employer do if an employee mentions a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?
A: The employer may still discipline the employee for the misconduct.

Q: Should an employer mention an employee's disability during a discussion about a performance or conduct problem if the employee does not do so?
A: Generally, no.

Q: When discussing performance or conduct problems with an employee who has a known disability, may an employer ask if the employee needs a reasonable accommodation?
A: Yes, but the employer is not required to ask - the duty to request is on the employee.

Q: May an employer require an employee who is having performance or conduct problems to provide medical information or undergo a medical examination?
A: Sometimes. The ADA permits but does not require an employer to seek medical information. An employer may choose to focus solely on the performance or conduct problems and take appropriate steps to address them.

Undue Hardship

You are not required to reasonably accommodate any disability if it would be an undue hardship. According to one company's lawyer, "As far as the government is concerned, spending money is never an undue hardship!" Buying equipment is almost always considered reasonable.

An undue hardship causes significant difficulty or creates a significant expense for the company site (not just for you or your department). You look at the net cost after tax credits.

When the ADA passed, Congress recognized that hiring people with disabilities could cost companies more. Congress explicitly made the decision to shift the cost of supporting people with disabilities from the taxpayers, who pay the cost of a non-working disabled population, to employers who will get the benefit of the work they perform.

Congress was asked to put a $10,000 limit on the amount an employer could be required to spend. This was defeated, so you could be required to spend more. However, according to a report from the Office of Vocational Rehabilitation, over half of the people with disabilities who were accommodated required no extra costs, and another 30% required expenditures less than $500.

The same report found 91% of the disabled workers had average or better productivity on the job than non-disabled employees. 75% had

better safety records. And able-bodied workers' turnover rate was 11:1 compared to people with disabilities. Most important to the issue of reasonable accommodation, 55% of the people with disabilities had better attendance than able-bodied workers, and only 5% had worse records.

If an employee with a disability needs more than 12 weeks, how much time off do you have to give before it's an undue hardship? It depends on the answers to these questions:

--is temporary help available?
--how essential are the job functions?
--how will work delays impact the company?
--how much time off is requested?
--is the employee otherwise satisfactory?

Sensitivity and Acceptance

Once hired, employees who are disabled must be treated the same as non-disabled employees whenever you make decisions about pay increases, transfers, training, overtime, promotions and terminations.

Just as important, you should support them after they are on the job. That means including them in casual conversation, giving them visibility as a representative of your area and preparing them for promotion in the organization.

Don't allow yourself or others to blame employees' errors on their disabilities. Everyone makes mistakes. On the other hand, don't be overly solicitous of employees who are disabled. Don't make the assumption that people with disabilities need help unless they ask for it.

W Mitchell, a professional speaker who uses a wheelchair, tells of the time a well-meaning person tried to help him when he wasn't expecting it. He almost fell over the edge of the stairs. Mitchell advises always to ask people in wheelchairs if they want help before giving it. Otherwise, just act naturally.

The ADA was passed because Congress perceived the value of the 43 million of "differently abled" people among us. If you treat them fairly, they will make great contributions to your company.

Genetic Characteristics

"There are currently over 15,500 recognized genetic disorders affecting 13 million Americans, and every one of us is estimated to be genetically predisposed to between 5 and 50 serious disorders," reported Congresswoman Louise M. Slaughter during a House debate in 2007. As a result of employee privacy concerns and the reluctance of people to get genetic tests for fear they would be used against them by their employers or insurance companies, many states have passed legislation adding genetic information to their list of protected characteristics.

As of January, 2009, genetic information is a protected characteristic in Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Virginia, Washington and Wisconsin. And, under the Genetic Information Nondiscrimination Act of 2008, (GINA) this will become a federally-protected characteristic on November 21, 2009.

Under GINA, which is similar to many of the state laws that preceded it, employers will be barred from:

1. discriminating against employees and applicants on the basis of genetic information, which is defined as:
    a. information about (i) such individual's genetic tests,(ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual.
2. requesting, requiring, or purchasing genetic information (limited exceptions apply, such as for FMLA certifications)
3. retaliating against individuals who exercise their rights under the law; and
4. disclosing an individual's genetic information, which is considered confidential medical information under ADA.(limited exceptions apply).

However, genetic monitoring of employees for the effects of toxic substances in the workplace will continue to be permitted under specified conditions.

Group health plans will also be barred from discriminating against individuals in terms of enrollment eligibility and premiums based on genetic information; and requesting or requiring that employees or their family members undergo genetic tests.

Affirmative Action

Remember the political turmoil that led to the passage of the Civil Rights Act in 1964? During the next year, the civil rights movement continued gaining strength. President Johnson decided more action was needed -- affirmative action. He wanted companies to do more than not discriminate. He wanted them to go out and recruit minority and female employees.

He issued a presidential edict, called an Executive Order. It required Affirmative Action. This Executive Order can be revoked at any time by any President. But not one President since Johnson has tried to stop Affirmative Action, including Presidents Nixon, Reagan and Bush.

Affirmative Action also has been upheld by the so-called Reagan (U. S. Supreme) Court. In 1989, the Court approved an Affirmative Action plan implemented by an employer as required by the Executive Order.

Affirmative Action has this kind of broad-based support because it does not require quotas. In fact, the Affirmative Action regulations specifically prohibit quota and preferential hiring and promotions under the guise of affirmative action numerical goals. In other words, discrimination in employment decisions is prohibited

Some states, like California, passed laws banning state Affirmative Action, but these laws do not change the federal requirements.

Affirmative Action applies only to federal government contractors and subcontractors. More than 100,000 companies are covered. Affirmative Action applies only to women, certain defined minorities, veterans and people with disabilities. It does not apply to employees over 40 or religious groups. The fundamental premise underlying Affirmative Action is that, absent discrimination, over time a contractor's work force will generally reflect the gender, racial, and ethnic profile of the labor pools from which the contractor recruits and selects.

Companies that have Affirmative Action Plans are required to keep data about the race, sex, disability and veteran status of all applicants. Questions that are otherwise illegal can be asked in order to compile this applicant flow data. While the company is required to ask for the information, it is voluntary for the applicant to give it.

The data are used by the U. S. Office of Federal Contract Compliance Programs (OFCCP) to audit the company's success. If the company doesn't meet the requirements, its federal contracts can be cancelled or suspended, it can be debarred from future federal contracts or prevented from receiving federal funds.

So what is Affirmative Action? There are three requirements:

--have an Affirmative Action Plan
--recruit targeted groups
--hire the best.

There are somewhat different rules for construction contractors, as discussed on page 3-80.

The Affirmative Action Plan

The Affirmative Action Plan (AAP) is simply a statistical check on the company's hiring, promotion and termination practices. It is a self-analysis done to discover and eliminate barriers to equal employment opportunity.

In 2000, OFCCP estimated that preparing, updating, and maintaining an AAP took an average of 150 hours per year. New regulations adopted at the end of 2000 are expected to cut that burden by one-third.

The AAP has five parts: organizational profile, job group, availability and underutilization analyses, and goals.

Organizational Profile

The Organizational Profile is an organization chart showing the company's units, their relationships to each other, and the gender, racial, and ethnic composition of each unit. Units are departments, divisions, sections, branches, groups, project teams, job families and similar components. Employers who had AA plans before 2000 may continue to use the workforce analysis method from the old regulations, which also required itemization of individual job titles, and reporting of gender, race, ethnicity and salary information by job title.

Job Group Analysis

Next, the company combines jobs at each location with similar duties, wage rates, and opportunities (training, transfers, mobility, and other

career enhancements) into job groups. It must also state the percentage of women and minorities in each job group.

A job group analysis in Widget, Inc.'s Engineering Department might look like this:

Table 1

Job Group	Total	% female	%minorities
Electrical Engineers Electrical Engineer I Electrical Engineer II EE Project Leader	**700**	**15**	**21**
Job Group	**Total**	**% female**	**%minorities**
Mechanical Engineers Mechanical Engineer I Mechanical Engineer II ME Project Leader	**500**	**17**	**27**

Availability Analysis

Before 2000, employers had to consider eight different factors in determining the availability of women and minorities in each job group. Now there are only two factors:

1) the percentage of women and minorities with the needed skills in the reasonable recruiting area, that is, where the company usually looks for or reasonably could look for workers; and

2) the percentage of promotable, transferable and trainable women and minorities already employed by the company.

For Factor One, employers will look at statistical data such as the census, figures maintained by state job service offices, and graduation data from colleges, universities, and other training institutions. For Factor Two, employers will determine which job groups are "feeder pools" for other jobs, and ascertain which employees could be promoted or transferred with appropriate training which the employer can reasonably provide.

For example, Widgets, Inc. has a job group of Engineering Managers. Over the past year, everyone who has been promoted into that job group had been either an Electrical Engineering Project Leader, or a Mechanical Engineering Project Leader. There are 100 Electrical Engineering Project Leaders, including 20 women and 25 minorities. There are also 100 Mechanical Engineering Project Leaders, of whom 20 are minorities and 15 are women:

Table 2

Job Group	Total	Female	Minorities
EE PL	100	20	25
ME PL	100	15	20
Total	200	35	45

Female availability=17.5% (200/35)
Minority availability =22.5% (200/45)

Where Widgets, Inc. is located and where it recruits, 25% of the workers with the skills, training and experience needed to be Engineering Managers are minorities, while 15% are women.

Utilization Analysis

The fourth step in the AAP process is simple: compare the job group analysis with the availability analysis to see if the company has "utilized" as many women and engineers as expected.

In Table 3 you see the comparison. Of the current Engineering Managers, 25% are minorities. 25% of the external EMs are minorities, and 22.5% of those in the feeder job of Project Leader are minorities. So, there is no underutilization of minorities in that job.

Table 3
Utilization Analysis

Minority

Job Group	Minority %	% Availability	Underutilization
Engineering Manager	25%	25% External 22.5% Internal	No

In contrast, table 4 shows that Widgets, Inc. employs only 12.5% women Engineering Managers, while 15% of the external candidates and 17.5% of incumbents in the feeder job are women. So Widgets is underutilizing women as Engineering Managers.

Table 4
Utilization Analysis

Female

Job Group	Female %	% Availability	Underutilization
Engineering Manager	12.5%	15% External 17.5% Internal	Yes

Goals

After the company does the required analyses, it sets goals for curing areas of underutilization. For example, this company might plan on hiring 10 Engineering Managers in the next two years. They could set a goal of hiring or promoting two women among them. That would be 20% of the new hires. The company would then have to set new goals to continue to increase female representation.

You decide, based on your own business plans, the job market and other factors, how quickly you can reach your goals. The government does not expect it to be done overnight.

What's the difference between a goal and a quota? Quotas are court ordered. If you don't meet a quota, you're in trouble. Goals are enforced by the OFCCP. If you don't meet a goal, they will not automatically shut you down. Instead, you will be asked why you didn't meet the goal. Your good-faith efforts are essential.

The Affirmative Action regulations say: "Quotas are expressly forbidden"! AA goals are not ceilings or floors for the employment of women and minorities. AA goals do not create set-asides, and they are not intended to achieve proportional representation. You are never required to hire or promote someone who lacks qualifications to perform the job successfully, and you never have to hire or promote someone who is less qualified than other applicants.

There are many non-discriminatory reasons why you might not meet your goals. If you just had a major layoff, it will be difficult to hold on to the gains you've made, much less achieve new ones. Hiring and promotion freezes also impact your plan.

You may do lots of recruiting, but no minorities apply. Or you may get applicants, but they don't meet your qualifications. All of these are reasons why a goal might not be reached. If a goal turns out to be unrealistic, it can be changed.

Recruit Applicants

The second requirement of Affirmative Action is to identify problem areas and to create action-oriented programs to correct them. One of the best ways to do this is to have an active recruiting program that targets underutilized groups. You can't just rely on following the same old procedures that produced the inadequate results.

Most companies send lists of job openings to various community groups. This is a bare minimum. Recruiting requires networking with groups by attending their meetings and getting involved. It includes on-line networks, too. Make sure your job advertising covers all segments of society.

Many companies send recruiters to Black colleges. But don't ignore the minority students at the universities where you already recruit. Contact the student professional associations for women, Blacks, Hispanics, Native Americans and Asians that exist at all major college campuses.

Hire the Best

Once you have opened up your recruiting processes – internal as well as external – and you have the broadest group of candidates you can find, hire the best.

Affirmative Action says you should hire the most qualified candidate. You decide what the qualifications are, based on legitimate business reasons.

True affirmative action employers consider it a plus when an employee is "different." They like having different perspectives on such issues as product design, marketing and customer service. They see Affirmative Action as part of the trend towards globalization.

Those employers hire and promote women and minorities even when they are slightly less qualified in some areas, because the company considers them to be better qualified overall as a result of their different perspectives.

Affirmative Action for People with Disabilities

In 1973, Congress passed a law requiring Affirmative Action for people with disabilities. Unlike Affirmative Action for women and minorities, there are no goals and timetables for hiring disabled employees. Instead, the law encourages you to hire as many qualified applicants as possible.

The company is required to have a written affirmative action plan for hiring and promoting people with disabilities. Although the law does not require any particular program, government regulations suggest that at least some of these steps should be followed:

--Gain support for AA from the top down.

--Post job openings with disability community groups and government agencies.

--Recruit employees from training programs and schools for the blind, deaf and disabled.

--Promote and train current employees who are or become disabled.

--Picture disabled workers in ads, company newspapers and annual reports.

--Evaluate managers on their affirmative action efforts and results.

Affirmative Action for Veterans

Originally designed to protect Vietnam-era veterans, federal regulations now call for affirmative action for all military veterans. Like the other Affirmative Action laws, it applies only to government contractors, sub-contractors and public employers.

The law prohibits discrimination and requires Affirmative Action.

Some of the law's requirements:

Treat veterans the same as all other employees in hiring, evaluating, training, transferring, paying and terminating. You must have a legitimate business reason for treating a veteran inconsistently.

Don't single out veterans for conversation about Vietnam, Afghanistan, or Iraq. Asking questions about war experiences, bringing up the latest war movie, or talking about some psychopath recently in the news who also happens to be a veteran, can be offensive. Like most people, veterans don't want to be singled out for being different. If veterans want to talk about combat experience, they'll bring it up.

Affirmative Action also requires a written plan for recruiting, hiring and promoting veterans. The plan should have the same steps as plans for disabled employees. You don't set goals and timetables for hiring vets. Instead, hire and promote as many as possible.

Special Rules for Construction Contractors

Due to the fluid and temporary nature of the construction workforce, OFCCP has established a different approach to affirmative action for the construction industry. For construction contractors and sub-contractors, OFCCP, rather than the contractor, establishes goals and specifies affirmative action which must be undertaken. In 1980, OFCCP issued a specific national goal for women of 6.9 percent, which remains in effect today. For minority group members, OFCCP publishes goals for each region of the country.

Unlike other federal contractors, construction contractors are not required to develop written affirmative action programs. Federal regulations list the good-faith efforts that construction contractors must make, including:

1. Maintaining a work environment free of harassment, intimidation, and coercion;
2. Establishing and maintaining current lists of minority and female recruitment sources and provide written notification to those recruitment sources and to community organizations when the contractor or its unions have jobs available;
3. Compiling files containing the names, addresses and telephone numbers of each minority or female off-the-street applicant and minority or female referral from a union, recruitment source or community organization and of what action was taken with respect to each applicant or referral;
4. Developing on-the-job training opportunities or participating in training programs which expressly include minorities and women;

5. Creating and publicizing EEO policies to employees, unions and training programs;
6. Reviewing EEO policies and affirmative action obligations with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions, at least once a year, and annually assessing supervisors' compliance with EEO and affirmative action policies;
7. Recruiting at minority, female and community organizations, at schools with minority and female students and at minority and female recruitment and training organizations;
8. Encouraging minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to young women and young minority members;
9. Evaluating all minority and female personnel for promotional opportunities, and encouraging these employees to seek or prepare for promotion through appropriate training.

How to be an Affirmative Action Manager

In the spirit of affirmative action, you have four major responsibilities as a manager.

1. Evaluate applicants for employment, transfer and promotion consistently. Have legitimate business reasons for your decisions. If you don't discriminate, chances are you will meet affirmative action goals.

2. Know the affirmative action goals for your area. If your area is underrepresented in females, minorities, disabled and veterans, go out and find some! Don't wait for Personnel to recruit people. There are literally hundreds of professional associations and organizations for women, minorities, disabled and veterans. Find out who they are and let them know about job openings. Join. Give money. Become a visible sponsor.

3. Support Affirmative Action employees after you hire them. Help them become part of the team. Some companies have found assigning a mentor or buddy to new minority employees is helpful. That person doesn't have to be another minority. The idea is to have someone initiate the new employee into your unique company culture in a way that you, the manager, cannot. (And, yes, you must assign a buddy to every new employee, whether or not minority.)

Prepare women, minorities, disabled and veterans in your area for transfers and promotions, including promotion into your job. After all, if you are irreplaceable, you can't get promoted. As a manager, you should be grooming one of your subordinates to replace you. That person should be picked based on legitimate business reasons. One of those reasons should be meeting Affirmative Action goals.

4. Document your efforts. Affirmative Action does require you to fill out additional paperwork to prove you made good faith efforts to recruit candidates. If the company doesn't reach its Affirmative Action goals, it must be able to prove with documentation that a good faith effort was made.

Valuing Diversity

Equal Employment Opportunity law was the first step towards achieving equality. Affirmative Action was the second step.

Both of these laws successfully created opportunities for people who otherwise would have been left out of the system.

But both of these laws were flawed. They divided us. EEO made us pretend we're color blind. We're not. Then Affirmative Action required us to be color bound. It violated our sense of fairness.

Valuing diversity goes beyond the laws. It sees difference as value added. It celebrates our differences. Ultimately that's the spirit of equal employment opportunity law.