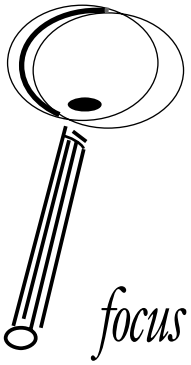
1

Equal Employment Opportunity Laws and Executive Orders



Learning Objectives

By the end of this chapter you should be able to:

- Identify the different groups protected under current EEO laws and Executive Orders.
- Describe reverse discrimination.
- Explain the key provisions of Title VII of the Civil Rights Act of 1964.
- Define "employee" and "protected group."

You Be the Judge

Test of Discrimination

If you were the courtroom judge and the applicant in the following case petitioned your court, would you hear this case? Decide how you would rule before reading the actual court response.

MEANS OR RESULTS?

African-American firefighters in a Midwestern city sued their department for racial discrimination in promotions. Only two of twelve captains eligible for promotion, out of seventy-eight applicants, passed the Battalion Chief's test; therefore, they argued, the test was biased against them and violated federal and state civil rights statutes. The fire department argued that all the questions were related to job performance, and it was therefore fair and appropriate; it was not the fault of the test that only two of the candidates passed it.

You Be the Judge continues on next page.

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You Be the Judge **continued from previous page.**

RESULTS MAY NOT MATTER

The question the 8th U.S. Circuit Court of Appeals considered was not whether only two candidates were African American, but whether or not the test met the criteria for fairness. In its opinion denying the firefighters their judgment, the court ruled that the test itself "was related to safe and efficient job performance and consistent with business necessity." Additionally, the court said, the complainants were unable to demonstrate "any evidence of a less discriminatory procedure."[1]

In many cases, the results are not as important as the means by which employers make decisions. In this case, "job performance" and "business necessity" are the criteria by which all management decisions should meet when it comes to hiring, managing, and firing.

HOW LARGE MUST A COMPANY BE?

Serious questions arise with regard to numbers of employees and who is considered an employee. For example, are part-timers to be counted? How about contract personnel; are they employees? The U.S. Supreme Court and the Equal Employment Opportunities Committee (EEOC) have set some guidelines.

As of January 14, 1997, the Supreme Court defined part-time workers as employees under Title VII of the Civil Rights Acts of 1964 and 1991. The Court unanimously ruled that under Title VII a company's list of workers includes anyone with whom it has an "employment relationship," which includes part-timers and employees on leave of absence. Size therefore is not a matter of numbers but rather a matter of legal definition. Additionally, the Court has ruled that if you violate those acts in your hiring practices you may be liable to pay in excess of $300,000, the cap authorized by Congress for the recovery of compensatory and punitive damages. Since front pay ("future pecuniary losses") is not within the meaning of compensatory damages, front pay is excluded from the statutory cap of $300,000.[2]

Likewise, who is an employee is a matter of legal definition. Generally speaking, an employee is a person who works for an employer who reserves the right to specify both what is to be done, how, where, and when. An independent contractor is one with whom the employer makes special arrangements to have a specific job done, usually by a specific deadline; the contractor then determines the how and where the job is done. Although there is no scientific test, three sets of criteria distinguish between independent contractors and employees: the IRS Checklist, Common Law, and the Economic Test based on federal wage and hour laws. (See the table in Exhibit 1–1.) If all or most of the conditions listed are present, the person is classified as an employee, which under the tests of Common Law, includes some temporary employees and most telecommuter workers.[3] If most if not all the conditions are not present, the person is not classified as an employee but rather as an independent contractor.

DEFINITION: "PROTECTED GROUP" OR "PROTECTED CLASS"

The legal definition of "protected group" or "protected class" is any classification of people protected by federal or state laws. However, that definition does little to explain the concept. A clearer definition emerges from the details embodied in a variety of EEO laws. A protected group is any group of people that historically has experienced unfair hiring, management, or firing practices and that can demonstrate that its chances for equal opportunity in employment can be achieved only through legislation and legal guidelines.

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Exhibit 1–1

Definition of an Employee

Condition			
A person is an employee if	**IRS Checklist**	**Common Law**	**Economic Test**
He or she complies with employer's rules as to where, when, and how the job is done.	✔		✔
Employer provides training for work to be done in a specific way.	✔		✔
Job is integrated into the employer's business and business success depends significantly on job performance.	✔		✔
The person must render the services personally.	✔		
Employer hires, supervises, and pays the person directly.	✔		
Employer and person have a continuing relationship even if in irregular intervals.	✔	✔	✔
Employer sets hours of work and person is required to do the job during those hours.	✔		✔
The person is expected to devote full time to the employer and is usually restricted to providing services only to that employer.	✔		✔
The work is performed on the employer's premises.	✔		
The employer sets schedules and routines to follow.	✔		
The person must submit written or oral reports or other documents (e.g., time sheets) on a regular basis.	✔		
The person is paid by the hour, the week, or the month.	✔		✔
The employer uses the person for tax purposes.		✔	
The employer pays the person benefits, e.g., health insurance.		✔	
The person's business/travel expenses are usually paid by employer.	✔		✔
Tools and materials for doing the job are supplied by employer.	✔		✔
The person does not have to invest in the employer's business.	✔		
Profit or loss is not solely the direct result of the person's performance.	✔		✔
Performs services solely for the employer or the employer's agent.	✔		
The person's services are available to only one employer at a time and not to the general public.	✔		
The employer has the right to terminate the person's services and controls performance under the threat of termination.	✔		
The person has the right to terminate the relationship with the employer at any time without incurring liability.	✔		

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EEO Laws and Protected Groups

Knowing which laws apply to safe hiring, managing, and firing practices gives you the ability to research gray legal areas in whatever you do. EEO laws make it illegal to discriminate against *anyone* regardless of race, color, gender, age, national origin, religion, creed, disabilities, and military status (including veteran status and current obligations in the National Guard or Reserve). Some state laws legislate an even more expansive list of classes. Given the complexities of most of these laws, you still should contact an attorney if you have any specific questions or concerns about how to apply a federal or a state statute to your situation.

At the same time, these laws also refer to specific groups of people identified as previously injured by social, legal, and business practices that prevented them from entering the mainstreams of society. Knowing the legal definitions of "protected group" could help keep you out of trouble without consulting a lawyer. (Summaries of all the Acts listed below are in the Appendix.)

1. Title VII of the Civil Rights Act of 1964 applies to companies employing 15 or more employees (full- or part-time). This law sets the basic parameters of what the phrase *protected group* means and prohibits discrimination against:
   a. People of race or color other than white. "Other than white" is defined by the Civil Rights Act of 1866 as "all ethnic minorities."
   b. People of any bona fide religious persuasion.
   c. Members of either sex.
   d. People whose national origin is other than the United States.

   The Civil Rights Act of 1991 expands on the rights of protected groups to sue for discrimination.
2. Executive Order No. 11,246 Covering Government Contractors and Subcontractors (as amended by Executive Orders 11,375 and 12,086) and Sex Discrimination Guidelines, 41 C.F.R., Pt. 60-20, prohibits discrimination on the basis of race, religion, color, creed, sex, or national origin by any company doing business with the federal government. President Bill Clinton expanded the order to apply to hiring *legal* aliens as well.
3. The Age Discrimination in Employment Act of 1967 (ADEA) makes it illegal to discriminate against anyone over the age of 40 or to force someone into retirement because he or she has reached a certain age.
4. The Rehabilitation Act of 1973, as reinforced by the Americans with Disabilities Act of 1990 (ADA), expands the definition of "protected groups" to include:

   > Individuals with a disability (a physical or mental impairment) that substantially limits one or more major life activities, who have a record of such impairment, or who are perceived as having such an impairment, who with or without reasonable accommodation can perform the essential functions of the job that he or she holds or wants. Those not covered include applicants and current employees currently using controlled substances; homosexuals, bisexuals, trans-

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vestites, and persons whose sexual behaviors do not stem from physical impairments; compulsive gamblers, kleptomaniacs, pyromaniacs, and people who experience compulsive psychoactive substance use disorders (e.g., "flashbacks").

The disability acts and their administrative guidelines also provide general guidelines for "reasonable accommodation."

5. Vietnam Era Veterans Readjustment Assistance Act of 1974, Title IV (Veterans, Wives, and Widow Employment Assistance and Preference and Veterans' Reemployment Rights) makes it illegal to discriminate against anyone who has served in the armed forces between 1964 and 1991, or who is currently serving in an active reserve unit. It also defines a "protected group" as:

a. Any veteran of the Vietnam Era, which means anyone who served in the armed forces for 180 days or more between 1964 and 1991.

b. Any member of the Active Reserves or National Guard.

c. Any person discharged or released from active duty because of a service-connected disability or who is entitled to compensation under the laws administered by the Veterans Administration. This law protects the jobs of people called up for military service and prevents you from not hiring or from firing someone who has to meet specific military obligations. The term *military* is used here to include members of both the active armed forces and veterans.

6. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. §§ 4301-4333), like its predecessors, guarantees the rights of military service members to take a leave of absence from their civilian jobs for active military service and to return to their jobs with accrued seniority and other employment protections (to include vacation allowances, pension credit, 401(k) contributions, and protections from discharge upon return to work except for cause for a period of time depending on the length of military service).

With regard to National Guard members, USERRA only applies to National Guard members performing federal service, but many state laws afford similar protection to individuals performing state service. To determine compliance obligations under these circumstances, employers should obtain a copy of the employee's orders and consult with an attorney.

Under USERRA employees are only entitled to protection during cumulative periods of military leave of up to five years, but there are many exceptions to this general limitation, which your attorney would be able to identify.

In general, employers must provide to covered employees returning from active duty:

a. Reinstatement to the position that the employee would have held if his or her continuous employment had not been interrupted (the "escalator principle").

b. Other rights and benefits that are generally provided to individuals of similar status who are on a leave of absence.

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c. Continuation of medical benefits under the same terms and conditions as when actively employed if military service is 31 days or less.
d. Optional continuation of medical benefits under terms similar to those of COBRA
e. All seniority, rights, and benefits upon return to work as if the employee had remained continuously employed.

Be advised that lawsuits alleging various forms of discrimination in the workplace more than tripled in the decade of the 1990s, according to the Justice Department's Bureau of Justice Statistics: from 9,936 in 1990 to 21,540.[4] Whether or not an employer is innocent of the claims, court battles are very costly. Therefore, many employers find it more practical to settle out of court to avoid long legal battles and potentially high jury awards.[5]

AFFIRMATIVE ACTION

A California referendum in November 1996 on Proposition 209 put an end to all affirmative action programs in that state. It was promptly challenged in the federal court of the Ninth Circuit, which upheld Proposition 209. The U.S. Supreme Court, in November 1997, refused to review that decision. In the meantime, in 1997, the voters in Houston, Texas, overwhelmingly refused to repeal that city's affirmative action legislation. Confusing? Let's try to clarify the situation.

What Is Affirmative Action?

Legally and linguistically, affirmative action is nothing more than a proactive attempt to improve the employment or educational opportunities for members of minority groups and for women. An affirmative action plan outlines steps a company will take to recruit, hire, and promote such protected group members; it also makes provisions for documenting the numbers and percentages of the company's workforce of minority group members and women. Organizations are legally required to produce a written affirmative action plan *only* if they are government nonconstruction contractors or subcontractors of $50,000 or more, or if they are under a court order because someone has demonstrated that the company or other legal entity has a pervasive history of discrimination. The written plan has to contain the following:

1. A detailed analysis of the employer's current workforce: by race and sex
2. An analysis of representation and utilization of minorities or women
3. Setting of rules for job categories in which minorities or females are underrepresented
4. Action programs for achieving stated goals and for remedying identified problem areas
5. Timetables for achieving goals

The Office of Federal Contract Compliance Programs (OFCCP) has responsibility for enforcing Executive Order No. 11,246 (amended by Exec-

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utive Orders 11,375 and 12,086) by specifically prohibiting job discrimination by government contractors based on race, color, religion, sex, national origin, disability, or veteran's or military status. Your own responsibility with regard to affirmative action, unless otherwise constrained (as just described), is to see to it that you hire and promote from a *broad pool of talent* that makes no distinction on the basis of a characteristic covered by protection clauses.

A waiver for affirmative action can be granted under Executive Order No 11,246, according to the 4th U.S. Circuit Court,[6] if the company files a request for exemption for some part, division, or facility of the company that "operates in all respects separate and distinct from the activities related to [the company's] performance of its government contracts." Failure to file for the exemption requires the company to comply with all affirmative action requirements.

Affirmative Action, Not Preferential Treatment

A confusion between affirmative action and "preferential treatment" has roiled the issue, and many companies have voluntarily included hiring preferences in their workforce planning in the mistaken belief that affirmative action requires them to do so. This is not true, except in the case of a company with an established history of racial, gender, age, or any other form of discrimination, where a court might mandate that the company's affirmative action plan include hiring preferences that would bring the company into compliance with the law.

Too often, however, this is seen by many as creating a quota system in which minorities or women must be hired or promoted in accordance with a statistical formula that matches employee numbers with numbers in the community. They think that, for example, if the community has a 12 percent African-American population, then the company must attempt to hire 12 percent of its employees from that population unless it can be shown that, given the nature of the company's work, it's impossible to achieve that goal. Such numbers usually represent a moderately long-term goal, however, not an immediate requirement, and it certainly does not represent a cap; nothing prevents a company from hiring a larger percentage of African-Americans. The misapplication of affirmative action has, for example, led many white males to assume that there is such a legal thing as "reverse" discrimination (discussed below).

Affirmative Action and Qualified Employees

Another issue that is often debated is that affirmative action requires a company to hire an unqualified or underqualified applicant simply to fulfill affirmative action requirements. In fact, the courts have often ruled that so-called race norming, which some organizations have used for lowering standards to admit or promote more African-Americans, is illegal, banned by the Civil Rights Act of 1991. There are no laws that require a company to hire people incapable of performing, or of learning how to perform, the functions of the available jobs.

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How any or all of these issues will finally be resolved by the courts remains to be seen. In the meantime, to repeat the theme of this course, the safest management practice is simply the good management practice of hiring the best from the broadest possible available pool of talent.

Exercise 1–1 poses a series of questions whose answers will determine whether your company uses affirmative action properly or if it includes an unnecessary, and illegal, preferential treatment policy.

Exercise 1–1

What Affirmative Action Efforts Does My Company Make?

Answer as many questions as you can. You may have to consult with your HR professionals to answer some of them. In statements that include a series of alternatives in parentheses, circle the correct answer. If you are a member of a minority group, a woman, a person with a known disability or a person over 40 years of age, include yourself where appropriate to an answer.

1. When I look about me, I see (many) (several) (one) (no) members of minority groups. I see (many) (several) (one) (no) women. If the answer is one or no, you may want to ask why.
2. As far as I know, the company has (never) (at one time or another) hired members of minority groups, and has (never) (at one time or another) hired women. If the answer is never, you may want to ask why.
3. The company values diversity and has made a sincere effort to recruit, hire, and promote members of minority groups and women. ____ Yes ____ No. If the answer is no, you may want to ask why not.
4. The company has written policies that require hiring or promoting people on the basis of merit, regardless of race, color, gender, age, religion, creed, national origin, disability, or military status. ____ Yes ____ No. If the answer is no, you may want to ask why not.
5. The company (is) (is not) under a court order to hire more members of minority groups or women. If the company is under such a court order, you may want to find out why and what the company is doing to comply with the order.
6. Estimate the percentage of employees from the following list of protected group members:

   - African Americans (or African resident aliens): _____
   - Hispanic Americans (or Hispanic resident aliens) : _____
   - Asian Americans (or Asian resident aliens) : _____
   - Native Americans: _____
   - Women: _____
   - People with disabilities: _____
   - Employees over 40 years of age: _____

Exercise1–1 continues on next page.

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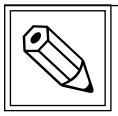
Exercise 1–1 **continued from previous page.**

7. The company encourages recruiting and hiring members of religious minorities (e.g., Muslims, Jews, Buddhists) by recognizing the differences in religions among employees, e.g., by allowing members of religious minorities to observe their holy days without penalties and by not decorating with heavily religious themes at Christmas. ____ Yes ____ No. If the answer is no, you may want to discuss what the company can do about the situation to encourage recruiting and hiring members of religious minorities.
8. The company provides training for supervisors on the importance of diversity and methods for hiring without regard to race, color, gender, age, religion, creed, national origin, disability, or military status. ____ Yes ____ No. If no, you may want to find out why not.
9. I personally have attended training sessions on the importance of diversity and methods for hiring without regard to race, color, gender, age, religion, creed, national origin, disability, or military status (not to include this self-study course). ____ Yes ____ No. If no, you may want to find out what you can do to rectify that situation.

Exercise 1–2 asks you to consider how affirmative action benefits your company.



Exercise 1–2

How Diversity Is of Value to Our Company

Write a brief essay describing how affirmative action does or can benefit your company.

"REVERSE" DISCRIMINATION

By these definitions, and under the laws that define them, there is no legal theory for charging "reverse" discrimination, which many white males and others have claimed. However, for example, where race or sex has been the *sole* or *primary* basis for hiring a nonwhite female over 40, the courts have been willing to concede that discrimination has occurred because the laws protect

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either sex and prescribe that hiring decisions be made "regardless of race, gender, or age."

The Supreme Court might have had a chance to settle this issue during its 1997–1998 term by deciding whether an employer can lay off a white employee and retain an equally qualified African-American employee (in the case, both female) to promote a "policy of diversity." A history of racial discrimination was not an issue here. The parties, however, settled the case out of court before the justices could hear arguments for and against.[7]

Still, white males per se are not defined as members of a protected group under the law. If the company is under a court order to increase its minority or female population, or if the company has a proven history of deliberate discrimination injuring nonwhites or women, white males may not succeed in seeking legal remedies.

Think About It

As unfair as the laws may seem to some white males, the courts have ruled that nonwhites and women have suffered far more unfair treatment for a much longer period of time. White males have historically hired and promoted white males to the exclusion and detriment of other people merely on the basis of race or gender. That amounts to de facto preferential treatment. The courts have therefore ordered that where historical exclusion has occurred, protected groups must receive special consideration. In your opinion, what constitutes genuine fairness?

Several major pieces of legislation deal with the definition of "protected group," which comes down to the simple statement that you shouldn't discriminate against anyone on the basis of race, color, gender, religion, creed, national origin, age, disability, or military status. You should be especially careful not to discriminate against anyone whose group of origin has historically experienced unfair hiring, management, or firing practices, and that now can demonstrate that its chances for equal opportunity in employment can be achieved only through legislation and legal guidelines.

Notes

1. 8th U.S. Circuit Court of Appeals, No. 993676P (8/11/2000).
2. No. 00-763. June 4, 2001.
3. No. 98-71388, (5/12/99); see also, Thompson, Brenda B., in "HR Executive Special Reports: Telecommuting, Pluses and Pitfalls" (Brentwood, TN: M. Lee Smith, Publishers LLC, 1999).
4. Associated Press, "Lawsuits over bias soared in 1990s, Justice Dept. says," reported in the *St. Louis Post Dispatch*, January 17, 2000, p. A9; see also, "Survey reveals more than half of employers have been sued," in *HRNews*,

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the newsletter of the Society for Human Resource Management, August, 1999.

5. For example, these two high profile cases. The Boeing Company, in 199, paid $6.5 million to 3,600 employees, $4.05 in attorney fees, and $3.6 million on workplace diversity programs. The Federal Deposit Insurance Corporation paid 3,000 current and former black employers $14 million in 2000.
6. See, "Affirmative action plans: Are you required to have one?" in *Missouri Law Letter* (Brentwood, TN: M. Lee Smith, Publishers LLC, February, 1999), pp. 18–20.
7. In the case of *Piscataway* v. *Taxman,* the white teacher (Taxman) claimed her school district illegally discriminated against her in order to promote its diversity policies. This case took several years and three appeals to get to the Supreme Court, and the Justice Department wavered back and forth between supporting her and not supporting her. See Associated Press "High Court to Hear Reverse-Bias Case," in the *St. Louis Post-Dispatch* (June 5, 1997), p. 1A; see also "Supreme Court to hear Affirmative Action Case," *Wall Street Journal* (June 30, 1997), p. B8; "Administration May Join Affirmative Action Case," *St. Louis Post-Dispatch* (October 4, 1997), A4; "Civil Rights Groups help Fund Settlement for Reverse Discrimination Case," *St. Louis Post-Dispatch* (November 22, 1997), p. 3A; Eva M. Rodriguez, "Rights Group's Settlement Settles Little," *Wall Street Journal* (November 24, 1997), p. A3. In 2003, the Supreme Court ruled that race can be a factor in selecting students for admission, but that an unbalanced rating system or quota would not be acceptable.

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Review Questions

1. A "protected" person belongs to a group: 1. (a)
(a) that is defined as "protected" by one or more pieces of federal legislation or state statute.
(b) that believes it has suffered from discrimination in the past and is now seeking preferential treatment.
(c) of racial minorities, e.g., African Americans, Asian Americans, Native Americans.
(d) of individuals with disabilities.

2. The Civil Rights Act of 1991: 2. (c)
(a) replaces the Civil Rights Act of 1964.
(b) makes it more difficult for employers to enter a lawsuit with regard to discriminatory practices.
(c) expands on the rights of protected groups that can sue for discrimination.
(d) expands the rights of illegal aliens.

3. Title VII of the Civil Rights Act of 1964 applies only to companies: 3. (c)
(a) employing all full-time employees.
(b) employing racial minorities.
(c) with 15 or more employees.
(d) doing business with the federal government.

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4. "Front pay" refers to: 4. (d)
(a) money actually paid to new employees.
(b) money paid to consultants who represent companies in Washington.
(c) potential jury awards if found guilty of discrimination.
(d) awards for potential earnings or future earnings.

5. Affirmative action refers to an attempt to: 5. (b)
(a) legislate a quota system for hiring and promoting minority group members and women.
(b) improve the employment or educational opportunities of minority group members and women.
(c) lower the entry requirements for all minority group members and women.
(d) increase employment opportunities of minority group members through "race norming."

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