

LEGAL RIGHTS AND RESPONSIBILITIES

Laws Governing the Workplace

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After studying this chapter, you should be able to:

- Explain the sources of law that apply to human resource management;
- Distinguish between a binding and a persuasive judicial decision;
- Determine if a law or proceeding is criminal, civil, or administrative in nature;
- Identify the main laws that create the framework for human resource management and explain each one's purpose and basic requirements;
- Recognize employment practices that raise legal concerns; and
- Spot situations in which a human resource professional or lawyer should be contacted.

People do not have the same rights on their jobs that they have as citizens. The vast majority of individuals who want to be employed must arrive on time, follow orders, accept limits on their speech and privacy, and conform to a variety of other rules, regulations, and norms. Those who manage must leave their personal prejudices at home and enforce workplace rules, such as safety protocols, even if they decrease productivity or are otherwise unpopular. Broadly conceived, the ultimate paradox presented by employment is this: To get something (money, responsibility, opportunity to make a difference), employees must give up something (liberty, time, discretion).

Most of the obligations and restraints that exist in the workplace have a basis in the law, some of which are several centuries old and others of which reflect a shift in society's values. Successful and valued leaders of organizations—public or private, big or small—must be familiar enough with the law and its application and effect to anticipate and prevent problems from developing into formal legal actions in the first place. Even a case successfully defended by an employer consumes enormous resources—time, emotion, and money—and, in many cases, will diminish morale and the culture of the organization. Paradoxically, then, managers must embrace the law to avoid the law.

Those entrusted with supervising or managing others must master the laws that apply to the workplace for another reason: to gain the confidence to know when and how to act, even when that means making tough and potentially life-changing personnel decisions, such as discharging an employee. While these decisions are usually emotionally charged and can carry high risk, an educated and confident manager can make decisions based on facts, not emotions,

and use discretion, not impulses, even with the looming threat of a legal action. The reality is that, in today's workplace, nearly every employee possesses at least one legally protected characteristic (e.g., race, color, religion, sex, national origin, age, gender identity, sexual orientation, or disability, to name a few) or has engaged in at least one act of legally protected conduct (e.g., organized or participated in a union, filed for workers' compensation, or complained about harassment or conduct the employee thought was unlawful or a waste of resources). An employee may brandish one of these characteristics like a shield, especially when that person's performance is being scrutinized. Employment laws do not shield workers from discipline when it is warranted, and supervisors should not be afraid to act due to a potential lawsuit. Indeed, the failure to discipline someone when it is justified creates problems as well, by establishing precedent. It is better for managers to learn the law and confidently apply standards uniformly and objectively.

A final, compelling reason for administrators to delve into the law is so that they can capably assist in implementing worthy societal objectives. Equality, fairness, dignity, economic well-being, strong familial relationships, and healthfulness are all goals that employment laws impact—directly and indirectly. In notable instances, the government, the largest employer in the nation, has led the way in complying with new workplace laws and modeling desirable behavior by employers—for example, by providing equal opportunities to women, members of minority groups, and individuals with disabilities. An administrator who comprehends policy objectives as well as technicalities will reap personal satisfaction along with professional success.

Still, even leaders who diligently stay abreast of legal developments will find themselves perplexed on a regular basis. Another overarching paradox in the legal arena is this: Those in charge are expected to uphold the law, but inherent complexities and uncertainties make compliance frustratingly difficult. Five commonly occurring factors explain much of this disconnect:

1. Legal requirements and interpretations of them are voluminous and dynamic, so managers sometimes have the experience that “the more you know, the less you know.” A manager who seeks to review all available information on a topic before making a decision may be overwhelmed and experience “paralysis by analysis.” There is always more to know.
2. Supervisors should not hesitate to contact legal counsel for guidance, but formal opinions take time, and counsel may be unwilling to stand behind initial, informal opinions.
3. Applying a statute is rarely straightforward. A law often contains a general principle, but the apparent simplicity of such a principle is usually qualified or conditioned on the intricacies and exceptions created by courts or executive agencies. For example, the Americans With Disabilities Act (ADA) requires an employer to provide **reasonable accommodation** to employees with

disabilities. But what is reasonable? For example, must an employer pay for a sign-language interpreter so that an employee who has a hearing impairment can participate in a group meeting?

4. Basing decisions on judicial opinions is tricky, because judges decide cases based on specific facts. Managers seldom have either the time or the resources to research these decisions or decipher their distinctive facts; and, even if they did, they rarely confront circumstances identical to those relied upon by a court, making it difficult to determine whether minor distinctions should alter their decision making.
5. Legal requirements may be crosscutting, so that compliance with one directive conflicts with the requirements of another. For example, antidiscrimination laws require swift corrective action to stop harassment, but civil service laws require time-consuming, fairness-ensuring procedures prior to discipline.

In light of these many challenges, the prudent course for a manager would be to call a human resource (HR) professional or attorney before taking any action. Although managers should consult with legal experts regularly, the reality is that they must make choices daily about how work is to be performed, often with little time for input from others. This chapter provides a basic overview of the law, which will help a manager understand the legal landscape and recognize which decisions can be made without consulting an expert and which ones cannot.

No matter how complex employment law on a particular topic appears to be, it typically is grounded in the balance of three often-competing interests: (1) employers' need to manage their workforces and operations in efficient ways; (2) employees' rights to economic security, privacy, and other matters; and (3) governments' interest in pursuing social objectives through public policy. The balance struck varies from situation to situation and changes dynamically over time. Indeed, as attitudes, social norms, and economic conditions change, previously resolved issues may resurface (e.g., health benefits for family members may extend to same-sex partners/spouses) and new areas of contention arise (e.g., whether veterans with post-traumatic stress disorder have a disability that must be accommodated).

In reading this chapter, note its emphasis on the rights and responsibilities of individual employees—in other words, *employment law*. Chapter 11 discusses *labor law*—the collective rights of employees to organize and bargain in public sector workplaces. Since 1960, the trend has been toward more direct government intervention into employees' individual relationships with employers, and the result has been a proliferation of employment law statutes, litigation, and court decisions. Still, in the United States union membership is higher in the public sector than in the private sector, so the rules applied to agency workplace issues are often found in collective bargaining agreements, not the law. In these instances, disputes are resolved through grievance procedures, not lawsuits. This chapter's focus on legal processes also means that alternative dispute resolution methods (see Chapter 10), such as arbitration and mediation, receive little attention

Exhibit 2.1 Keeping Abreast

How do administrators stay up-to-date with legal changes? Most prefer to await policy directives from their organizations, and this works well normally, but sometimes employers are behind the curve and managers need current information. The HR department is usually a good source to tap. Singular situations for line managers are routine events for HR administrators, who have access to networks of specialists and subscribe to niche publications.

Still, it pays to develop an independent perspective. Professional association newsletters and conferences are ideal sources of information

about the latest trends. The International Public Management Association (IPMA) publishes a manager-friendly newsletter that covers legal issues. Leading newspapers follow legal developments, and resources abound online. Of particular note is the Catherwood Library at Cornell University's School of Industrial and Labor Relations, which houses a vast collection of labor and employment law materials accessible through a user-friendly subject guide (<http://www.ilr.cornell.edu/library>) and the Society for Human Resource Management (SHRM) (<http://www.shrm.org>).

here. Yet, more than 90% of employment-related disputes initiated in judicial forums are settled before trial, often as a result of mediation.

The chapter begins with a review of a few foundational principles and then shifts to a discussion of specific activities. Disciplinary procedures, speech and political activity, compensation and scheduling, health and safety, and the individual liability of employees are examined. Next, searches, pre-employment investigations, and post-employment references are reviewed. The last part of the chapter explains how antidiscrimination and anti-retaliation laws affect the employment relationship. For each topic, the relevant laws are identified and discussed. After studying this chapter, a student should be able to examine a policy, such as a dress code, explain the legal provisions that apply to it, and determine whether it is permissible. Checking agencies' decisions against current regulations to ensure they are lawful is an ongoing process. Exhibit 2.1 discusses strategies for staying up-to-date.

THE FOUNDATIONS OF EMPLOYMENT LAW

Legislation is a major source of employment law in the United States. Exhibit 2.2 lists the main federal laws and their purposes, but state statutes and local ordinances affect the employer–employee relationship as well. States and local governments, for example, have created civil service systems, raised the minimum wage above the national minimum, and passed antidiscrimination and anti-retaliation laws with broader protections than those found in national laws. In some cases, citizen-led initiatives, in the form of amendments to a state's constitution, have mandated the increase in minimum wage.

Not surprisingly, these laws frequently conflict, and courts must decide whether one governmental body's law preempts another's. The term “preempt” generally refers to the displacing effect that federal law has on a conflicting or inconsistent state law under

Exhibit 2.2 Overview of Selected Federal Employment Laws

42 U.S.C. § 1981 (Civil Rights Act of 1866)	Prohibits intentional discrimination based on race or ethnicity in the making and enforcement of contracts (including employment).
42 U.S.C. § 1983 (Civil Rights Act of 1871)	Prohibits public sector employment discrimination based on race, color, religion, sex, or national origin. Section 1983 is the exclusive tool for bringing suit against individuals acting under “color of law” or public entities for the violation of rights guaranteed by the U.S. Constitution, including the free exercise of speech, religion, and expression.
42 U.S.C. § 1985	Prohibits conspiracies to deprive citizens of equal protection of the law or equal privileges and immunities under the law. Can be used to challenge public sector employment discrimination with Section 1983.
Age Discrimination in Employment Act	Protects workers age 40 and over from adverse employment actions based on age, including hiring, promotion, and termination decisions.
Americans With Disabilities Act (ADA)	Prohibits discrimination against qualified individuals with disabilities. After the U.S. Supreme Court issued several decisions narrowing the ADA’s scope, Congress amended the Act in 2008 and broadened its application.
Civil Rights Act of 1964, Title VII	Prohibits employers from discriminating against employees in hiring, promotion, and termination decisions based on race, color, religion, sex, or national origin.
Civil Rights Act of 1991	Amended Title VII and other employment laws to provide the right to trial by jury and the recovery of emotional distress damages.
Consolidated Omnibus Budget Reconciliation Act of 1985	Mandates an insurance program giving some employees the ability to continue employers’ group health coverage after leaving employment.
Consumer Credit Protection Act	Regulates the use of credit reports by employers. Limits the amount of an employee’s earnings that may be garnished and protects employees from being discharged because their wages have been garnished.
Electronic Communications Privacy Act	Title I, The Wiretap Act, prohibits employers from intercepting wire, oral, and electronic communications. Title II, the Stored Communications Act, prohibits employers from intentional unauthorized access to stored communications.

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Employee Polygraph Protection Act	Limits the uses of lie detectors by private employers with respect to employees and job applicants. The act does not apply to governmental employers.
Employee Retirement Income Security Act (ERISA)	Establishes minimum standards for health and pension plans in private industry.
Equal Pay Act	Prohibits employers from paying men and women different wage rates for equal work on jobs that require equal skill, effort, and responsibility and are performed under similar working conditions.
Fair Labor Standards Act (FLSA)	Sets minimum wage and overtime pay standards with notable exceptions, sets standards for record keeping, and regulates the employment of minors.
Family and Medical Leave Act (FMLA)	Requires employers of 50 or more employees and all public agencies to provide up to 12 weeks of unpaid leave to eligible employees for the birth and care of a child, adoption and placement of a child, or serious illness of the employee or immediate family member.
Genetic Information Nondiscrimination Act of 2008 (GINA)	Prohibits employers from discriminating on the basis of genetic information, requiring genetic testing, purchasing or collecting genetic information, and disclosing genetic information.
Health Insurance Portability and Accountability Act (HIPAA)	Protects the security and privacy of health data.
Immigration Reform and Control Act	Prohibits employers from knowingly hiring or recruiting immigrants who do not possess lawful work authorization.
Occupational Safety and Health Act (OSHA)	Regulates safety and health conditions, including exposure to a variety of health hazards.
Patient Protection and Affordable Care Act (ACA)	Requires employers with at least 50 workers to provide health insurance coverage to any employee working an average of 30 hours per week.
Pregnancy Discrimination Act	Amendment to Title VII; prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions.
Rehabilitation Act of 1973, Sections 501 and 505	The first civil rights statute for workers with disabilities; applies to entities that are recipients of federal funding.
Uniformed Services Employment and Reemployment Rights Act	Protects the employment rights of National Guard and Reserve members called up to active duty.
Whistleblower Protection Act	Protects personnel from retaliatory adverse action when, in good faith, they object to agency misconduct.

the Supremacy Clause of the U.S. Constitution (Article VI, Section 2), but it also refers to the displacing effect that state laws have on conflicting local government ordinances.

Confusion also occurs when Congress attempts to abrogate *sovereign immunity* by passing laws purportedly giving state employees the right to sue their state employers. The Eleventh Amendment to the U.S. Constitution creates a federal system in which each state is a sovereign entity that can be sued only if it consents to be sued. Congress can abrogate this immunity only if it unequivocally expresses its intent to do so and creates a remedy congruent and proportional to the wrong addressed. In recent years, the Supreme Court has held that Congress did not adequately abrogate this immunity in passing the ADA (Title I, Employment), the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), and the Fair Labor Standards Act of 1938 (FLSA); thus, state employees may not use these laws to sue their state employers for money damages. Importantly, only states, not other political subdivisions (such as cities or counties), are immune from suits for damages under the Eleventh Amendment.

Judicial opinions are another source of employment law. The United States is a **common-law system**. Not all rules are written down in statutes or codes. Instead, the law is built up successively, case by case, in written opinions of appellate judges. As a result, to find the law on any given issue, in addition to reading any pertinent legislation, one must read court opinions on the matter for interpretive guidance. In contrast, in a **civil-law system** comprehensive statutes or codes enacted by a legislative body cover almost every subject. Increasingly in the United States, specialized federal and state statutes do provide comprehensive legal rules on issues, but legislatures still leave gaps for courts to fill, so judicial interpretations remain important in developing and memorializing the law.

A manager seeking to apply the law expressed in a judicial opinion should be aware that only controlling court decisions must be followed. The United States adheres to the principle of **stare decisis**, which means that courts generally should abide by precedents established by superior courts. In essence, the federal and state court systems have a pyramid structure. In the federal system, the U.S. Supreme Court sits at the pinnacle, the 12 federal circuit courts (appellate courts) make up the middle, and the 90 federal district courts (trial courts) constitute the base. For a court's opinion to be a *controlling precedent* or binding precedent, it must have been written by a court directly up the pyramid from the lower court. The Supreme Court's interpretation of federal law controls all the circuit and district courts, but a circuit court's opinion binds only the few district courts located directly below it on the pyramid. Often, circuit courts disagree on a particular principle, and a district court is restrained by the ruling of its particular circuit court; however, if a circuit court has not ruled on an issue, a district court may choose to embrace a well-reasoned, nonbinding opinion of another circuit, treating it as a persuasive precedent.

Federal and state constitutions create legal rights as well. In the U.S. Constitution, the First, Fourth, Fifth, and Fourteenth Amendments conspicuously shape the employment relationship. Constitutional rights may be asserted both defensively and offensively. The most common defensive use is by criminal defendants. A person asserts a right offensively by bringing a civil suit. In litigation, a constitutional right frequently is

paired with a statute implementing that right. For example, 42 U.S.C. § 1983 (commonly referred to as Section 1983) allows a person whose constitutional right has been violated to sue the responsible public official or employee—and, to a lesser extent, a governmental body—for money damages and, like many other federal laws cited above, provides attorney’s fees for the prevailing party.

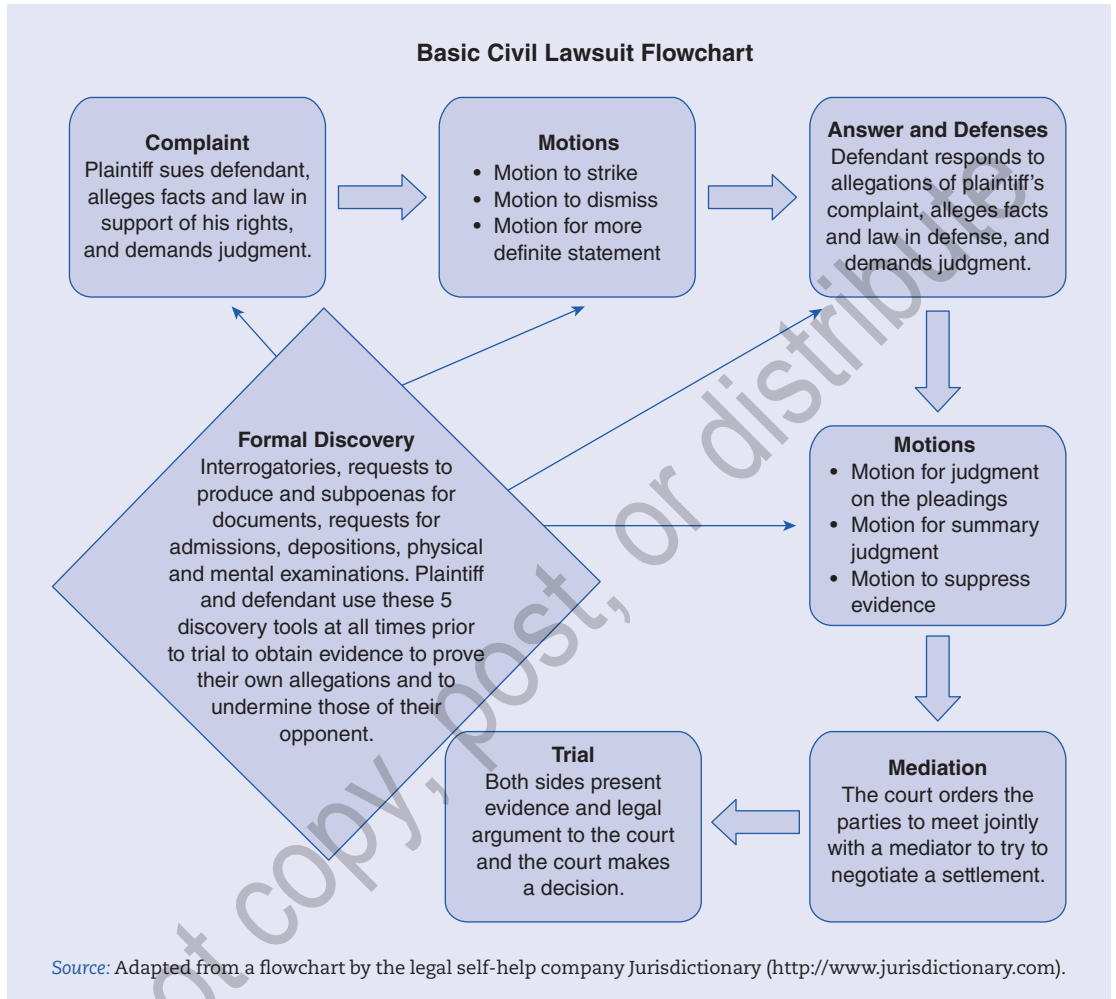
With all these potential sources of law, where should a manager who wants to prohibit employees from wearing sagging pants start looking? If a federal agency enforces or administers a statute, the agency’s rules, regulations, compliance manuals, and guidances provide detailed explanations about how to apply it. The **Equal Employment Opportunity Commission (EEOC)** and the U.S. Department of Labor (DOL) are responsible for most federal employment laws, and they publish voluminous materials on those laws. State agencies enforce and administer state employment laws and publish related materials, but they rarely provide the comprehensive assistance that federal agencies do. While an agency’s interpretation of a statute is not binding on a court, courts generally defer to agencies because of their expertise.

As you read this chapter, notice the differences among criminal, civil, and administrative laws and procedures. A criminal-law dispute occurs in court and involves the government on one side and a person believed to have violated the criminal code on the other. While the government seeks to prosecute and punish the defendant, extensive procedures focus on protecting that same defendant from wrongful conviction: A defendant is entitled to a jury of his or her peers, is provided an attorney if unable to afford one, may refuse to testify or otherwise incriminate himself or herself, and can be found guilty only if the government proves its case very convincingly (beyond a reasonable doubt).

Civil-law disputes take place in courts, usually (but not always) before juries, and involve private or government parties seeking to determine their rights under the civil laws; often the goal is to obtain an award of money to compensate for a physical or economic injury or to enjoin conduct that is unlawful. Each party usually pays its own attorney or self-represents. The person bringing the claim must prove it by a comparatively low standard (a “preponderance of evidence”), but elaborate procedures still allow each side to vigorously present its own allegations and undermine those of the opponent. The emphasis remains on protecting the parties from an erroneous result; consequently, these cases take a long time. Exhibit 2.3 shows the progression of a basic civil lawsuit.

Administrative-law disputes are handled by agencies. Typically, an administrative-law judge holds an evidentiary hearing to determine the facts, and an agency head makes a final decision. The process permits politically selected agency leaders to influence decisions and shape policy. Disputes generally involve the government on one side and a person challenging a decision of the government (e.g., denying or disciplining a license, enforcing a regulation, or denying a benefit) on the other. Procedural rules favor speedy resolution, with short timelines, few motions, and little discovery. Parties pay their own attorneys, and employees often self-represent because they cannot afford counsel.

Exhibit 2.3 Basic Civil Lawsuit Flowchart



Keeping these three types of laws separate analytically can be difficult, because an employee may violate all types in a single incident. Consider the example of a police officer who unnecessarily strikes and injures a person during an arrest: A prosecutor may charge the crime of battery, the victim may sue for civil money damages, and the police standards commission may discipline the officer's certification.

The last foundational principle to bear in mind throughout this chapter is the notion of a remedy. When evaluating alternative courses of action, for each one a manager should ask, "If a lawsuit is filed and the employer loses, what will the remedy be?"

The remedy is the concrete risk. Directing a driver to operate a school bus with faulty brakes could be costly, but firing a habitually tardy nurse who should have been merely suspended probably will necessitate reinstating him later. The remedy is determined by the legal claim being made and the losses suffered. Possibilities include hiring, reinstatement, retroactive seniority, reasonable accommodation, back pay, front pay, a declaratory statement that a particular practice violated the law, an injunction to modify behavior, court-ordered affirmative action, medical costs, damages for emotional distress, punitive damages, attorney's fees, expert witness fees, and litigation costs. In addition to quantifying the risk, the remedy is illuminating for another reason: It reveals the importance that society places on the right involved. A famous legal maxim holds that "where there is no remedy, there is no right."

THE EMPLOYMENT RELATIONSHIP

An employment relationship is formed when parties exchange promises about duties, wages, hours, and benefits. Employers have policies and forms that define the arrangement, but legislatures and courts have added terms to it.

At-will employment is the relationship predominantly used by American businesses, and governments use it as well (Bowman & West, 2007). In its pure form, it means that if the parties do not specify the duration of employment—and most do not—either party may terminate the employment at any time, for any reason (other than an unlawful one). Supporters claim that the relationship upholds freedom of contract and fairly balances the interests of employers and employees, because either employer or employee may sever the relationship. But critics point out that many workers need their jobs more than their employers need them, so at-will employment opens the door to abuse. It permits an employer to refuse to hire members of disfavored groups, to engage in opportunistic firings, and to punish employees for behaving in socially undesirable ways. It also subjects families to uncertainty and hardship based on employers' whims. To ameliorate these effects, lawmakers and courts have carved out exceptions to at-will employment that make it unlawful for an employer to take adverse action against an employee for specific bad reasons. The civil rights laws are the most well-known example. As a result of these exceptions, at-will employment now means something different: If the parties do not specify the duration of employment, either party may terminate it at any time, for any lawful reason. From a manager's perspective, this means that despite employment being "at-will" in name, employees have many rights that cannot be violated.

In the public sector, many employees do not serve at will. Schools and colleges use annual contracts to ensure that teachers stay for the entire academic year, and they use tenure systems to protect teachers' academic freedom. Governments use civil service systems to guard against patronage. In these relationships, employers promise employees that they will be discharged only for cause. Legislatures and courts have added conditions to these arrangements as well. The Supreme Court has ruled that when a law, rule, or understanding creates an expectation of continued employment in a government job, then employees possess a constitutionally protected property interest that cannot be

taken away without due process. The Supreme Court has also ruled that when a public employer takes adverse action against an employee it is state action, so federal and state constitutional protections apply. As a result, employees who exercise freedom of speech or freedom of association or assert the right to privacy at work cannot be punished if their conduct falls within the ambit of one of these constitutional protections. As you read the next section, consider whether these arrangements in the public sector create a model that, compared with at-will employment, more equitably balances the interests of employees, employers, and the government, or whether they unduly limit the flexibility of government employers.

BALANCING EMPLOYER, EMPLOYEE, AND SOCIETAL INTERESTS

This section examines the law's attempt to balance employers' interests, employees' rights, and social objectives in six areas: furnishing due process, taking adverse personnel action, safeguarding free speech and political activity, providing compensation and work schedules, protecting health and safety, and holding employees individually liable.

Procedural Due Process and the Taking of Property and Liberty

The Fifth Amendment (applicable to the federal government) and the Fourteenth Amendment (applicable to the states) forbid the taking of "life, liberty, or property without due process of law." Odd as it may seem, based on the definition of the word "property" in these amendments, this includes the right to continued public employment, referred to as *a property interest*. When an employee has a property interest in a job, he or she also has procedural **due-process rights**. As a result, the employee may not be disciplined seriously unless procedures designed to guarantee fairness are followed. Managers (and courts) grapple with two questions that flow from this proposition: (1) What guarantees create a property interest? (2) If a property interest exists, what procedures must be followed to give an employee a fair opportunity to affect the result?

In *Board of Regents v. Roth* (1972), the Supreme Court explained what promises raise government employment to the level of a property interest. The employee must have a legitimate claim of entitlement to continued employment based on codified rules or explicitly agreed-upon contract terms. Generally, academic employees with tenure and classified civil servants with permanent (non-probationary) status and the statutory right to be discharged only *for cause* fit this description.

As for the procedures required, prior to 1985, it was understood that a government employee with a property interest who was facing serious discipline was entitled to notice of the charges and a *post-termination hearing* in front of a neutral judge. In *Cleveland Board of Education v. Loudermill* (1985), the Supreme Court held that due process demanded an additional middle step—a *pre-termination hearing*. Before making a decision, the employer must give the employee notice of the charges, an explanation of the evidence, and an opportunity for the employee to present his or her side of the

story. Only in rare situations when an employer must act quickly may a pre-termination hearing be omitted.¹

The Due-Process Clause also prohibits governments from depriving citizens of their liberty without a fair process. When a public employer discharges someone for a stigmatizing reason, such as an immoral act, and the allegation becomes publicly known, the employee, on request, must be provided a hearing to have the chance to clear his or her name. Otherwise, his or her ability to obtain another job will be unjustly limited. In practice, this means that sometimes a probationary or exempt civil servant still must be provided a post-termination hearing. If the employee prevails, the discipline is nullified, but the employee is not reinstated; that person's remedy is his or her liberty to seek other jobs with a clean record.

Adverse Action

Discipline or the negative consequences to an employee (covered in Chapter 10) are two examples of the concept referred to as **adverse action**. This term encompasses any action that constitutes a serious and material harm to the employee, such as termination, suspension, salary reduction, or demotion. Other measures that affect employees (e.g., reprimands, transfers, alteration of duties, changes in schedule, and denials of promotion) may not be serious or material enough to meet the legal definition of adverse action for antidiscrimination and other laws, but they may be sufficient to trigger protections under anti-retaliation laws.

The right to challenge adverse action has been created chiefly by statute. It is a critical component of civil service systems, designed to ensure that discipline and hiring decisions are based on merit, not patronage. Civil servants in classified (covered) positions have this right. Probationary employees and individuals in unclassified (uncovered or exempt) positions do not, so they are truly at-will employees. Staff members who initially have the right to challenge adverse action may lose it by being promoted to an exempt position or by having their positions reclassified as exempt, a practice utilized extensively by some states (Bowman & West, 2007). Adverse action rights are created by statute, but the procedures also provide the due process required by the U.S. Constitution. In addition, the evolving definition of what is and what is not an adverse action is largely the product of appellate court decisions.

Either unsatisfactory performance or misconduct may prompt adverse action. The process followed often differs depending on which of these is involved. The probationary period is the ideal time to weed out employees who are unable to do their jobs. Once they become permanent, prior to adverse action for unsatisfactory performance, an employer may be required to notify them of deficiencies, provide them with an explanation, give them remedial assistance if necessary, and allow them time to improve. The purpose of the process is to improve performance by reducing deficiencies. Written performance evaluations (discussed in Chapter 10) are critical for identifying initial problems, as well as improvement or lack thereof. As a general matter, for private employers, this process is required by the custom and practice of the employer; that is, how has the employer dealt with this in the past?

The process used to punish misconduct often is quicker. Serious discipline usually involves the supervisor, a high-level manager, a representative from the personnel department, and one of the employer's attorneys. This group reviews the supervisor's recommendation for discipline and, if necessary, requests an investigator (within the agency or from the outside) to interview witnesses, review documents and physical evidence, and prepare a report. After reviewing the information gathered, the group determines whether the employee's conduct violates agency standards—the *cause* question—and, if it does, selects a penalty. If the alleged misconduct is serious, when the employee is apprised of the charges he or she also may be suspended and perhaps even escorted from the premises.

Typically, a civil service statute or rule lists offenses that provide cause for discipline. Florida's civil service statute, for example, prohibits "poor performance, negligence, inefficiency or inability to perform assigned duties, insubordination, violation of the provisions of law or agency rules, conduct unbecoming a public employee, misconduct, habitual drug abuse, or conviction of any crime" (Florida Statutes, 2018). Agencies maximize their discretion by making lists of offenses open-ended (e.g., "misconduct includes, but is not limited to") and by incorporating standards located outside the statute (i.e., "violation of the provisions of law or agency rules" incorporates all rules, directives, policies, regulations, and internal operating procedures promulgated by the agency and its subdivisions). Wherever they are located, agency *cause* standards should be clear enough to apprise employees of what is prohibited and to prevent unbridled agency discretion (Gertz, 2001).

Public servants may, within limits, be disciplined for off-duty conduct. Usually the charge is "conduct unbecoming a public employee" or "conviction of any crime." Law enforcement officers and teachers, especially, are held to high standards, but all government leaders worry about their agencies' reputations being sullied by off-duty behavior. Generally, a *nexus*, or demonstrable connection, must exist between the off-duty misconduct and the job. A school employee, for example, likely could be terminated for any off-duty misconduct involving illegal drugs, due to the government's strong interest in maintaining drug-free schools. However, a firefighter arrested for off-duty conduct that is unrelated to his or her duties may retain his or her job.

In civil service systems, the right to challenge adverse action includes the right to an administrative hearing. Governments have created quasi-judicial administrative agencies to hear these disputes, such as the U.S. Merit Systems Protection Board (MSPB) and state civil service commissions. An administrative-law judge hears the case and determines what happened; whether those facts justify discipline; and, if they do, whether the penalty chosen is fair. An agency head or panel reviews the decision. Timelines are expedited; rules of procedure are streamlined; and, in many cases, the rules of evidence are not strictly applied, as they would be in a court of law. Unions provide attorneys for union members; nonmembers in highly compensated positions often hire private attorneys, but nonmembers in lower salary ranges often represent themselves. An employee who prevails will have the discipline nullified or reduced and may receive back pay and attorney's fees. Sometimes an employee has the choice of challenging adverse action through an administrative hearing or through the grievance procedure in a collective

bargaining agreement, but, depending on the terms of the agreement, a grievant may have to pay at least some share of the cost of arbitration.

On a related matter, a person who is terminated may seek partial, temporary replacement wages while seeking another job by filing for **unemployment compensation**. This federal–state insurance program is funded by employers through a tax on payrolls. Employers with repeated claims pay higher tax rates. An employer may prevent a former employee from obtaining benefits (and raising the employer’s tax rate) by proving at a hearing that the individual voluntarily resigned or was discharged *for cause*. Accordingly, this administrative hearing often covers the same issues and involves the same parties as the adverse action hearing.

Freedom of Speech

Citizens do not relinquish their **free-speech rights** when they enter public employment, but they do accept restrictions on them (see discussion of the paradox of democracy in the Introduction). The First Amendment, which prohibits the making of any law abridging freedom of speech, protects a citizen’s right, in limited circumstances, to speak out on matters of public concern.

In *Pickering v. Board of Education* (1968), the leading case in this area, the Supreme Court balanced employees’ speech rights against the need for workplace efficiency. The case concerned a teacher, Marvin Pickering, who wrote a letter to a local newspaper criticizing the school board’s funding priorities and subsequently was dismissed for disloyalty and insubordination. The court found that the letter addressed a “matter of public concern” and had not unduly disrupted operation of the school district. Consequently, it held that the board could not fire Pickering. Out of this decision grew the two-part “*Pickering* balancing test.” To determine whether an employer may take adverse action, a court asks (1) whether the speech was a matter of public concern and (2) whether the disruptive nature of the speech justified the adverse personnel action. To enforce his or her First Amendment rights, an employee must file an action in court.

Trying to determine what constituted a “matter of public concern” proved confusing, so in the 1983 case of *Connick v. Myers* the Supreme Court clarified that the speech must relate to a “political, social or other concern of the community.” *Connick* centered on a district attorney who was dismissed from his position after he circulated a questionnaire to coworkers soliciting their opinions about office management. His speech did not qualify for protection, according to the Court, because it concerned primarily matters of personal grievance, not public policy. After *Connick*, courts repeatedly held that frustrated, disgruntled staff members who vented their personal disagreements were not speaking about matters of public concern.²

Confusion also arose about whether a comment made as part of a person’s job was protected. In *Garcetti v. Ceballos* (2006b), the Supreme Court ruled that an employee’s expression “made pursuant to official responsibilities” is *not protected* by the First Amendment. Ceballos, a district attorney, wrote a memo to his superiors recommending that a case not be prosecuted because he suspected that the sheriff had lied in the affidavit used to secure the search warrant. Ceballos claimed that, as a result, he was the victim of

unlawful adverse employment action; specifically, he was moved to a less desirable position, transferred to a different courthouse, and denied promotion (*Garcetti v. Ceballos*, 2006a). The court denied his claim, because he made the comment as part of his job. In light of *Garcetti*, a supervisor considering disciplining an employee for an expression should ask a preliminary question before applying the *Pickering* balancing test: Was the speech made pursuant to the employee's official responsibilities? If the answer is yes, the First Amendment is no impediment.

Critics of *Garcetti* claim that it will deter employees from raising legitimate concerns and that **whistleblower statutes** will not overcome this reticence (Gertz, 2007). Almost all jurisdictions have enacted legislation protecting personnel from retaliatory adverse action when, in good faith, they object to misconduct in their agency. But safeguards are limited. For example, the Whistleblower Protection Act of 1989 shields a federal employee's disclosure of gross mismanagement, waste of funds, illegal acts, misuse of funds, and danger to public safety or health. A victim initially must seek assistance from the U.S. Office of Special Counsel, an agency charged with stopping prohibited personnel practices. If unsatisfied, the whistleblower may request a hearing before the MSPB, where the person must pay for an attorney and prove that the adverse action was retaliatory.

An employee may not initiate a civil action for money damages in court. In 2012, a unanimous Congress passed and President Obama signed the Whistleblower Protection Enhancement Act of 2012, which closed judicially created loopholes in and enhanced and broadened the protections afforded employees under the original Whistleblower Protection Act of 1989. Generally stated, the amendments clarified what disclosures received protection, enhanced the remedies available to a whistleblower, and provided procedural enhancements that benefit employees. State whistleblower statutes vary, and some, such as Florida's Public Whistle-blower Act, provide for temporary reinstatement, full reinstatement (or front pay alternatively), back pay, lost benefits, and attorney's fees. The temporary reinstatement element under Florida's law creates the possibility that a terminated employee may be judicially reinstated at the earliest stage of litigation, which could last for 2 or more years.

Political Activity and Affiliation

During the 19th century, public employees routinely campaigned and raised funds for the political parties or executives who appointed them. The passage of the **Hatch Act of 1939** codified limits on the extent to which a government worker could engage in political activity. From the late 20th century into the modern day, the Hatch Act, as amended, and state and local little Hatch Acts restrict a person's First Amendment right to political expression, which courts allow because they reduce political coercion of the bureaucracy and promote a nonpartisan, efficient government workforce. Congress retreated from some initial broader restrictions, because it feared that denying so many Americans their right to engage in political activity was negatively affecting the quality of democracy. The impact of this retreat—whether it is repoliticizing the bureaucracy—is unclear (Bloch, 2005; Bowman & West, 2009).

In late 2012, Congress passed the Hatch Modernization Act of 2012, allowing most state and local employees to run for partisan political office. With the change, the federal Hatch Act no longer prohibits state and local government employees from running for partisan office unless the employee's salary is paid for completely by federal loans or grants.

The MSPB and the U.S. Office of Special Counsel (OSC) are responsible for enforcement of the Hatch Act, provide advisory opinions to government employees contemplating political activity, and prosecute violators. In 2014, the OSC published a revamped guide, available at <https://osc.gov/Documents/Outreach%20and%20Training/Handouts/A%20Guide%20to%20the%20Hatch%20Act%20for%20Federal%20Employees.pdf>.

What happens when a victorious political leader takes office and wants to replace current civil servants with loyal party supporters? Classified civil servants, who may be discharged only for cause, are protected, but exempt civil servants, who serve at will, are not. Here, the First Amendment potentially bars the way, because it forbids adverse action based on beliefs as well as on speech. In *Elrod v. Burns* (1976), the Supreme Court held that patronage dismissals are allowed only if the person being discharged occupies a policy-making or confidential position. Later, in *Branti v. Finkel* (1980), the court refined its ruling and explained that party affiliation must be necessary for effective performance of the job. A decade later, in *Rutan v. Republican Party of Illinois* (1990), the court extended this holding to personnel actions other than discharge—including hirings, promotions, transfers, and recalls. Now, a government leader who uses party affiliation for any of these decisions must show that it is necessary for job performance.

Compensation and Scheduling

If a worksite is unionized, the collective bargaining agreement likely addresses the matter of wages. The primary statute covering the right to compensation is the **Fair Labor Standards Act of 1938 (FLSA)**, enforced and administered by the DOL. The act prohibits child labor, mandates a minimum wage, and requires that overtime be paid, at one and one-half times the regular rate, for all hours in excess of 40 per week. State and local governments may substitute compensatory time off (referred to as *comp time*), at the rate of time and one-half, for overtime; in some cases, the substitution of comp time is *only* available to public employees, and it may be subject to a “use it or lose it” policy, meaning the leave must be taken by a certain date (usually the end of the year) or lost. The FLSA applies to federal, state, and local employees, but a lawsuit against a state employer by one of its employees is barred by Eleventh Amendment immunity. Many states and localities mandate a minimum wage higher than that in the FLSA.

Certain FLSA provisions regularly are the foci of lawsuits—for example, the *white-collar exemptions*. These exemptions were created to excuse employers from paying overtime to highly compensated and managerial employees. Employees engaged in an “executive,” “administrative,” or “professional” capacity (as those terms are defined by statute and interpreted by the DOL and the courts) are exempt from both minimum wage and overtime requirements. An exempt individual must be paid on a salary basis

(as opposed to an hourly basis), earn at least \$684 per week (just over \$35,000 annually), and meet certain criteria showing supervisory duties, independent decision making, and/or management responsibilities. In 2019, just under 7,500 FLSA lawsuits were filed in federal district courts, many of which claimed that an employer misclassified an employee as exempt to avoid paying overtime and minimum wages.

Another way organizations sidestep FLSA requirements is by mislabeling workers as independent contractors or interns rather than as employees. The Internal Revenue Service and the DOL have independently issued guidance to navigate this tricky area. In a January 2021 pronouncement, the DOL reaffirmed an economic-reality test to determine whether a person is in business for himself or herself or is economically dependent on a business for work. Two core factors are integral to this determination under the new rule: (1) the nature and degree of control over the work and (2) the worker's opportunity to profit (or suffer loss) based on initiative and investment. Three other factors that may be relevant in the analysis are the amount of skill required for the work, the degree of permanence of the working relationship between the employer and the employee, and whether the work is an integrated unit of production.

Conflicts also erupt over whether idle time is compensable work time. Waiting time, on-call time, sleep time, travel time, and rest and meal periods all raise this question and require managers to examine the precise facts and to look for specific rules and guidance from the DOL. The FLSA has complicated overtime exemptions for firefighters and law enforcement officers, and agencies with these positions should designate and train personnel to master them. *Off-the-clock* time spent responding to phone calls, texts, and emails must generally be counted as work time and compensated.

A part of the executive branch, the DOL's rule making and opinion letters often reflect the ideology and values of the administration in power. Consider, for example, that between November 30, 2020 (almost four weeks after the presidential election defeating the incumbent, Donald J. Trump), the DOL issued 13 opinion letters, the majority of which occurred in 2021 before the inauguration. For context, as of November 30, 2020, the DOL had issued 16 opinion letters for the entire year. The issues on which the DOL opined were significant, and they included establishing criteria to determine whether a person is an employee or an independent contractor; whether certain commuting times are compensable; and the extent to and the manner in which a tip pool for restaurant servers should be shared with hosts and hostesses, cooks, and other staff. It is anticipated that the Biden administration will, to the extent that it can, undo or modify as many opinions as necessary. This unstable environment often results in employers' having to stay abreast of changes in the law.

The 1963 Equal Pay Act amended the FLSA to require employers to pay men and women equal wages for equal work, unless an employer can justify the differential by seniority, merit, piecework, or any factor other than sex. *Equal work* means that the skill, effort, responsibility, and working conditions are equal. The work need not be identical, but significant portions of it should be. A plaintiff must find one opposite-sex *comparator* who is doing equal work at a higher rate and may use statistical evidence of gender-based disparity to buttress a claim. An employer that is found guilty may comply with the act by raising the rate of the lower-paid employee. (Chapters 7 and 8 cover pay and benefits programs.)

Pensions are prized by government employees, who see themselves as agreeing to lower wages than they could earn in the private sector in exchange for the promise of a secure retirement, but that promise may be illusory (see Chapters 10 and 11). In the past decade, state and local governments have cut pension benefits by enacting laws, using ballot initiatives, and declaring bankruptcy. The Employee Retirement Income Security Act (ERISA) is the main federal law governing pensions in the private sector, but no counterpart exists in the public sector. As a result, when a government reduces pension benefits, constitutional provisions, state statutes, and court decisions about contract principles and property rights determine legal outcomes. Protection varies from state to state and worker to worker.

Retirees have the greatest rights. Courts have not allowed reductions in base benefits, but Colorado and Minnesota were permitted to reduce scheduled cost-of-living adjustments, and other locales followed suit. For current employees, the situation is less clear; many cases are still wending through the courts. In Arizona, Colorado, and Oregon, courts have protected future benefits that had been promised to current employees. But in Maryland, only benefits based on past service have been protected, which means the government could cut future benefits. The state of Florida and the city of Atlanta cut benefits by increasing the percentage of current employees' contributions. Rhode Island raised the retirement age and reduced payments from 80% to 75% of salary. For new hires, governments are free to discontinue or change pension plans (Munnell & Quinby, 2012).

Ultimately, the right to a pension is meaningless if there is no money, but public employees have limited ability to ensure that governments adequately fund pension plans, do not raid them, and invest the funds wisely. The Pension Protection Act of 2006 addressed problems with underfunded private pensions, but not public ones. Privatization raises complex legal issues about pension rights that are beyond the scope of this chapter (Ravitch & Lawther, 1999).

Pensions may be lost due to misconduct. Forfeiture laws in at least 13 states allow public employers to withhold pensions from employees for misbehavior. Depending on the state, misbehavior may be defined as a felony conviction, administrative misconduct, or conviction of a particular crime.

Scheduling largely is left to employers' discretion, but workers have some rights. Under the Patient Protection and Affordable Care Act (ACA, popularly known as Obamacare), employees who are nursing mothers must be provided break time and private places to express milk. Antidiscrimination statutes give those with disabilities and religious needs the right to request accommodations (discussed under "Discrimination" later in this chapter).

Many part-time workers face the trial of dealing with unpredictable schedules. A writer for the *New York Times* provoked a flurry of responses when he reported the story of Mary Coleman, who, after an hour-long bus commute, arrived for her scheduled shift at a Popeye's in Milwaukee only to be told to go home without clocking in because the store had enough people working (Greenhouse, 2014a, 2014b). A fluctuating schedule makes it impossible for a worker to juggle two or more jobs, to secure child or elder care, or to take classes; yet many employers demand that their part-time workers be available on call. Vermont and San Francisco have adopted laws giving workers the

right to request predictable schedules, and other locales are considering similar measures. These laws require an employer to discuss employees' situations with them and to consider scheduling requests; the employer is not obligated to grant the requests, however.

Health and Safety

In 2016, there were 497 fatal occupational injuries to government workers in the United States. The injuries occurred most often in the job categories of police protection, national security, construction, trade, transportation, and utilities (BLS, 2016). The number of nonfatal public sector injuries is unavailable. People may suffer harm on the job because employers create dangerous conditions, because employees are careless, because someone becomes violent, or because nature intervenes, among other reasons.

The Occupational Safety and Health Act of 1970 (OSHA) is the main federal statute protecting federal employees from unsafe working conditions. Twenty-three states have adopted their own OSHA laws for public and private employees, and a few states have plans that cover only public employees (the Workplace Fairness website provides a comprehensive chart of state OSH acts; see www.workplacefairness.org). In general, federal and state OSH acts mandate standards and enforce them through inspections, fines, and closures. They do not give employees the right to sue.

The remedies available to injured persons generally are those in **workers' compensation** acts. In 1908, Congress passed the Federal Employees Compensation Act, and subsequently all states passed workers' compensation laws. These laws demand sacrifices from both employers and employees to ensure that all injured workers receive health care and lost wages. Employees relinquish the right to sue in civil court for on-the-job injuries, which, in some instances, means giving up large money damage awards. Employers forfeit the right to deny benefits to employees whose own negligence caused or contributed to their injuries; these plans are no fault. Employers must finance these systems through insurance premiums or by being self-insured and paying claims themselves. Disputes are resolved through an administrative system. Benefits include payment of medical expenses, partial replacement income, and, if an injury is fatal, survivors' benefits. Permanently injured employees who are unable to work also may be eligible for Social Security disability benefits and early pension benefits.³

In the United States, health insurance is provided primarily by employers. Citizens in other industrialized countries have permanent, portable insurance, but for Americans, health insurance usually is tied to their jobs. In the public sector, governments provide wide coverage to their full-time employees and pay most of the premiums. Current and retired federal employees have access to the well-regarded Federal Employees Health Benefits Program. In 2007, about 85% of those eligible were enrolled, and the federal government paid 72% of the average premium across all plans (U.S. GAO, 2007). In 2016, 89% of state and local government employees had access to health plans, with employers shouldering 89% of the premium cost for single coverage (BLS, 2017). Most agencies offer coverage to retirees, and many subsidize the premiums, but financing benefits is a challenge, especially as large numbers of workers under the age of 65—and thus not yet eligible for Medicare—retire.⁴

Extending health coverage was a major goal of the Obama administration. Part-timers are a large segment of the government workforce, but in 2014 just 24% of part-timers in state and local government had access to employer-sponsored health insurance (BLS, 2014). Starting in 2015, the ACA required employers with at least 50 employees to offer coverage to people who work an average of 30 hours a week. One immediate response by some cities, counties, public schools, and community colleges was to reduce the hours of part-timers to keep them under the 30-hour threshold (Maciag, 2014). Although the ACA required all Americans to maintain health coverage, known as the individual mandate, Congress repealed that portion of the ACA as a part of the tax legislation of December 2017. In all likelihood, the ACA will continue to be a political football, largely directed by ideology.

Coverage of young adults, same-sex partners, and those changing jobs also is compelled by law. The ACA currently requires health plans to make dependent coverage available until an adult child reaches the age of 26. Many parents and children who once worried about a child losing health insurance after graduation from college no longer have that concern.

As for same-sex partners, the federal Defense of Marriage Act (in 1996) defined marriage as a legal union between one man and one woman, but the Supreme Court declared that provision unconstitutional under the Due-Process Clause in *United States v. Windsor* (2013). Federal employees with same-sex partners now may enroll them in the Federal Employees Health Benefits Program.⁵ In the 14 months following *Windsor*, 19 federal courts ruled on the constitutionality of state bans on same-sex marriages, with 19 victories for those challenging the bans (*Brenner v. Scott*, 2014). In 2015, the Supreme Court, in *Obergefell v. Hodges*, ruled that the Fourteenth Amendment requires all states to grant same-sex marriages and to recognize their unions even from other states. After *Obergefell*, employers who offer fully insured health plans in any of the 50 U.S. states must provide spousal benefits to same-sex couples if they provide such benefits for opposite-sex couples.

Health coverage for those changing jobs was the subject of an older law, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). It requires most employers to offer continued coverage to most former employees and their families for 18 to 36 months, or until coverage of another plan begins, at not more than 102% of cost.

Health insurance laws also address what conditions must be covered and how much companies may charge. The ACA requires coverage to be *affordable* and *adequate* as defined in the statute. It forbids insurers to deny coverage because of a preexisting condition, and it prohibits annual or lifetime limits. Again, this part of the ACA has been the subject of intense debate and could be significantly amended or repealed. Two older acts, the Health Insurance Portability and Accountability Act (HIPAA) and the Genetic Information Non-discrimination Act (GINA), curtailed some exclusions for preexisting conditions, but they did not limit the premiums that insurers could charge, nor did they require insurers to enroll individuals. The best-known part of HIPAA is its privacy rule—employers must safeguard the privacy and security of personally identifiable

health information through a panoply of measures spelled out in the act and its accompanying rules.

In addition to insurance, the **Family and Medical Leave Act of 1993 (FMLA)** requires local, state, and federal government agencies to provide eligible workers with up to 12 weeks of unpaid leave, during a defined 12-month period, for childbirth or adoption, or the serious illness of the employee or the employee's family member. The DOL has rules on many contentious issues related to this act, including the definition of a "serious health condition," the use of unscheduled and intermittent leave, and the medical certification process. To enforce the act, an employee may file suit or request the secretary of labor to bring suit. Robust remedies are available, including back pay, liquidated damages (meaning double the back pay), and attorney's fees. In 2003, the Supreme Court held that Congress could abrogate sovereign immunity and give state employees the right to sue their state employers under the FMLA. Approximately half the states have their own family and medical leave laws. Collective bargaining about workplace safety, health, and leave is common. (Chapter 8 examines the effects of health and safety policies.)

Beginning in March 2020, a global pandemic shattered the paradigm of the conventional workplace and scheduling. In the United States, the rapid spread of COVID-19 resulted in massive unemployment, the widespread closing of businesses and office spaces, and persistent fear and uncertainty. Congress passed emergency legislation, which included requiring employers to pay nearly all employees for at least 2 and up to 12 weeks for issues related to the pandemic. In part, the legislation amended the FMLA to provide leave for, among other reasons, the need to care for a child whose school was closed. The agencies entrusted with enforcing employment laws—the DOL, EEOC, and OSHA—all had to quickly issue regulations and guidances for employers to follow in order to comply with this emergent legislation. The process resulted in a number of amended and supplemental guidances, conflict between agencies' interpretations, and general uncertainty to employers.

The pandemic also brought about new opportunity and a paradigm shift for many employers, perhaps out of necessity. Although employers had generally been loath prior to the pandemic to allow employees to "telecommute" or work from home, and such allowance was granted only sparingly (e.g., if it was a reasonable accommodation for a disability), the pandemic created a seismic shift. Videotelephony platforms such as Zoom, Microsoft Teams, and Cisco Webex became invaluable tools and means of continuing operations. As such, employers had to act quickly to equip employees with the necessary tools at home, train employees, and keep employees engaged in this new environment while safeguarding data and confidential information.

Individual and Vicarious Liability

Urban legend has it that prolific bank robber Willie Sutton, when asked why he robbed banks, responded, "Because that's where the money is." Likewise, employees (and the lawyers who advise them) prefer to sue deep-pocketed employers, but occasionally they

sue an official in his or her individual capacity, seeking to hold the official personally responsible for money damages.

Official immunity is a common-law doctrine that shields government employees from individual liability. It is based on the belief that government actors should not be made hesitant to carry out their responsibilities by threats of lawsuits and should not be diverted from their duties by litigation. A few kinds of officials, such as judges and legislators, have absolute immunity for actions performed in furtherance of their judicial or legislative functions. Most officials, however, have qualified immunity. They are immune from liability for discretionary acts in the scope of their duties if they act in good faith (without malice) and reasonably under the circumstances. To act reasonably, they must not violate clearly established rights that a reasonable person would have known about, which generally means not acting egregiously.

Consider the example of a school nurse and administrative assistant who strip-searched a 13-year-old girl because they found prescription-strength ibuprofen pills in her notebook. The girl's mother sued the searchers individually, but the court concluded that the student's rights were unclear and the searchers had immunity. The doctrine of qualified immunity has been the subject of intense debate, primarily as a result of its application to law enforcement officers accused of civil rights violations.

In reality, public employees are shielded from most lawsuits. The Federal Employees Liability Reform and Tort Compensation Act of 1988 gives federal personnel the right to request that suits against them individually be converted into suits against the government. Many states have similar laws. The ability to avoid civil liability does not make officials unaccountable, as they still may be disciplined by their agencies for misconduct, but it relieves them of the anxiety that a wrong decision will imperil their personal savings.

On the flip side, leaders worry about an agency being responsible for the misdeeds of a rogue employee, which raises this question: Under what circumstances is an employer responsible for an employee's acts? Vicarious liability is a common-law doctrine that makes one person (or entity) liable for the acts or omissions of another because of a legal relationship between the two. *Respondeat superior* (Latin for "let the master answer") is a type of vicarious liability that holds an employer liable for the acts or omissions of an employee committed in the course of employment. It is based on the theory that because the employer controls the employee's behavior, the employer must assume some responsibility for the employee's actions. Whether an act was in the course of employment depends on the particular facts. A court may consider the employee's job description or assigned duties; the time, place, and purpose of the employee's act; the extent to which the employee's actions conformed to what he or she was hired to do; whether the employer benefited from the employee's act, and whether such an occurrence could reasonably have been expected.

Generally, an employer will not be held liable for an employee's assault or battery, unless the use of force bears some relationship to the work, such as in the case of a police officer. The city of Sacramento, for example, was not vicariously liable for the sexual assault of a woman by several on- and off-duty firefighters, who drove a fire truck to a party, invited the woman onto the truck, and assaulted her.

PRIVACY ISSUES

Conflicts arise when people believe that managers are invading their private affairs or private work spaces. These invisible barriers may be breached unconsciously in the regular course of business, such as when a supervisor calls a subordinate at home or searches her desk for an urgently needed work document.

Searches

The Fourth Amendment, which limits government's ability to conduct **unreasonable searches and seizures**, is the main restriction on workplace searches by government employers. In the leading case of *O'Connor v. Ortega* (1987), the Supreme Court held that whether a search violates the Fourth Amendment depends on (1) whether the area is one in which the employee has a reasonable expectation of privacy and (2) whether the search is reasonable under the circumstances.

The court determined that Magno Ortega, a physician, had a reasonable expectation of privacy in his desk and file cabinet because he was the only one who used the office, he stored only personal materials there, and his hospital-employer had never discouraged him from keeping personal items at work. Next, the court asked whether the search was reasonable under the circumstances. A reasonable search must balance the governmental interest in the efficient and proper operation of the workplace with the employee's privacy interests. It does not require an employer to obtain a warrant or even to give an employee prior notice. In *Ortega*, the hospital's need to retrieve job-relevant material overrode the physician's privacy rights, so the search was permissible. Managers may wish for a brighter line, but the reasonableness of an employee's privacy expectations and the reasonableness of a search are determined by the discrete facts of each situation.

Agencies can take steps to increase the likelihood of searches' lawfulness. They can reduce expectations of privacy by eliminating personal work spaces and adopting policies authorizing searches. (Paradoxically, these measures may erode employee-supervisor trust and impede managing.) Most employers have policies allowing searches of employees' texts, emails, and internet use on the employers' devices and networks. As a result, employees have no expectation of privacy in these domains, and searches are permissible. Agencies also may conduct video and telephone surveillance if these policies are communicated in advance. In sum, there are few restrictions on organizations' rights to monitor personnel at work, especially if employees are told about their lack of privacy up front (West & Bowman, 2016).⁶

Testing for Alcohol or Drug Use

Urinalysis, the most common drug-testing method, is a search and seizure under the Fourth Amendment (*National Treasury Employees Union v. Von Raab*, 1989). The privacy invasions are considerable. Urinalysis permits an employer to surveil several days of off-duty behavior, forces a person to disclose confidential information about

medications being taken (e.g., HIV drugs, antidepressants, and Viagra), and compels a person to perform an intimate bodily function with a stranger listening or watching. As with other searches, whether it is lawful depends on whether it is reasonable under the circumstances.

In 1986, President Reagan issued Executive Order 12564, requiring executive agencies to test approximately 2 million federal employees in sensitive positions for illegal drug use. The order authorizes drug testing (1) where there is a reasonable suspicion of illegal drug use, (2) in a post-accident investigation, (3) as part of counseling or rehabilitation for drug use through an employee assistance program, and (4) in the screening of any job applicant. Congress also passed two laws affecting large numbers of private employees. The Drug-Free Workplace Act of 1988 covers federal government contractors and grant recipients, and the Omnibus Transportation Employee Testing Act of 1991 requires drug and alcohol testing of 6 million workers in transportation industries. Numerous states and localities followed the federal government's lead and passed drug-testing laws. Court challenges ensued.

In determining whether a test is reasonable, the timing of the test (pre-employment, preplacement, periodic, post-accident, promotion, or random) is important. Testing is liberally allowed at the pre-employment and pre-placement stages, because applicants and new hires have little right to expect privacy. Return-to-work testing after an accident, periodic testing with advance notice, and testing upon promotion also are likely to be approved, because employees expect these tests. At the other extreme, *random testing* of current employees without any articulable suspicion is the most intrusive and therefore the least permissible.

The nature of the job also matters. For safety-sensitive and security-sensitive positions, random testing is allowed. Applying this principle, one court allowed the suspicionless testing of the U.S. Army's civilian air traffic controllers, mechanics, police, guards, and drug counselors. Police officers and firefighters may be tested randomly. More surprisingly, a court applied this rationale to allow random testing of a broad group of school staff (principals, assistant principals, teachers, aides, substitute teachers, secretaries, and bus drivers). On the other hand, a court refused to allow random testing of all Forest Service Job Corps Center employees. Current employees in positions that do not affect safety or security may be randomly tested only with reasonable suspicion, which means information that would lead a reasonable person to suspect on-the-job drug use, possession, or impairment.

Grooming and Dress Codes

One cannot help but pity the poor manager forced to grapple with **dress and grooming codes** in today's workplace (Exhibit 2.4). The landscape is fascinating—bejeweled faces, exposed undergarments, colorful tattoos, plunging necklines, artful hair constructions, and stubbly cheeks pervade the scene. But legal and interpersonal land mines await. People consider their clothes and bodies to reflect their individuality and are sensitive to criticism of them. In the legal arena, grooming and dress codes may be unconstitutional or violate antidiscrimination statutes. This is an area where an administrator almost always should ask an HR professional for help.

Exhibit 2.4 Dress and Grooming Regulations in the Public Service

Clothes make the man. Naked people have little or no influence in society.

—Mark Twain

Written and unwritten dress and grooming codes are common in the private and public sectors, because a suitably attired and groomed workforce is an integral part of a professional, productive organization. As vital mediators in social relations, clothing and hairstyle choices can reflect complex feelings about power, money, autonomy, and gender, feelings that often have significant interpersonal consequences. Although few would deny the obvious superiority of character and values as bases for judgment, too much credence may be given to glib assertions that images are without moment; empirical evidence demonstrates that people readily form opinions—right or wrong—about the social and professional desirability of individuals based largely on their appearance.

The government is a highly visible employer; its employment-relations practices are observed and emulated. One reason dress and grooming practices matter to public employers is that they have subtle and obvious implications for management philosophies (e.g., participative management), task organization (employee teams), personnel functions (selection, placement, and evaluation), quality of work life (self-confidence and mutual respect), and constitutional issues (freedom of speech, equal treatment, and sex discrimination). In government, dress and grooming can also represent the mantle of state authority.

Managers also should be aware of the instrumental role played by dress and grooming in communicating personal and organizational credibility and responsibility. In one national sample of state managers, a majority

of respondents thought “well-dressed and groomed people are often perceived as more intelligent, hardworking, and socially acceptable than those with a more casual appearance.” They rejected the contention that “an employee’s appearance is unimportant to the organization.” Given this consensus, it is not surprising that an Oklahoma agency dress code codifies these attitudes and affirms that “all employees . . . are representatives of the State . . . and shall dress accordingly, in a manner that presents a good image.”

These data suggest that certain norms, or formal and informal dress rules, are part of the fabric of most agencies’ cultures. Ignoring commonly held standards of neatness, demonstrating an inability to adapt to the work environment, and showing insensitivity to one’s milieu could affect job performance. For example, an employee of the EEOC would likely encounter difficulties in rendering service to the public if he or she wore Nazi or Ku Klux Klan insignia to work.

A current social trend is body art and ornamentation. According to a Pew Research Center study in 2010, nearly 40% of Americans between the ages of 18 and 29 have at least one tattoo, and a survey performed by Statista in 2017 reported that 40% of all Americans between the ages of 18 to 69 have at least one tattoo, compared with only 1% a generation ago. As with dress and grooming standards, employers have wide latitude in developing appearance regulations to address skin decoration, but the rules must be justifiable, consistently enforced, nondiscriminatory, and flexible enough to allow for reasonable

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accommodation of religious beliefs and disabilities. (These legal requirements are discussed in the “Grooming and Dress Codes” section of this chapter.) To illustrate, the state has a right to promote a disciplined, identifiable, and professional police force by maintaining its uniform as a symbol of impartiality; accordingly, the state can require police officers to cover tattoos that may be offensive or disruptive. What may be offensive or disruptive, however, can be debated.

Sources: American Academy of Dermatology (2008); Bowman (1992, pp. 35–51); Pew Research Center (2010); Statista (2017).

A clear, one-size-fits-all standard of dress and grooming is not recommended here. Given wide variations of occupations and agencies, not only would such a code be difficult to promulgate, but also it would be contrary to the agency-initiated, participative management approach needed to develop useful standards. A contingency approach seems warranted.

Constitutional Law

The First Amendment (free expression and free exercise of religion) and the Fourteenth Amendment (equal protection and due process) afford employees some rights in grooming and attire choices, but courts generally uphold an employer’s rule against a constitutional challenge if it is rationally related to a legitimate interest. In *Kelley v. Johnson* (1976), the Supreme Court’s principal decision about grooming, a police officer challenged a county policy limiting the length of male officers’ hair. The court concluded that the regulation was rationally related to safety because it provided a disciplined and easily recognizable police force. Bans on mustaches, goatees, and beards for police also have been upheld because they promote esprit de corps. Prohibitions on beards for firefighters and on mustaches and beards for emergency medical technicians have been upheld for safety reasons.

Agencies should be extra-cautious about grooming regulations that may limit the free exercise of religion. The U.S. Fourth Circuit Court of Appeals upheld a rule preventing correctional officers from wearing dreadlocks due to safety concerns, even though the hairstyle was required by an employee’s religion. But the Third Circuit struck down a rule prohibiting police officers from wearing beards, because the policy prevented a Muslim man from observing his beliefs. The rule allowed an exemption for a medical need, and the court reasoned that, by allowing an exemption for a secular but not a religious purpose, the county unlawfully discriminated against those with religious motivations. Because of the exemption, the court applied the “strict scrutiny” standard, which requires a measure to be narrowly tailored and to further a compelling governmental interest.

Dress codes raise similar constitutional issues. The leading dress code case is *Goldman v. Weinberger* (1986), involving the First Amendment’s guarantee of free exercise of religion. In that case, the Supreme Court determined that the U.S. Air Force’s dress code, which prevented an Orthodox Jew from wearing a skullcap while on duty, was lawful because it served the legitimate purpose of encouraging “the subordination

of personal preferences and identities in favor of the overall group mission.” In 2003, the Third Circuit upheld a county’s requirement that all van drivers wear pants against an employee’s claim that her religious beliefs required her to wear a skirt. The court applied a “rational basis” standard and accepted the county’s explanation that skirts posed a risk to safety. On the other hand, in 2005 a district court in Kentucky held that a public library violated an employee’s free exercise rights by prohibiting her from wearing a necklace with a cross on it.

Antidiscrimination Statutes

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers from discriminating in terms and conditions of employment based on race, color, religion, sex, or national origin.⁷ Grooming policies and dress codes are terms and conditions of employment. The grooming policies attacked as gender discrimination primarily have involved different hair-length requirements for men and women. Courts routinely uphold such standards if they reflect cultural norms and do not treat one sex more harshly than the other. The grooming rules challenged as race discrimination mainly have been no-beard rules. About 25% of black men (compared with less than 1% of white men) suffer from a skin disorder caused by clean shaving, so no-beard rules have a disparate negative impact on black men. Some courts have upheld no-beard rules, while others have pronounced them unlawful. (Disparate impact is discussed further under “Discrimination” later in this chapter.)

Dress codes that treat the sexes differently, such as rules that require men to wear ties, are lawful if they do not favor one gender over the other. On the other hand, rules that require only women to wear revealing or physically uncomfortable uniforms, facial makeup, or contact lenses instead of glasses have been invalidated as discriminatory. (Casinos and restaurants mandated these “sexually appealing” uniforms.) Policies that limit an individual’s ability to observe religious customs have been attacked as religious discrimination. In 1990, a court upheld a state statute that prohibited a Muslim public-school teacher from wearing a head covering. Likewise, in 2007 the city of Philadelphia’s rule prohibiting a Muslim police officer from wearing a head covering was upheld. In both cases, the courts concluded that requiring employers to accommodate these exceptions would impose undue hardship. (Under Title VII, employers must accommodate employees’ religious beliefs unless doing so would impose undue hardship, as discussed below.)

But in 2008, the New York State Department of Corrections settled a high-profile Title VII case by agreeing to determine on a case-by-case basis whether to grant religious exemptions from uniform and grooming regulations. It also agreed to allow personnel to wear close-fitting, solid dark-blue or black religious skullcaps, provided no undue hardship was posed. (Exhibit 2.5 considers the need for dress and grooming codes in the government workplace.) In 2015, a unanimous Supreme Court invalidated the no-headwear policy of a clothing retailer when its implementation violated a Muslim applicant’s request for a religious accommodation (*EEOC v. Abercrombie & Fitch Stores, Inc.*, 2015).

PRE-EMPLOYMENT INVESTIGATIONS: TRUTH, PERSONALITY, HEALTH, CREDIT, AND CRIMINAL RECORDS

The cardinal rule for **pre-employment investigations**, including interviews, questionnaires, and record checks, is that they must be job-related. Employers should not inquire about personal matters, such as marital status, the willingness of a working spouse to relocate, or whether the person has children, because those questions are not germane to the candidate's ability to perform the job. Instead, the interviewer should ask, for example, whether there are any barriers to relocation and whether adequate child care is available (if the applicant discloses having children). These questions solicit the information the organization actually needs to know. (Chapter 4 reviews the hiring process in detail.)

Once the hiring committee crafts its questions, how can it ascertain whether an applicant answers them truthfully? Scientific tests are alluring, but the Employee Polygraph Protection Act of 1988 restricts the use of polygraph tests due to concerns about the technology's accuracy. Private businesses rarely are authorized to use such tests. Public agencies are exempt from the act, but the law does not preempt state or local regulation, and about half the states have enacted anti-polygraph statutes. Even when testing is not prohibited, it has been successfully challenged in court. The Texas Supreme Court held that a state agency's use of mandatory polygraph testing violated the right to privacy provided in the state constitution. And the Montana Supreme Court determined that a state law allowing polygraph testing of law enforcement personnel but not other government employees violated the state constitution's equal protection clause (the Washington Supreme Court reached a contrary result). If polygraph testing is used, questions about characteristics protected by antidiscrimination laws should be avoided, because they suggest that hiring decisions will be based on those factors.

Some organizations seek to refine the hiring process by using personality and psychological tests, such as the Myers-Briggs Type Indicator (which provides information about decision-making styles and interpersonal interactions) and the Minnesota Multiphasic Personality Inventory (MMPI) (which tests for some adult psychopathologies). Not surprisingly, given the controversial nature of psychological testing, there are legal restraints on the use of such tests. If a test is a medical exam under the ADA, which some courts have found the MMPI to be, it may not be administered until after a conditional offer of employment has been made. And if a disability, such as a tendency toward alcoholism, is then revealed, ADA requirements must be followed. Some states—for example, Massachusetts—prohibit the use of any written exam to assess honesty, which includes the MMPI.

In general, psychological and personality exams should be used for public sector applicants only when state laws allow it and when the tests are job-related, such as when public safety is involved. Employers should ensure that tests are given at the right point in time, instruments are valid, results are interpreted and used lawfully, and confidentiality is maintained. Agencies may be required to give individuals access to their own test results under state laws mandating disclosure of medical records.

Medical testing of applicants in the public sector is usually done to detect drug and alcohol use or the presence of communicable diseases. This testing is subject to legal restrictions, as well. Under the ADA, applicants may not be required to answer medical questionnaires or to take medical tests prior to an offer. Post-offer but pre-placement medical exams are permissible and need not be job-related. Medical testing of current employees must be job-related. For example, an AIDS test may be administered if transmission of HIV is a demonstrable risk. Return-to-work medical exams after disability leave are lawful. The results of such tests must be kept confidential and used in a non-discriminatory way.

During the COVID-19 pandemic, the EEOC issued guidance that allowed employers to require employees and even applicants to submit to medical questionnaires and the taking of their body temperature. These drastic measures may legally remain in place so long as the Centers for Disease Control declare a pandemic.

An emerging concern is the use of genetic testing for illnesses that might affect job performance, such as Alzheimer's disease. The GINA (covered in greater detail in Chapter 4) prohibits employers from discriminating on the basis of genetic information. It bars employers from requesting or requiring genetic testing and from purchasing genetic information about employees, applicants, or their family members. At least 35 states also have laws against genetic discrimination in employment. (A list of state laws and analysis of their coverage is available from the National Conference of State Legislatures.) Although these laws aim to prevent employers from acquiring genetic information, employers may still receive it—for example, in a family health history provided as part of a pre-employment health exam, or in documentation supporting a leave request (e.g., a prophylactic mastectomy). If genetic information is revealed, agencies must be careful how they use and maintain it.

Does an applicant's financial history reveal whether the person will be a dependable, trustworthy employee? Perhaps, but Congress enacted the Fair Credit Reporting Act of 1970, as amended in 2003, in part to prevent employers from using inaccurate or arbitrary financial information. To obtain a credit report on an applicant, the prospective employer must ask the applicant to authorize one. Before taking adverse action based on a credit report, the employer must provide the applicant with a copy and advise the employee of his or her legal rights. About one-third of the states also have laws regulating the use of credit reports, but the Fair Credit Reporting Act may preempt them. Other laws regulate this area as well. The federal Bankruptcy Act prohibits public and private organizations from denying or terminating employment because an individual has declared bankruptcy. Garnishment of wages for child support or other reasons places administrative burdens on employers, but many states forbid adverse action due to garnishment, and, if the adverse action has a disparate impact, it may violate Title VII.

Applicants' criminal records are of great moment to government employers. According to the U.S. Department of Justice, in 2016, over 110 million Americans had a criminal record, which represented a 4% increase from two years earlier (Goggins & DeBacco, 2018; U.S. Dept. of Justice, 2016). Three types of laws address the necessity/permissibility of criminal background checks. In the first category are laws that mandate pre-employment criminal record reviews. These laws cover applicants seeking

positions with access to vulnerable persons (e.g., children, the elderly, patients, and prisoners) and positions of great trust (e.g., with the lottery, in nuclear power facilities, and in law enforcement). Common-law doctrines also may oblige an agency to take this step. For example, an employer may be liable for negligent hiring if it fails to perform a check and, as a result, unreasonably exposes coworkers or others to a dangerous person who harms them. A second group of laws allow but do not require checks. Lastly, a third group of laws restrict access to or use of criminal records or allow applicants to withhold them.

Deciding what to do about criminal records, once they are revealed, is a separate policy choice. Governments may disqualify persons convicted of certain offenses (e.g., felonies) for certain jobs, either permanently or for a set period, or they may consider each applicant's situation individually. A few states prohibit discrimination against applicants with criminal records. Even in states without laws of this type, constitutions and Title VII provide some protection. For example, a state law prohibiting the hiring of all convicted felons for civil service positions was held to violate the federal Equal Protection Clause, and an agency's refusal to hire individuals with arrest records violated the state constitution. In another case, the blanket rejection of all convicted felons was held to be disparate impact race discrimination under Title VII. Criminal record checks are necessary for many positions, but managers should pay attention to applicable laws, the relationship between the crime and the position, and the time elapsed since the conviction. They also should base restrictions on convictions, not arrests. The EEOC publishes helpful guidance on this topic.

Post-employment References

Should a former employer be able to limit a person's job prospects by providing a negative reference? There is a striking paradox here between employers' and employees' needs. Open communication about employees in the job market promotes efficient hiring, but protecting individuals from **defamation** is essential. A job reference is defamatory if it contains a false statement that injures an individual's work reputation. Written defamation is libel; spoken defamation is slander. References with unfounded allegations of misconduct, incompetence, poor performance, criminal or other illegal conduct, dishonesty, or falsification of records are defamatory, because they impugn the employee's ability or fitness for a job.

Employers who provide job references have a common-law privilege that broadly protects them from liability for defamation, but they lose that protection if they provide information they know is false, act with reckless disregard for the truth or falsity of the information, communicate the information to persons who are not within the purpose of the privilege, or excessively publish it. In addition to this common-law shield, approximately 36 states have enacted legislation protecting employers who provide job-related information in good faith. Still, some organizations believe the safer approach is to provide abbreviated references—usually job title, dates of employment, and salary history (Cooper, 2001). If an agency allows its supervisors to give references, it should provide them with training on how to compose lawful ones.

DISCRIMINATION

Antidiscrimination Laws

The big three federal antidiscrimination statutes—Title VII of the Civil Rights Act of 1964, the **Age Discrimination in Employment Act of 1967 (ADEA)**, and the **Americans With Disabilities Act of 1990 (ADA)**—are discussed in this section. The cumulative effect of these laws is that employers may not discriminate against employees on the basis of race, color, national origin, religion, sex (gender), age (40 years and older), or disability. A host of other federal laws, and myriad state and local laws, forbid discrimination based on additional criteria, such as sexual orientation, gender identity, marital status, familial status, medical condition, political affiliation, military discharge status, weight, height, and physical appearance.⁸

In public employment, an oft-cited goal of antidiscrimination laws and affirmative-action initiatives is a representative bureaucracy. Has this objective been accomplished? A study using data from 2000 found that the federal government employed a higher proportion of African Americans, Asian Americans, and persons categorized as Native Americans and others and a lower proportion of Hispanics than would be expected based on the labor pool, leading the authors to conclude that affirmative action programs have increased the overall representation of minorities but benefited certain groups at the expense of others (Kogut & Short, 2007). Other scholars have noted that, as of 2000, women were still grossly underrepresented in high-level positions (Hsieh & Winslow, 2006). More generally, critics contend that current antidiscrimination law is out-of-date because it addresses only conscious prejudice, not unconscious bias, which persists (Cunningham et al., 2001). The demographic changes in America's workforce, the legal erosions of affirmative action, and new understandings derived from psychological and sociological research pose ongoing challenges to those devising future diversity efforts, a topic covered in Chapters 3 and 4. (Exhibit 2.5 explains how antidiscrimination laws are enforced in the public sector.)

Intentional Discrimination

Title VII, the ADEA, and the ADA make it unlawful for an employer to make an adverse employment decision because of an individual's race, color, religion, sex, national origin, age, or disability. The most straightforward claim is one alleging **disparate treatment discrimination**, also known as intentional discrimination.

Under this theory of liability, proving the motivation of the employer is key. But proving a person's state of mind is difficult; a manager's thought process cannot be observed, so his or her motivation must be inferred from statements and actions. One way a plaintiff may prove discriminatory motivation is with **direct evidence**—a written or oral statement revealing bias—for example, a supervisor calling an employee a “black radical” while firing him. The timing and context of a statement are important. For example, a supervisor's remark that all Italians are “mobsters and goombahs,” uttered to a coworker several months before the employee's discharge, was not adequate to prove anti-Italian bias toward the plaintiff at the time of his discharge.

Exhibit 2.5 It's Good to Be the Government

An employee seeking to enforce Title VII against a private company initially must file a complaint with the EEOC or a comparable state agency. These agencies are charged with investigating discrimination and retaliation claims, determining whether they have merit, trying to conciliate disputes, and sometimes prosecuting cases themselves. In most cases, plaintiffs eventually may file civil suits and, if successful, may receive awards of damages, including lost pay, attorneys' fees, compensation for mental anguish, and punitive damages.

Both Title VII and the Rehabilitation Act add an extra layer of procedure for federal workers. Every federal agency has an equal employment opportunity counselor who initially must review a complaint. If the counselor cannot resolve it, the agency investigates, holds a hearing if requested, and issues a decision. Only then may an unsatisfied employee file a complaint with

the EEOC. If the employee eventually succeeds in court, the government's financial exposure is less; no punitive damages are available against governments.

Congress likewise benefits from unique enforcement provisions. The Congressional Accountability Act of 1995 applied the protections of 11 employment laws to employees of Congress but created special procedures and remedies for them. Following suit, the Judicial Conference of the United States recommended that employees in the federal court system have rights comparable to those in the legislative branch.

Title VII covers state and local governments if they have 15 or more employees, but personal staff, legal advisers, and policy-making assistants have special procedures and minimal remedies. Due to sovereign immunity, employees cannot use the ADEA or the ADA to sue state governments.

The civil rights laws are decades old, and few supervisors, even if they harbor strong prejudices, are unwise enough to vent them. A more common and more complicated way an employee may prove intentional discrimination is through **indirect or circumstantial evidence**.

Here, the plaintiff relies on the employer's actions to support an inference of an unlawful motive. First, the plaintiff must present evidence that he or she was treated differently based on a forbidden criterion. (In a hiring case alleging race discrimination, the Supreme Court said the plaintiff could do this by proving that the complainant belongs to a racial minority; that the complainant applied for and was qualified for a job for which the employer was seeking applicants; that, despite the complainant's qualifications, he or she was rejected; and that, after the rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications, *or* the employer hired someone of a different race with inferior qualifications. These elements can be adapted to fit promotion, discharge, and other adverse action claims.) Second, the employer can defeat the plaintiff's claim by presenting evidence that it had a *legitimate business reason* for its action. Third, the plaintiff can introduce evidence to show that the employer's stated business reason was a *pretext* to hide its real discriminatory motive. This analytical approach, known as the **McDonnell Douglas burden-shifting framework**, was announced by the Supreme Court in *McDonnell Douglas Corp. v. Green*

(1973), and it is used in the vast majority of discrimination cases. Throughout this analysis, under *McDonnell Douglas*, the plaintiff, or the employee adversely affected, has the burden of proof.

Employers have many defenses available. Typically, an agency argues that the adverse action was prompted by a legitimate business reason and the supervisor had no discriminatory intent. But sometimes the evidence shows that the supervisor had a mixed motive, meaning that he or she was motivated by a legitimate business reason and an unlawful criterion. Imagine, for example, a boss who fires a prison guard for arriving late and for speaking Spanish to coworkers on breaks. Under Title VII, if an employer proves it would have made the same decision without considering the illegal factor, the victim's remedies are limited to a declaration that the conduct was unlawful, reinstatement, and attorney's fees (which can often be substantial). Under the ADEA and ADA, by comparison, a mixed motive is an absolute defense; the plaintiff receives nothing.

Title VII and the ADEA prevent employers from segregating workers in positions on the basis of a proscribed dimension. For example, employers may not limit job applicants for a position to those under 40 years of age. But these acts allow segregation in the rare circumstances where it is an essential requirement of the position, known as a bona fide occupational qualification (BFOQ). An example would be auditioning only female actors for a female role. Race is never a BFOQ. Today, BFOQs are seldom utilized, because they are difficult to defend. Thus, a men's prison may not make being male a job qualification for guards unless it can show that, for job-related reasons, females must be excluded.

For decades, the manner in which employment discrimination laws affected gay, lesbian, bisexual, and transgender people was evolving and uncertain. On the federal level, several federal circuits were at odds with whether Title VII applied to discrimination on the bases of gender identity or sexual orientation. Several cases each year unsuccessfully sought Supreme Court review. Several states, and local jurisdictions within some states, passed laws and ordinances that afforded protection from discrimination in these areas; other jurisdictions chose not to protect such characteristics.

Federal statutes prohibit job-related discrimination on the basis of race, color, religion, sex, national origin, age, or disability for companies with more than 15 employees. In 1998, Executive Order 13087 outlawed discrimination related to sexual orientation in federal civilian employment, except for the Central Intelligence Agency, the National Security Agency, and the Federal Bureau of Investigation; in 2014, President Obama issued Executive Order 13672, which added gender identity as a protected category. This order also amended Executive Order 11246 to prohibit discrimination by federal contractors. The Don't Ask, Don't Tell Repeal Act of 2010 sought to improve conditions for gay, lesbian, and bisexual people in the military, but it does not apply to transgender people.

Currently, 23 states and the District of Columbia prohibit discrimination based on sexual orientation (HRC Foundation, 2020). Of these, 22 states and the District of Columbia also prohibit discrimination based on gender identity. So far, 429 local governments prohibit discrimination based on gender identity as well as sexual orientation throughout their areas (HRC, 2014a). Recently, 2,211 private sector companies, 175

nonprofit organizations, and 577 universities and colleges included sexual orientation as a protected category in their nondiscrimination policies (HRC, 2014b). At least 790 of the private sector companies, 35 of the nonprofit organizations, and 104 of the universities and colleges also included gender identity as a protected category (HRC, 2014b). Some of the policies also included gender expression as a protected category.

Efforts have been made since 1974 to pass legislation in Congress such as the Employment Non-Discrimination Act (H.R. 1755; S. 815), which includes protections for transgender people; it passed the Senate in 2013, but not the House. Policies that prohibit discrimination based on anatomical sex and sexual orientation do not adequately protect all people from discrimination (Sellers, 2014). “Sexual orientation” refers to attraction, while “gender identity” and “gender expression” refer to individuals’ sense of their gender. A transgender person’s inner sense of gender identity differs from the gender that individual was assigned at birth. To protect all people from discrimination related to actual or perceived gender and sexual orientation, nondiscrimination policies need to include reference to gender identity and gender expression.

In June 2020, the U.S. Supreme Court issued a landmark decision in *Bostock v. Clayton County* (2020), which definitively held that Title VII prohibits employers from discriminating on the basis of sexual orientation and gender identity. Writing for a majority of six, Justice Neil Gorsuch, a Trump appointee, explained that an employer who fires an individual for being gay or transgender “fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.” Justice Gorsuch (joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan) assumed, as the employers argued, that the word “sex” in Title VII refers to the biological distinctions between male and female. But that, the court said, was “just a starting point”: “The question isn’t just what ‘sex’ meant, but what Title VII says about it.” Title VII prohibits an employer from firing an individual based in part on the employee’s sex. And, the court reasoned, “it is impossible” to discriminate against a person for being gay or transgender without taking the employee’s sex into account. The court thus concluded that an employer that discriminates against an employee for being gay or transgender “inescapably intends to rely on sex in its decision-making.”

Retaliation

The antidiscrimination statutes prohibit not only discrimination but also reprisal. Title VII, the ADEA, and the ADA, as well as nearly every other federal law listed above (including the emergency legislation passed due to the pandemic), make it unlawful to discriminate against an individual because of opposition to a prohibited employment practice or because of participation in an investigation, proceeding, or hearing. An employee who is fired as a consequence of reporting being sexually harassed is a victim of **retaliation**. To prevail on any type of retaliation claim, a plaintiff must prove three basic elements: (1) that he or she engaged in a protected activity; (2) that adverse action was taken against him or her; and (3) that there was a causal connection between the

two. As with discrimination claims, the employer's motive may be proven with direct or indirect evidence.

Since 2018, retaliation claims have accounted for over 50% of all charges filed with the EEOC. To put that into context, in 2005, retaliation claims composed only 29% of all claims. Strategically, such claims offer plaintiffs an advantage: Causation is often easier to prove than in discrimination claims. The time sequence alone—protected activity followed by discipline—may be enough to suggest a cause-and-effect relationship, especially if the events occurred close together. In general, however, if an adverse action occurs more than six months after protected activity, there is no causation between the two absent other evidence.

From the employer's perspective, these claims are a disincentive to discipline or otherwise take action against an individual who recently engaged in protected activity. This is primarily because adverse action in the retaliation context is broader and easier for the employee to establish. Recall that in a discrimination claim, adverse action means a serious and material adverse change to the employee's terms and conditions of employment. In 2006, the Supreme Court clarified that in the retaliation context, adverse employment action means action that might dissuade a reasonable worker from engaging in protected activity (*Burlington Northern & Santa Fe Railway Co. v. White*, 2006).

Harassment

Title VII makes it unlawful for an employee to be subjected, on the basis of a proscribed criterion, to unwelcome **harassment** that is severe or pervasive enough to create an objectively hostile or abusive work environment. Many people associate harassment claims with gender discrimination (i.e., sexual harassment), but a claim is viable if an employee is harassed due to any characteristic listed in Title VII, the ADEA, or the ADA. Typically, it is the behavior of supervisors, coworkers, and others who interact regularly with the employee that creates a **hostile environment**. Indeed, harassment claims can be based on the statements or conduct of vendors, customers, or even elected officials.

Whether objectionable conduct is severe or pervasive enough to be unlawful is often the pivotal question. These laws are not general civility codes, and they do not provide redress for behavior that is boorish, rude, abrasive, unkind, or insensitive. Courts look at the gravity, frequency, duration, character, and threatening nature of the conduct. Occasional racial or ethnic slurs are seldom enough to create a hostile environment, but 6 months of being called “ayatollah” and “camel jockey” was sufficient to support an Iraqi employee's claim. In another case, a female employee who acquiesced to her supervisor's ongoing unwelcome sexual conduct established a claim. And non-English speaking workers forced to abide by an employer's English-only rules were successful.

In 1998, the Supreme Court decided two companion cases and established a defense for an employer facing a hostile environment claim. Known as the *Ellerth/Faragher affirmative defense*, an employer can avoid liability for harassment if it can show that it exercised reasonable care to prevent and correct the harassment and that the employee unreasonably failed to use the remedial procedures available. An organization can reasonably prevent harassment by adopting adequate policies and procedures, ensuring

that all staff members receive the policies, and training supervisors to handle complaints promptly and thoroughly.

The Virginia Department of Corrections is a good example of an employer that avoided liability by quickly correcting harassment. A supervisor distributed a memo to prison personnel about dress codes and identified the plaintiff as someone who wore attire that was too revealing. After the memo was distributed, coworkers made crude jokes. Managers at the prison prevented public posting of the memo, counseled the supervisor who wrote and distributed it, admonished the employees who had made the offensive remarks, and stopped the harassment. When nonsupervisory coworkers or nonemployees (such as customers, contractors, or others sharing the work site) create a hostile work environment, the agency is responsible if it was negligent, meaning if it knew or should have known about the harassment and failed to take prompt and appropriate corrective action.

One of the toughest hostile-environment claims to defend against is one that involves **tangible employment action**—a significant change in employment status, such as hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a significant change in benefits. An example would be an administrative assistant who resists a boss's sexual demands and is subsequently given less desirable work assignments. If a supervisor takes tangible employment action against a victim based on unwelcome sexual conduct, the employer faces a tough legal battle because the *Ellerth/Faragher* affirmative defense is not available. In 2013, however, the Supreme Court clarified that for purposes of determining employer liability for harassment cases, a *supervisor* is limited to those who are empowered by the employer to take tangible employment actions against the employee (*Vance v. Ball State Univ.*, 2013). For managers, the lesson is that all personnel actions should be scanned for improper motivation.

Affirmative Action

Beginning in the early 1960s, many government employers voluntarily adopted **affirmative action** plans to increase the number of employees from groups historically excluded from their workplaces. They also adopted rules requiring vendors seeking contracts from the government to adopt such plans. These plans used various means to achieve a more representative workforce, including targeted recruitment and training programs, numerical goals and timetables, and special preferences in hiring and promotion. In the 1980s and 1990s, court decisions raised doubts about the lawfulness of these plans under both Title VII and the Equal Protection Clause, and most were modified or suspended.

Even when affirmative-action programs are legal, they are contentious, because they contain a conspicuous paradox: They use race-based decision making to remedy harm caused by race-based decision making. Understandably, critics ask: "If race was an unfair criterion to use in the past, how can it be a fair criterion to use now?" (Such programs do include women and members of minority groups, but the debate over affirmative action usually is couched in terms of race.)

Title VII protects all groups, including majority groups, from discrimination. As a result, a white employee, for example, who has been treated disparately on the basis of

race due to an affirmative action plan may use Title VII to bring an action for reverse discrimination. Additionally, Title VII requires any affirmative action program to be described in a formally adopted plan. The plan must remedy conspicuous racial imbalances in traditionally segregated job categories, it must be temporary, its purpose must be to remedy underrepresentation (not to maintain gender or racial balances indefinitely), and it must not unduly trammel the rights of the majority.

Under the Equal Protection Clause, a government affirmative action program based on race or ethnicity is reviewed using the exacting “strict scrutiny” standard. It is constitutional only if it is narrowly tailored to further a compelling governmental interest. To date, only the goal of remedying past discrimination has been compelling enough for the Supreme Court to approve a plan. Furthermore, the government adopting the plan must provide convincing proof of its own past discrimination.⁹ If an affirmative action program is based on gender rather than on race or ethnicity, it receives less rigorous intermediate judicial scrutiny; it will be approved if it has a substantial relationship to an important governmental interest.

The most prominent case in this area in the relatively recent past did not involve employment. In 2003, the Supreme Court decided in *Grutter v. Bollinger* that the University of Michigan Law School could constitutionally use a race-conscious admissions policy because the law school had a compelling interest in attaining a diverse student body. In 2016, the Supreme Court handed down its decision in *Fisher v. University of Texas*, which upheld an affirmative action program geared toward admissions. The impact of these decisions in the context of public employment is still unclear. Prior to *Grutter*, it was widely accepted that attaining workforce diversity was not a sufficiently compelling reason for a race-based program. But after *Grutter*, the Seventh Circuit approved a plan by the city of Chicago to increase diversity among its police sergeants. The city’s compelling reason was its desire to set the proper tone in the department and to earn the community’s trust, which in turn would increase police effectiveness. This is an area where caution and expert advice are necessary. A plan that seeks cultural diversity runs the risk of being denounced as unlawful racial or ethnic balancing.

In rare cases, affirmative action plans may be involuntarily imposed on employers by courts to remedy past discrimination. In 1987, for example, after years of litigation, a federal court ordered the Alabama Department of Public Safety to use quotas to increase the number of state troopers who were members of minority groups. The Supreme Court approved the plan because of the department’s history of overt and defiant racism.

Unintentional Discrimination

In addition to intentional discrimination, Title VII, the ADA, and the ADEA prohibit neutral practices that inadvertently produce a disproportionate or disparate impact on a protected group. The Supreme Court first accepted the theory in *Griggs v. Duke Power Co.* (1971), and it was codified in the Civil Rights Act of 1991. **Disparate impact discrimination** claims most frequently challenge hiring and promotion devices, but the theory can be used for layoffs (sometimes referred to as reductions in force [or RIFs]) and other employment practices. To aid enforcement, the EEOC requires employers to

maintain records of all hiring, promotion, and firing by race, sex, and national origin. Hiring and promotion test scores also must be kept.

To prove disparate impact, an employee must show that a specific selection device had an exclusionary effect. In *Griggs*, a high-school graduation requirement and a battery of aptitude tests disproportionately excluded black candidates from being hired. There is no “bright line” rule stating how much disparity is unlawful, but the EEOC uses an 80%, or four-fifths, rule of thumb: If the qualification rates of protected groups are less than 80% of the rate of the highest group, then the selection device is suspect. The Supreme Court has disparaged the EEOC’s **80-percent rule** and has stated that a case-by-case approach is necessary because “statistics come in a variety and their usefulness depends on all the surrounding facts and circumstances” (*Watson v. Fort Worth Bank & Trust*, 1988). Still, since the EEOC investigates and determines the merit of claims, and sometimes prosecutes them, agencies should use the 80-percent rule as a guide.

An employer can defend against a disparate impact claim by showing that a challenged practice is job-related and a business necessity. This defense can be used for subjective procedures, such as interviews, and objective procedures, such as tests. In order to defend tests as job-related, agencies must prove their validity. The EEOC adopted the *Uniform Guidelines on Employee Selection Procedures* to assist organizations with this endeavor. If a test is proven to have predictive validity, content validity, or construct validity under these guidelines, then it is job-related and its use is justified even if it has a disparate impact. (Chapter 4 explains these validation methods in detail.)

Rather than validating tests, some employers have sought to avoid disparate impact claims by using scores creatively. For example, one agency adopted a cutoff score above which test performance was irrelevant; the court, however, ruled that the cutoff score had to be validated. Another minimized the relative weight of the exam in the selection process; here, the court found the practice to be an unlawful affirmative action plan. Others took the top scores in each racial and gender group, a practice known as **race norming**, prohibited by the Civil Rights Act of 1991. Still others used **banding**, meaning they treated applicants within a certain range as having identical scores. So far, this process has not been found unlawful, but certain aspects (such as bandwidth) may need to be validated. Finally, the city of New Haven, Connecticut, invalidated test results altogether because none of the firefighters who passed the exam who were members of minority groups scored high enough to be considered for the vacant positions, and the city did not want to risk being found guilty of disparate impact discrimination. The Supreme Court held that New Haven’s decision to ignore test results violated Title VII.

Age

The ADEA is the primary federal statute prohibiting age discrimination. Perhaps a product of views when it was passed, the act forbids discrimination in the terms and conditions of employment on the basis of age, which means against those at least 40 years old. There is no claim for reverse discrimination by the young. Unlike Title VII, the

ADEA does not allow an employee to prevail based on a mixed motive; instead, the employee must show that but for the employee's age the employer would not have discriminated against him or her.

Involuntary retirement generally may not be required, but mandatory retirement is permissible in public safety and executive policy-making positions. Voluntary early-retirement incentives are permitted. The act provides a defense for an employer that uses a bona fide seniority system, and in rare instances age may be a bona fide occupational qualification. But employers cannot rely on stereotyped assumptions about older workers' strength, endurance, or speed. Courts have struck down rules that limited the position of flight engineer to those under the age of 60 and that of bus driver to those under the age of 65.

Disability

The ADA prohibits discrimination against any qualified person with a physical or mental impairment that substantially limits a major life activity. It also protects those with records of impairment, those regarded as impaired, and those who associate with impaired persons. Employers must provide qualified disabled persons with reasonable accommodation. The terms "qualified person," "substantially limits," and "major life activity" have spawned considerable litigation.

When it was enacted, the ADA was hailed as a major step toward eradicating disability discrimination, but the Supreme Court issued several decisions that sharply limited the scope of the statute (Selmi, 2008). In response, Congress amended the ADA in 2008. The ADA Amendments Act (ADAAA) rejected numerous Supreme Court decisions and EEOC regulations narrowing the act's coverage, and it emphasized that the definition of "disability" should be interpreted broadly. One change is that the determination of whether a person has an impairment that qualifies for coverage now is made without any consideration of the impact of mitigating measures, such as medication or prosthetics (the impact of ordinary eyeglasses and contact lenses is considered). Still, even after the amendments, the line between minor conditions that are not covered by the act and substantially limiting impairments that are covered is often muddled. In an attempt to provide more clarity, the EEOC issued regulations with examples of impairments that easily should be concluded to be disabilities, including epilepsy, diabetes, cancer, HIV infection, and bipolar disorder.

To be covered by the ADA, a person with a disability must be able to perform essential job functions. This means that managers should identify essential job functions in a written job description and ask applicants whether they can do them. When an employee requests to be accommodated, managers should make an individualized assessment, with the assistance of HR and legal experts, to determine whether the person meets threshold conditions to be covered by the act. (Of course, an employer may voluntarily provide accommodation even when it is not legally required.) For qualified persons, accommodations likewise should be determined through individualized assessments. These might include, for example, reserved parking, special equipment, personal aides, part-time or flextime work schedules, and building renovations. Accommodations that cause

an undue hardship to employers are not required, but it is incumbent on the employer to prove that the requested accommodation is an undue hardship.

Religion

Religious employees may request time off for sacred holidays, schedules omitting work on the Sabbath, breaks during the workday to pray and a place to do so, and exceptions to dress and grooming codes. Title VII does more than simply prohibit religious discrimination. Similar to the ADA, it requires employers to make reasonable accommodation for religious beliefs and practices that do not impose undue hardship. *Reasonable accommodation* means that which is minimally necessary for the individual to fulfill his or her religious obligation or conscience. Organizations are not required to compensate workers for time off the job fulfilling their religious duties or to alter their work schedules or duty assignments. According to the EEOC (2008), the most common forms of accommodation are (1) flexible scheduling, (2) voluntary substitutes or swaps of shifts and assignments, (3) lateral transfer or change of job assignment, and (4) modification of workplace practices, policies, or procedures.

The Free Exercise Clause of the First Amendment (as balanced by the Establishment Clause) may expand a public employer's duty to accommodate religiously motivated requests, but the law is unclear. The impact of the Religious Freedom Restoration Act of 1993 on the duty to accommodate also is uncertain. Managers should consider but need not accept an employee's suggestion for accommodation. The "Religious Discrimination" section of the *EEOC Compliance Manual* is a helpful resource for managers responding to accommodation requests (EEOC, 2008).

Preventing and Responding to Discrimination Claims

How can managers prevent discrimination and retaliation claims from occurring and successfully defend those that do arise? Agencies should have and be able to prove legitimate business reasons for the actions they take. Some basic strategies enable managers to do this. First, agency leaders should not act rashly but should carefully gather and review all the facts before making personnel decisions. They should consciously articulate and use job-related criteria. By deliberating with other professionals, managers can make sounder and more defensible decisions, as such collective decisions are less likely to have been influenced by any one individual's bad motives.

Communication with employees also is essential. Open, two-way communication eliminates surprises, reduces the likelihood of suit, and increases the agency's odds of winning. This should include regular, timely (i.e., not necessarily annual) performance evaluations, with positive and negative feedback, and articulation of organizational expectations. When problems arise, supervisors should promptly discuss them with staff members and immediately write summaries of these conferences. Documenting such communication not only underscores management's seriousness, but also provides credible evidence. Judges and juries consider contemporaneous business records eminently more reliable than the self-serving testimony of individuals.

Organizations should have policies in place prohibiting discrimination, should update them regularly, and should ensure that supervisors and employees receive them. Finally, supervisors and managers should treat all complaints of discrimination and retaliation seriously, regardless of whether complaints are made formally or informally.

SUMMARY AND CONCLUSION

Workplace laws reflect a balance among three competing objectives: managerial efficiency, employees' rights, and social aspirations of the law. This balance is not fixed. Rather, it changes to reflect lawmaking and decision making over time, as well as cultural norms. At present, a trend exists to interpret laws in favor of managerial efficiency. Employees' rights are becoming ever more narrowly defined.

For example, staff members have few privacy rights at work. Reasonable searches of their offices, computers, phones, and excretory fluids are permitted, as is surveillance of their movements. Workers may be required to alter their dress and grooming habits. Applicants for certain jobs may be investigated extensively. Employees must be careful what they say at work. They may be punished for disruptive speech or for pointing out agency problems they notice as they carry out their duties. More and more government jobs are being made at-will, so that the people in them can be fired without cause, notice, or explanation.

Still, certain rights remain intact. If an employee has a property interest in employment, he or she cannot be discharged except for cause and must be provided with due process before adverse action can be taken. Certain reasons for taking adverse action remain prohibited: An employer may not discipline an employee for speaking about a matter of public concern in a nondisruptive way (if the comments were not pursuant to the job), for "blowing the whistle" in a manner protected by a whistleblower statute, or for being a member of the "wrong" political party after an election (unless party membership

is necessary for the job). An employer cannot retaliate against an individual for participating in a proceeding to enforce a law or for opposing violation of a law. Antidiscrimination laws forbid an employer to intentionally or unintentionally make an employment decision based on a proscribed dimension (and, in some areas of the country, the list of proscribed dimensions is expanding). Employees must be paid at least a minimum wage and time and a half for overtime (unless they are exempt), must be paid the same as members of the other gender, and must be awarded pensions they already have earned. OSH acts require work sites to meet safety standards, and workers' compensation, health insurance, and FMLA leave provisions provide a safety net for those who become hurt or sick. Public employees rarely are held individually responsible for violating a law.

Of course, each law described in this chapter has conditions, exceptions, and gray areas. Managers who expect the law to provide an exhaustive, well-defined set of prohibited behaviors will be disappointed. Statutes are broad and vague, and court decisions analyze specific conduct under specific conditions. What are administrators to do when the law and their own employers fail to provide definitive guidance? They must form their own judgments. The basis for such judgments is the intent of the law—the values that underlie the cases and statutes discussed in this chapter. For example, if supervisors must respect employees' privacy, then it follows that they should ask permission when they think privacy expectations might be violated, even if they are unsure whether a right

exists. If employees refuse to cooperate, resolution should be attempted through collaboration, perhaps with assistance from other managers. Cases and laws seldom provide clear-cut answers, but they do provide guideposts that managers can use

to ensure that their actions are consistent with the spirit and aims of legislation and court decisions. Exhibit 2.6 provides a practical illustration of how various topics in this chapter come together in a real-life scenario.

Exhibit 2.6 Ethical Case Analysis

Zachary Delman is an Iraq War veteran who graduated from law school after his military service. He is now working as a budget analyst at the national headquarters of a large non-profit organization. Zach has been confined to a wheelchair since his diagnosis with ALS (amyotrophic lateral sclerosis, or Lou Gehrig's disease). His condition resulted in progressive neuromuscular deterioration. Zach has been able to work, but his mobility is limited.

Recently his nonprofit initiated, as part of its wellness program, a competitive exercise regimen with very attractive rewards (e.g., racing bikes, pricey iPads, discounts on gym memberships, and exercise equipment) available to those who engage and compete in vigorous exercises for many hours per month. The performance metrics used in the competition are recorded on wearable devices provided by the organization that track number of steps taken, nutrition and caloric intake, weight fluctuations, and so forth.

Zach is troubled by this initiative from which he is excluded due to his chronic medical condition. He knows several other organizations that are doing something similar involving wearables. He thinks the initiative discriminates against people with certain disabilities. He read recently that using broad definitions of "disability," as much as 20% of workers face a disability at any time, many of whom would also be excluded from such a program.

Zach also knows there are legal issues involved with organizational use of some wearables, because it permits the widespread collection of largely unprotected data. He remembers reading a policy brief indicating that the EEOC

proposed limits on the types of information that can be collected from employees with wearables. He perceives that discrimination, privacy, security, and harassment issues could arise, given the ubiquity of these devices promoted by employers.

He is aware that various health and labor laws are relevant to such matters:

- The ADA (forbidding inquiries about health as well as perceptions about one's health or ability to perform tasks)
- The GINA (prohibiting asking about genetic information)
- The HIPAA (setting standards to protect personal health data)
- The National Labor Relations Act (specifying terms of employment, including personal data collection and surveillance)

There are also ethical issues related to privacy, trust, fairness, distributive justice, and personal autonomy. Zach intends to share his misgivings about the program with his immediate superior, HR, risk management, legal affairs, and the union.

Directions/Questions

This case seemingly relates only to people with disabilities, but it raises legal and ethical issues with broader implications.

1. Brainstorm the ethical and legal implications of wearables in the workplace. Do you agree that the EEOC should put

limits on the types of information gleaned from data mining by employers? Why or why not?

2. Beyond the 20% percent of people with disabilities potentially excluded from such programs, what of the temporarily abled (the other 80%) who may be affected?
3. Principles like privacy, trust, fairness, security, and personal autonomy are

Sources: Bowman & West (2019); Ubiq Team (2015).

mentioned in the case. How is each principle important when considering employer-sponsored wearable initiatives?

4. Zach intends to contact five stakeholder groups about his misgivings; how do you think each will respond? Why?
5. What kinds of legal concerns might arise under each of the four laws mentioned in the case? Be specific in your response.

KEY TERMS

Adverse action 74	Due-process rights 73	Official immunity 84
Affirmative action 98	80-percent rule 100	Pre-employment investigations 90
Age Discrimination in Employment Act of 1967 (ADEA) 93	<i>Ellerth/Faragher</i> affirmative defense 97	Race norming 100
Americans With Disabilities Act of 1990 (ADA) 93	Equal Employment Opportunity Commission (EEOC) 70	Reasonable accommodation 64
At-will employment 72	Fair Labor Standards Act (FLSA) 78	<i>Respondeat superior</i> 84
Banding 100	Fair Labor Standards Act (FLSA) 78	Retaliation 96
Civil-law system 69	Family and Medical Leave Act of 1993 (FMLA) 83	Stare decisis 69
Civil Rights Act of 1964 89	Free-speech rights 76	Tangible employment action 98
Common-law system 69	Harassment 97	Title VII of the Civil Rights Act of 1964 89
Defamation 92	Hatch Act of 1939 77	Unemployment compensation 76
Direct evidence 93	Hostile environment 97	Unreasonable searches and seizures 85
Disparate impact discrimination 99	Indirect or circumstantial evidence 94	Whistleblower statutes 77
Disparate treatment discrimination 93	<i>McDonnell Douglas</i> burden-shifting framework 94	Workers' compensation 81
Dress and grooming codes 86		

NOTES

1. After *Loudermill*, the Supreme Court ruled that a law enforcement officer who was suspended, rather than discharged, was not entitled to a pre-termination hearing because the post-termination hearing was prompt and the loss of income relatively insignificant. To avoid having to determine whether a particular punishment is severe enough to trigger a

Loudermill pre-deprivation hearing, many organizations provide such hearings for all adverse actions. Although the Supreme Court predicted that agencies would catch and correct mistakes at pre-termination hearings, in practice, employers routinely use them to offer employees the option to resign and avoid being discharged.

2. In 2011, the Supreme Court held that suits under the Petition Clause of the First Amendment, which bars the passing of any law prohibiting petitioning for a governmental redress of grievances, are subject to the same “public concern” test as suits under the Speech Clause. A borough’s allegedly retaliatory actions against a police chief who filed and won a grievance did not give rise to liability under the Petition Clause, because the grievance did relate to a matter of public concern. Courts are divided over whether the “public concern” test applies to the First Amendment right to freedom of association (the right to association is not explicit, but it has been recognized as protected by the First Amendment). In one case, a youth worker claimed he was fired for retaining an attorney to assist him in a disciplinary matter. The Tenth Circuit Court of Appeals held that the underlying dispute was not an issue of public concern, so the association was not protected by the First Amendment.
3. Disagreements may arise over whether a condition was preexisting, a treatment is medically necessary, or a treatment is experimental, but most often parties disagree about whether an injury-related disability is permanent and how much money will adequately compensate for it.
4. Government Accounting Standards Board (GASB) Statements 43 and 45, effective in 2006 and 2007, require public employers to report net present liability for future retiree benefits on an accrual basis. A similar accounting change for private employers was blamed for a decline in retiree health coverage in the private sector. Whether public employers will reduce benefits for retirees remains to be seen.
5. Even before *Windsor*, some executive-branch agencies extended health and other federal benefits to same-sex partners. For example, Secretary of State Hillary Clinton directed her agency to extend a variety of relocation, medical, and other benefits to the partners of employees in same-sex, committed relationships (Ginsberg, 2010).
6. Strip searches are in a different category. Employees with public safety duties have a diminished expectation of privacy, but strip searches are so intrusive they must meet a higher standard to be reasonable. The Eighth Circuit Court of Appeals adopted a “reasonable suspicion” standard for strip searches of correctional officers, which means there must be specific objective facts and rational inferences supporting the belief that an employee has contraband hidden on his or her person.
7. The District of Columbia has one of the nation’s broadest dress code and grooming statutes. The law prohibits discrimination based on “the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards” (District of Columbia Human Rights Act, 2008). An employer violated this statute by discharging a receptionist who often had disheveled hair and wore low-cut, tight blouses.
8. The federal laws prohibiting discrimination include the Equal Pay Act, the Rehabilitation Act, the Family Medical Leave Act, Title IX, the 19th-century Civil Rights Acts (§§ 1981, 1983, and 1985), the Genetic Information Nondiscrimination Act, the Uniformed Services Employment and Reemployment Act, and the Black Lung Act.

- Two cases demonstrate how this is possible. In 2003, seven Caucasian police officers sued the city of Boston, alleging that their rights were violated when the police department promoted to the rank of sergeant three African American officers with identical test scores instead of them. The First Circuit found that the department's history of discrimination was well documented by past litigation and records, and the city's

evidence of disparity in the promotion of officers to sergeant was strong. In another case in 2007, the Seventh Circuit approved the disadvantaged business enterprises program of Illinois's state transportation agency, which included goal setting. The state relied on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market.

EXERCISES

Class Discussion

- Some departments in universities believe that their faculty should mirror the demographic composition of the student body and that faculty recruitment should use diversity policies to pursue this objective. Assess the merits of this proposition. What laws does it implicate? Can a lawful policy be drafted?
- Increasingly, people conduct work at home and take care of personal tasks at work. Which privacy rights and responsibilities, if any, does this trend raise, and how might managers deal with them?
- Many education reformers claim that teacher tenure (in particular, the right to be dismissed only for cause) is an impediment to improvement of primary and secondary schools. Use the test of balancing employees', employers', and society's interests to develop a range of possible policies addressing job security for secondary-school teachers. Which policy strikes the proper balance?
- Assume that a person with a mobility disability applies for a job in your office. Which interview questions can you ask about this disability without violating ADA provisions? Which questions should you not ask? How does this problem exemplify the paradox of needs discussed in the book's Introduction?

- Consider the steps of the hiring process. How can a manager prove that he or she did not discriminate in hiring based on a forbidden criterion but had a legitimate business reason for the choice? What witnesses and documents are available to prove this defense?

Team Activities

- Design a workgroup seminar to inform employees about their rights and limits when using social networks, email, texting, and the internet while at work. What paradoxes exist, and how can they be dealt with?
- Assume that a coworker informs you, in confidence, that she feels attracted to another coworker in your office. What legal or policy advice would you give her? If she supervises the person she is attracted to, does that change your advice?
- Assume that an employee requests a leave of absence to attend an event at church. He is important to the success of an effort that you are undertaking as a manager, and the employee's leave is likely to cause some delay and cost. What do you do?
- A classified civil servant who works as a computer technician for the city was arrested in a sting operation. While off duty, he solicited sex from an undercover male officer in a

public restroom. His arrest was reported in the newspaper, where he was identified as “a city employee.” No criminal charges were filed. Should the employee be fired for *immorality*?

10. Assume that your coworker, an abuse investigator at the state agency responsible for child protection, notifies you that she is going to write a letter to the governor and the local newspaper telling them that the heavy caseloads of investigators are endangering children. How would you advise her?

Individual Assignments

11. Explain the free-speech rights of employees. Are there any limits on these rights?
12. For what unlawful actions can public employees be held individually responsible?
13. Define and explain the 80-percent rule.
14. What substantial interests do public employees have in their jobs?

15. What accommodations must employers make for persons with disabilities?
16. Based on your experience, give an example of either the paradox of democracy or the paradox of needs, using one of the issues raised in this chapter. (Both paradoxes are discussed in the book’s Introduction.)
17. How may an employer use an applicant’s criminal record in a hiring decision? For example, a school district received an application from a man for the position of HVAC engineer. He appears well qualified, but a criminal background check revealed that 20 years ago he was convicted of possessing half a gram of cocaine, a felony for which he received probation. What laws apply?
18. Roman playwright and carpenter Plautus (254–184 BCE) advised, “Practice what you preach.” Do you agree with this advice? Explain your answer using issues from this chapter.

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