



Functional Area #15: U.S. Employment Law and Regulations

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Sources of Law





- Policies, procedures, training
- Workplace posters
- New-employee orientation
- Workers' compensation insurance
- Proper tax withholding
- Paychecks delivered in accordance with law
- Compliance training
- Organizational code of conduct
- Compliance hotline
- Provisions for reporting or participation in investigation of discriminatory employment practices



Securing appropriate legal counsel and employment practices liability insurance (EPLI) is prudent.

Legal Services

HR needs to:

- Understand relevant employment law and the potential implications of noncompliance.
- Recognize when involvement of legal counsel may be necessary.

EPLI

- Protects against the risk of heavy financial losses resulting from employment claims and lawsuits.
- Must be carefully considered and reviewed to ensure that it provides the level of protection needed.



- Checklists help to prepare for an HR compliance audit (internal or external).
- An organization may develop its own checklist or use or adapt ones from administrative agencies.



Administrative agencies may be more or less rigorous during a compliance audit than what appears on a HR checklist.

Typical Steps in Employment Employment Lawsuits



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Notification

Answering complaint

Scheduling conferences

Discovery process

Motion to dismiss

Summary judgment

Pretrial and trial

Equal Opportunity



Laws require employment decisions to be job- and business-related and not made on the basis of:

- Race.
- Sex (including pregnancy).
- Ethnicity.
- National origin.
- Citizenship.
- Religion.
- Age.
- Color.
- Military/veteran status.
- Genetic information.
- FMLA entitlement.
- Disability status.
- Other factors.

“Protected classes” describes people who are covered under a federal, state, or local antidiscrimination law.

Types of Discrimination



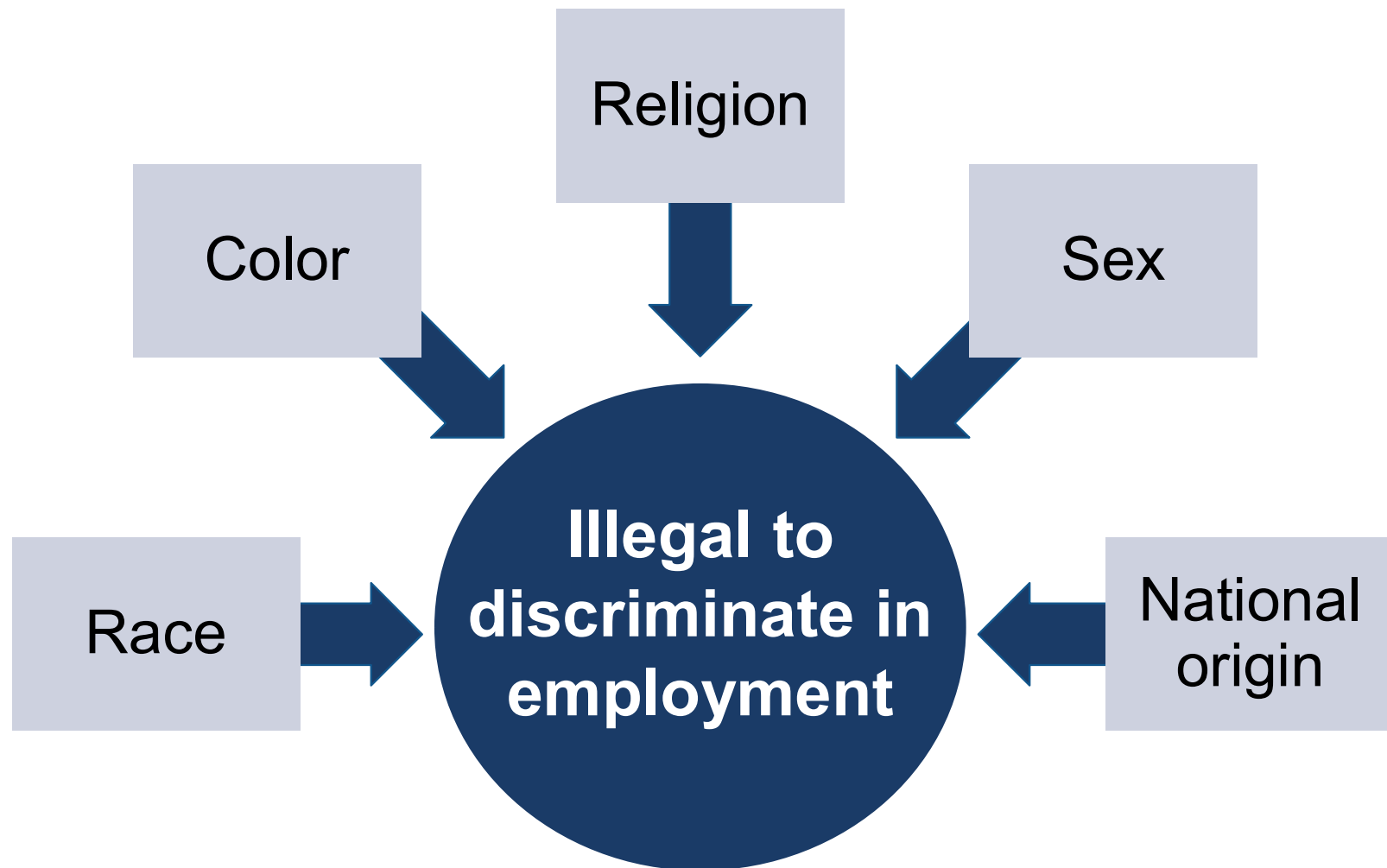
Disparate treatment

Direct discrimination that treats protected classes differently from other applicants or employees

Disparate (adverse) impact

Indirect discrimination that results when a policy that appears to be neutral has a discriminatory effect

Title VII of the Civil Rights Act of 1964





Specific provisions apply to:

- Recruiting, hiring, and advancement.
- Segregation and classification of employees.
- Harassment/hostile work environment.
- Compensation.
- Other terms, conditions, and privileges of employment.

Title VII Exceptions



Some exceptions include:

Work-related
requirements

Bona fide seniority
systems

Bona fide occupational
qualifications (BFOQs)

Affirmative action
plans

Key Title VII Amendments



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Equal Employment Opportunity Act

Gives the EEOC authority to “back up” its administrative findings and conduct its own enforcement litigation

Pregnancy Discrimination Act (PDA)

Prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions; requires employers to treat pregnancy the same as any other temporary disability

Uniform Guidelines on Employee Selection Procedures



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Assists employers in complying with Title VII, Executive Order 11246, and other EEO requirements.

Covers all aspects of the selection process.

Prohibits selection procedures that have adverse impact on protected classes.

Adverse impact occurs when the rate for a protected class is less than 80% of the rate for the group with the highest selection rate (also known as the 80% or four-fifths rule).

Key Discrimination Cases



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Griggs v. Duke Power (1971)

- Sets the standard for determining whether discrimination based on disparate impact exists.
- Practices, procedures, or tests that appear neutral on their face, and even neutral in their intent, and that result in a discriminatory effect on a protected class are illegal.

Phillips v. Martin Marietta Corporation (1971)

- Applied the sex discrimination provisions of Title VII of the Civil Rights Act of 1964 to employment decisions.
- Prohibits an employer (in the absence of business necessity) from refusing to hire women with preschool-aged children while hiring men with such children.

Civil Rights Act of 1991



- Allows jury trials when a plaintiff seeks compensatory or punitive damages.
- Compensatory damages are awarded to make an injured person “whole.”
- Punitive damages (exemplary damages) are awarded when the defendant’s willful acts were malicious, violent, oppressive, fraudulent, wanton, or grossly reckless.
- Under federal law, punitive damages are not possible against a governmental unit or agency (but may be available under state law).

Age Discrimination in Employment Act (ADEA)



ADEA prohibits:

- Employment discrimination against persons age 40 and over
- Mandatory retirement based on age (with few limited exceptions)

ADEA covers:

- Employers with 20 or more employees
- Unions with 25 or more members
- Employment agencies and apprenticeship and training programs



- Age can be a BFOQ if necessary for the normal operation of the business.
- Other exceptions can occur when:
 - The organization has a genuine seniority or benefit plan.
 - The employer disciplines or fires for good cause.
 - The employee is a top executive or policy maker.

The Older Workers Benefit Protection Act (OWBPA) amended the ADEA to prohibit discrimination in employee benefits and waivers of claims.

Americans with Disabilities Act (ADA)



Prohibits discrimination against qualified individuals with disabilities.

Applies to employers with 15 or more employees, employment agencies, labor organizations, and joint labor-management committees.



Qualified

- Has the requisite skills, experience, education, licenses, etc.
- Can perform the essential functions of the job, either with or without reasonable accommodation

Disability

- Has an impairment that substantially limits one or more major life activities
- Has a record of such an impairment
- Is regarded as having such an impairment

Essential functions

- Primary job duties that a qualified individual must be able to perform, with or without accommodation

ADA Amendments Act (ADAAA) of 2008



Retains the basic definition of disability contained in the ADA but expands interpretation.

Makes it easier to meet the definition of disability.

Includes nine rules of construction.

Identifies several impairments that virtually always meet the definition of disability.

Expands the ADA list of major life activities.

Reasonable Accommodation



Modifying or adjusting a job application process, a work environment, or the circumstances under which a job is usually performed to enable a qualified individual with a disability to be considered for the job and perform its essential functions

- Involves an interactive process between the employer and the employee.
- Does not require employers to provide reasonable accommodation but to give consideration for the reasonableness of the accommodation.

Workplace Harassment

According to the EEOC, harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964 and ADEA, ADA, EPA, and GINA.

Harassment becomes unlawful:

- When enduring offensive conduct becomes a condition of continued employment.
- When the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
- When an individual is harassed in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit.

Types of Sexual Harassment



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Quid pro quo

Employee must give in to sexual demands or forfeit an economic benefit (job or raise).

Hostile environment

Sexual or other discriminatory conduct creates a threatening or abusive work environment.

Key Sexual Harassment Cases



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Faragher v. City of Boca Raton

Burlington Industries, Inc. v. Ellerth

- Two separate U.S. Supreme Court rulings distinguishing between supervisor harassment that results in tangible employment action (e.g., discharge, failure to promote, demotion) and supervisor harassment that does not.
- When harassment results in a tangible adverse employment action, the employer is always liable.

Example: Vicarious liability



- ✓ Include sexual orientation in nondiscrimination policies.
- ✓ Provide training.
- ✓ Prohibit and prevent harassment of lesbian, gay, bisexual, transgender employees.
- ✓ Recognize organizations representing interests of lesbian, gay, bisexual, transgender employees.
- ✓ Refer to “sexual orientation” rather than “sexual preference.”

Harassment Policy/Prevention

- ✓ Have a written policy with a clear definition of harassment and a statement that it will not be tolerated.
- ✓ Establish a complaint procedure.
- ✓ Provide training and education.
- ✓ Investigate every complaint.
- ✓ Discipline if necessary.
- ✓ Communicate via variety of methods to management and employees.

Fair Labor Standards Act (FLSA)



Establishes minimum wage, overtime pay, youth employment, and record-keeping standards affecting full- and part-time workers in the private sector and in federal, state, and local governments

Applies to:

- Employers with at least \$500,000 in annual dollar volume of business (with limited exceptions).
- Organizations with employees who engage in interstate commerce or the production of goods for interstate commerce.



Behavioral
control

Financial
control

Relationship
of the parties

Under FLSA, an employer has no ongoing obligations to self-employed independent contractors.

Exempt and Nonexempt Employees



Type of Employee	Description
Exempt	<ul style="list-style-type: none"> • Excluded from minimum wage and overtime pay requirements of the law. • Must work in a bona fide manner and meet requirements for: <ul style="list-style-type: none"> — Primary (exempt) duties. — Salary compensation (as a uniform amount). — Minimum salary.
Nonexempt	<p>Not excluded from minimum wage requirements and entitled to overtime. This includes blue-collar workers, no matter their compensation level, as well as veterans in blue-collar jobs.</p>

“White-Collar” Exemptions



- “White-collar” exemptions include EAP employees and computer and outside sales positions.
- Employees who meet requirements of exemption tests in addition to minimum salary and salary basis tests are exempt from overtime pay.

Improper Deductions and Safe Harbor



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Improper Deductions

- Employers can lose the exemption if they did not intend to pay on a salary basis.
- Regulations specify several factors to identify a practice of making improper deductions.
- Improper deductions that are either isolated or inadvertent are forgiven if the employer reimburses the employees.

Safe Harbor

- “Safe harbor” exists if:
- The employer has a clearly communicated policy prohibiting improper pay deductions.
 - Employees are reimbursed for any improper deductions.
 - The organization makes a good-faith effort to comply in the future.

FLSA Overtime Pay Provisions



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Sets rate of overtime pay (1.5 times regular rate of pay after 40 hours worked).

Sets workweek as any fixed, recurring period of 168 consecutive hours (7 days × 24 hours).

Requires overtime on time worked, not time compensated.

Requires overtime to be paid in form of wages, except for public-sector employees. (Presently, compensatory time is not allowed for private-sector nonexempt employees.)

Other FLSA Regulations



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Child labor provisions

Restricts the hours and conditions of employment for minors

Minimum wage

Requires employers to pay covered nonexempt employees at least the federal minimum wage for all hours worked up to 40 in a workweek

Other administrative concerns

Other issues such as enforcement, claims investigations, penalties, and what to do when state laws differ from federal regulations



- Amends FLSA and defines additional rules for hours worked.
- Provides guidelines on:
 - On-call/standby time.
 - Preparatory/concluding activities.
 - Waiting time.
 - Meals and breaks.
 - Travel time.
 - Training time.

Equal Pay Act (EPA)



Prohibits unequal pay for equal or “substantially equal” work performed by men and women (with limited exceptions).

Skills

Effort

Responsibility

Working
conditions

Employee Retirement Income Security Act (ERISA)



- Establishes minimum standards for retirement plans.
- Plans must conform to the Internal Revenue Code's requirements and ERISA to receive tax advantages.
- Sets up the Pension Benefit Guaranty Corporation (PBGC).
- Rules cover:
 - Fiduciary duties.
 - Eligibility requirements.
 - Vesting requirements.
 - Communication requirements.
 - Reporting requirements.

Defined contribution plans

- Requires plan administrators to provide at least 30-day notice of blackout period (of more than three consecutive business days).
- Places restrictions on directors or executive officers from trading of company stock.
- 30-day blackout notice must be in writing and clearly communicated.

Whistleblower provisions

Prohibits any adverse employment action against employees because of protected whistleblowing activities.

Lilly Ledbetter Fair Pay Act



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- Overturned the 2007 U.S. Supreme Court decision *Ledbetter v. Goodyear Tire and Rubber Company*.
- States that the statute of limitations on pay discrimination lawsuits resets as each allegedly discriminatory paycheck is issued.
- Proactive organizations will identify and remedy any potentially discriminatory pay practices.

Consolidated Omnibus Budget Reconciliation Act (COBRA)



Provides continuous group medical coverage after a qualifying event.

Type of event determines the length of coverage, generally 18 or 36 months.

Employer can charge actual cost plus a 2% administrative fee.

Applies to employers who provide health-care benefits to 20 or more employees.



Patient Protection and Affordable Care Act (PPACA)

Generally requires group health plans to provide coverage to dependent children up to age 26.

Health Insurance Portability and Accountability Act (HIPAA)

Amended continuation coverage rules related to:

- Disability extension.
- Pre-existing conditions.
- Definition of qualified beneficiary.

Family and Medical Leave Act (FMLA)



- Covers private employers that have employed 50 or more employees for 20 or more workweeks in current or preceding year.
- Employee must have worked at least 12 months (total within last seven years) for employer, have worked 1,250 hours in past year, and work at site within 75 miles of which 50 or more employees work.
- Provides up to 12 workweeks of unpaid, job-protected leave for incapacity due to pregnancy; prenatal medical care; childbirth; child care following birth or placement for adoption or foster care; serious health condition of a child, spouse, parent, or the employee; for obligations arising from military service.

FMLA Regulations



Department of Labor regulations pertaining to:

- Absence of a legal or biological parent-child relationship.
- “Spouse” definition.
- Intermittent leave.
- Medical certification.
- Fitness for duty.
- Health benefits continuation during FMLA leave and trigger for COBRA.
- Reinstatement rights.
- Modified-duty programs.
- Cost containment.
- “Serious health condition” definition.

FMLA Expansion



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According to National Defense Authorization Acts provisions:

Qualified exigency leave

FMLA leave due to spouse, son, daughter, or parent being on or called to covered active duty.

Up to 12
workweeks

Military caregiver leave

FMLA leave for an eligible employee who is spouse, son, daughter, or parent of or next of kin to covered service member with serious injury or illness.

Up to 26
workweeks
during 12-
month period



Protects the employment, reemployment, and retention rights of persons who voluntarily or involuntarily serve or have served in the uniformed services

- Applies to virtually all employers, both public and private, regardless of size.
- VOW to Hire Heroes Act amended USERRA to recognize claims of a hostile work environment.

Patient Protection and Affordable Care Act (PPACA)



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- Minimum essential health coverage
- Lifetime maximum benefit limits
- Preexisting conditions
- Small employer health-care tax credit
- Preventive care
- Dependent coverage
- Uniform explanation of coverage
- Notice of material modifications
- Annual benefit limits
- State health marketplaces
- “Cadillac plan” tax



U.S. Supreme Court rulings on two key PPACA provisions:

Medicaid expansion

The requirement that states choose between complying with the PPACA or losing federal funding for Medicaid was ruled unconstitutional.

Individual mandate

The individual mandate was ruled constitutional; Congress has the power to assess a tax against those who do not purchase insurance.

Occupational Safety and Health (OSH) Act



Established the first national policy for workplace safety and health; requires employees to comply with OSHA standards and requires employers to provide safe and healthful working conditions for employees

- Covers virtually all workers in the country, with a few exceptions.
- Provisions are enforced by the Occupational Safety and Health Administration (OSHA).
- Overarching employee rights under the act are covered by the **General Duty Clause**.

OSH Act Key Standards



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Emergency Exit
or Evacuation
Procedures

Occupational
Noise Exposure

Machine
Guarding

Hazard
Communication

Control of
Hazardous
Energy

Bloodborne
Pathogens

Confined Space
Entry

Personal
Protective
Equipment

Process Safety
Management

Drug-Free Workplace Act



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Federal contractors with contracts of \$100,000 or more and recipients of grants from federal government in any amount must:

- Develop a policy that maintains a drug-free workplace.
- Specify penalties for policy violations.
- Provide a copy of the policy to employees.
- Establish a drug-awareness program.



Key questions:

If an employee uses medical marijuana, can the employee be terminated following a positive workplace drug test result?

Must an employer accommodate an employee using medical marijuana?

Do employers in states with legal recreational marijuana have to allow for marijuana use apart from participation in a recognized medical marijuana program?

Consultation with legal counsel is advisable.

National Labor Relations Act and Amendments



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National Labor Relations Act

- Intended to protect and encourage growth of union movement.
- Workers have right to organize and bargain collectively with employers.
- National Labor Relations Board (NLRB).

Labor-Management Relations Act

- Significantly amended NLRA to restrict activity and power of unions.

Labor Management Reporting and Disclosure Act

- Amended NLRA to regulate internal union affairs and the relationship between union officials and union members.



The NLRB protects the self-organization rights of employees to:

- ✓ Form, join, or assist labor organizations.
- ✓ Bargain collectively through representatives of their own choosing.
- ✓ Engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection.
- ✓ Refrain from any or all such activities.

The NLRB investigates charges of unfair labor practices.

Key Cases



NLRB v. Weingarten (1975)

- Deals with the rights of union employees to have another person present during investigatory interviews (the so-called ***Weingarten* rights**).
- Person attending must be affiliated with the union, not an attorney or relative.

Lechmere, Inc. v. NLRB (1992)

- Deals with NLRA rights of employees to self-organize to form, join, or assist labor organizations; makes interfering with employees as they exercise their rights a ULP for employer.
- The NLRA confers rights only on employees, not on unions or their nonemployee organizers.

Fair Credit Reporting Act (FCRA)



- Applicant/employee must provide written authorization before a consumer report is ordered (with limited exceptions).
- Employer must provide:
 - Written notice that a report may be used and time for a response to the report.
 - Notice if adverse action procedures are taken.
 - Certification to credit bureaus of FCRA compliance.

FCRA Amendments



Fair and Accurate Credit Transactions Act (FACT Act)

- Eliminates consent and disclosure requirements for certain third-party investigations (e.g., suspected misconduct, a violation of laws or regulations).
- Includes directives aimed at uncovering and preventing incidents of identity theft or unauthorized use of the information.

Dodd-Frank Wall Street Reform and Consumer Protection Act

- Adds notification requirements if any adverse action is taken either partly or wholly because of information in a consumer report.

Examples:

- Notice of the adverse action
- Specific credit score information
- Name of the consumer reporting agency or person that furnished the credit score

Immigration Reform and Control Act (IRCA)



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Prohibits discrimination on the basis of national origin or citizenship.

Establishes penalties for hiring illegal aliens.

Places burden on employers to verify an employee's identity and right to work.

Generally, documents must be unexpired.

E-Verify electronically checks the information provided by the employee on his or her Form I-9.

Employee Polygraph Protection Act (EPPA)



- Regulates the use of polygraph tests (lie detectors).
- Allows the use of polygraph tests when:
 - The employer is the federal, state, or local government.
 - **Current employees** are under reasonable suspicion of involvement in workplace incident that results in economic loss.
 - **Prospective employees** will work in security-sensitive, drug manufacturing, or intelligence situations.
- Employer may not discharge an employee based solely on test results or refusal to test.

Worker Adjustment and Retraining Notification (WARN) Act



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Requires a minimum of 60 days' notice for:

- Plant closings.
- Mass layoffs.

Limited exceptions: faltering company, unforeseeable business circumstances, natural disaster

Requires that notice be given to:

- Affected workers or their representatives.
- State dislocated worker units.
- Local government.

Employers must check state and local laws for other criteria and “mini WARN” laws that may apply.

Genetic Information Nondiscrimination Act (GINA)



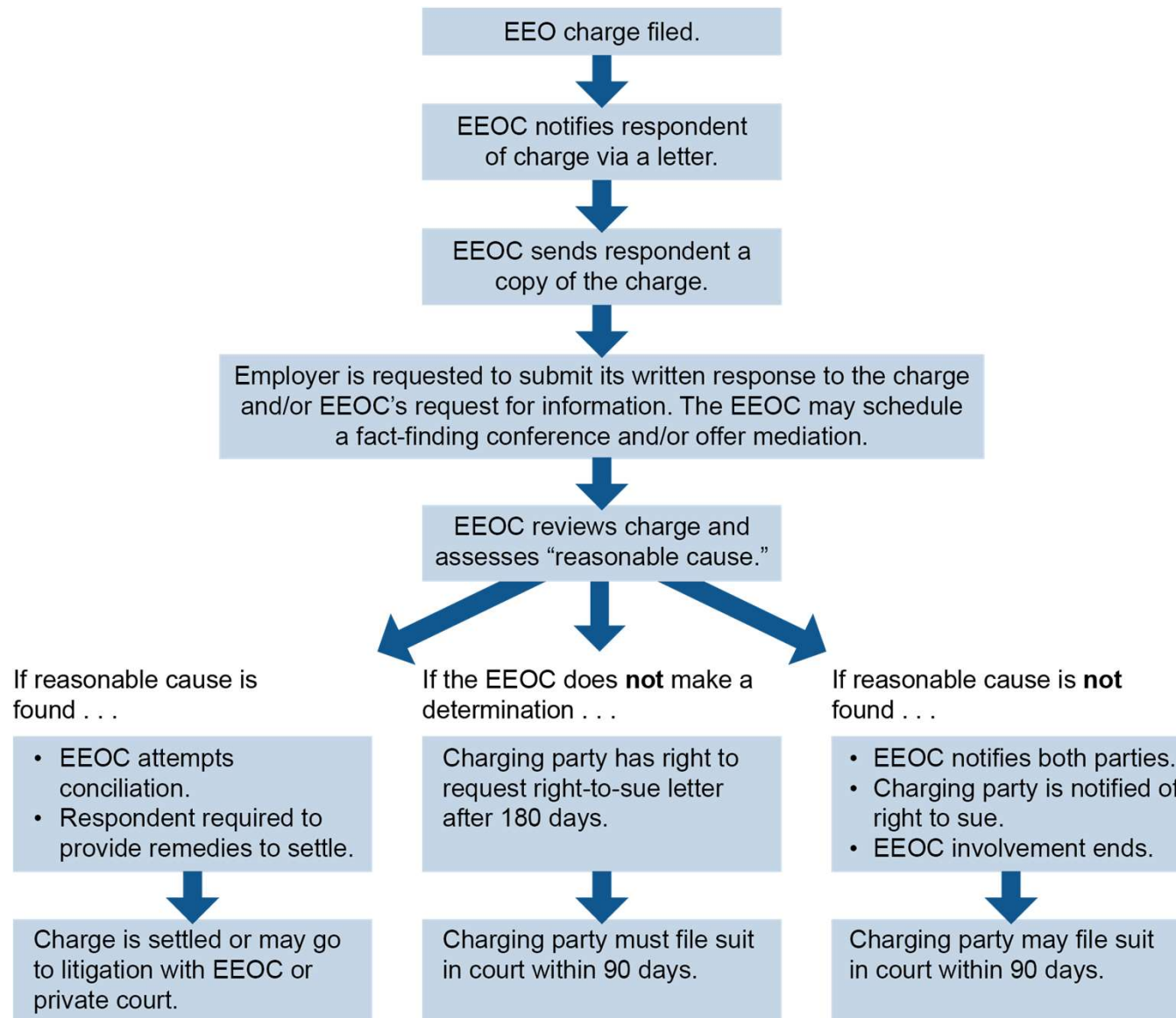
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- Prohibits discrimination against an individual in employment and health insurance on the basis of genetic information about the individual or a family member.
- With limited exceptions, prohibits an employer from requesting, requiring, or purchasing genetic information on the individual or a family member.

EEOC Complaint Process



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Employers are prohibited from retaliating against employees engaged in “protected activities.”

Examples of protected activities:

- Filing a complaint
- Threatening to file a complaint
- Refusing to obey a discriminatory or unsafe order
- Engaging in concerted activity with other employees

Examples of adverse actions:

- Firing, demoting, or disciplining an employee or treating an employee in a discriminatory manner
- Threatening action against or criticizing the employee
- Inappropriate discussions with the employee and internal or external parties

Records Management



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Federal and state
statutes/regulations

Status as government
contractor or
subcontractor

Requirements may
depend on...

Number of employees
or purpose of record
keeping

Industry, location, or
customers

Electronic Record Keeping



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- ✓ Systems must have reasonable controls to ensure the integrity, accuracy, authenticity, and reliability of records.
- ✓ Records must be maintained in reasonable order in a safe and accessible place.
- ✓ Records must be able to be converted to paper format.
- ✓ Adequate records management practices must be in place.



Employers are generally free to maintain their employment records either on paper or electronically.

However, some federal agencies impose electronic requirements.

OSHA Example

Revisions require certain employers (e.g., in high-hazard industries) to electronically submit injury and illness data for posting on the agency's website.

Discussion



A high-potential performer is among 20 employees selected for a mentoring program. The employee is matched to a senior executive in the organization. The mentee is excited about the opportunity and, as instructed by the program guidelines, e-mails the senior executive to set up a meeting.

The mentee does not get a response from the executive but does get an e-mail from the vice president of HR indicating that the mentee is no longer part of the mentoring program. The e-mail states that the mentee did not demonstrate the core values of the organization. The example given was the “aggressive and demeaning tone of her e-mail.” The mentee, upset, discusses her experience with others selected for the mentoring program.



One of these women says, “I think you really dodged a bullet on that one. The executive you were matched with hates women! Every female matched with him has quit, but no one does anything about his behavior.”

The mentee approaches you as part of the HR department and asks why she was removed from the program. She also shares the information gathered from the other mentee.

You have been recently promoted into the role of HR manager. You have heard about issues with females and this executive previously, but you do not know any details.

Discussion



- How would you respond to the mentee?
- What challenges do you face in responding to the employee?
- How would you approach the vice president of HR with this information?
- What HR competencies will be useful in supporting you in this situation?