

The ABC's of EEO

Presented by
Rita B. Coffey, Program Analyst
EEOC Chicago District Office
(312) 353-7254

What Are The EEO Laws?

Title VII of the Civil Rights Act
of 1964 (Title VII) prohibits
discrimination on the basis of:

- Race
- Color
- Sex (including pregnancy discrimination)
- Religion (including the requirement to reasonably accommodate religious practices of applicants and employees)
- National Origin (including ethnic background and traits associated with national origin, i.e., family surname, language or accent)

The Age Discrimination in Employment Act (ADEA)

- Prohibits discrimination on the basis of age
- Applies to individuals who are age 40 and over

The Equal Pay Act (EPA)

- Prohibits sex-based wage discrimination
- Includes fringe benefits
- Applies when men and women at the same establishment perform substantially equal work requiring similar skill, effort and responsibility
- In correcting wage differential, no employee's wage rate may be reduced

Title I of the Americans with Disabilities Act (ADA)

- Prohibits discrimination on the basis of disability, including the requirement to provide a reasonable accommodation to persons with physical and/or mental limitations
- Includes individuals with a record of a disability and persons perceived as having a disability

Retaliation Prohibited

- All laws enforced by EEOC also prohibit employer retaliation
- It is unlawful to penalize, punish or deny an employment benefit because that person opposed discrimination or participated in any way (for example, as a witness) in the investigation of a charge

Covered Employment Decisions

- Recruitment
- Hiring
- Promotion
- Training
- Layoff
- Wages and Benefits
- Work Assignments
- Discipline
- Discharge

Posting Requirement

- Employers covered by EEO laws are required to permanently post a notice informing employees about the EEO laws and the procedures for asserting their rights
- Failure to post is punishable by fine
- Notice must be placed in a location accessible to all employees

Recordkeeping Requirements

- Payroll, personnel and employment action records
 - EEO laws require that employers retain certain employment records for specified periods of time
 - The various EEO laws have slightly differing requirements
 - Employers can comply with all of the laws by retaining all payroll, personnel and employment action records for 3 years

Medical Records and Information--

- The ADA requires the employers who keep medical information about applicants and/or employees to retain those records in a confidential medical file that is separate from the personnel, payroll and employment action files.

Exception to the confidentiality rule--

- Employers may give medical information to state workers' compensation offices;
- Medical information may be disclosed to supervisors and managers for reasons related to reasonable accommodations or work restrictions; and
- To first aid and safety personnel in an emergency.

And...→

Medical information may also be disclosed--

- For insurance purposes,
- When planning emergency evacuation procedures, and
- When the information is requested by government officials investigating compliance with the ADA.

If a charge is filed against your company or agency--

- The records relevant to that charge must be retained until the final disposition of the matter, even if that is longer than three years.

How Do The EEO Laws Affect My Business?

Recruiting, Interviewing and Testing

Preparing to Recruit

- Start with a job description.
- Check it every time you fill the position to make sure that the duties have not changed.
- Determine the essential functions of the job.
- Determine the knowledge, skills and abilities necessary.

Drafting a "Want Ad"

- DO NOT use language that suggests that only particular EEO groups will be considered for employment
- DO NOT make statements like:
 - "Great opportunity for young men"
 - "Must be young and energetic"

Interviewing Applicants

Job Application Questions

- From an EEO perspective, it is best to limit job application questions to basic identifying information (e.g. name, address, social security number)
 - Questions about job qualifications
 - Questions related to the ability to perform essential functions
 - Required licenses or degrees

Conducting Interviews--

- If it is unwise to ask a question on a job application, it is unwise to ask the question during an interview.
- If it is unlawful to ask a question directly of a job applicant, it is unlawful to ask another person (such as a prior employer).
- To ensure fairness, it is best to ask all applicants for the same position the same basic questions.

More on interviewing--

- Make and retain notes of each interview.
- Notes will help you recall and document your reasons for the individual's selection or non-selection.

Interviewing Do's

- Provide any reasonable accommodation needed by applicants with disabilities to enable their full participation in the interview process.
- Ask all applicants for the same position, the same basic set of questions.
- Ask about the ability to perform essential (core) functions.

And ... →

Interviewing Do's

- Ask about prior employment: who, where, when, duties, how long, reason for leaving.
- Ask for references.
- Ask whether applicants possess whatever valid licenses or other certifications (if any) that are needed in order to perform essential functions.

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Interviewing Do's

- Ask whether applicants possess special skills, knowledge or experience relevant to the job.
- Ask applicants to explain significant gaps on resumes or job applications.

Interviewing Don'ts (Illegal or ill-advised)

- Don't ask applicants to provide photographs of themselves, and don't take photographs of your applicants.
- Don't ask applicants about their race or national origin.
- Don't ask applicants about their religion or religious beliefs or practices.
- Don't ask applicants about their age.

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Interviewing Don'ts (Illegal or ill-advised)

- Don't ask applicants whether they have a disability, and don't ask questions about a known or obvious disability.
- Don't ask questions that are closely linked to the existence of a disability, or that are likely to elicit information about the existence of a disability.

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**Interviewing Don'ts
(Illegal or ill-advised)**

- Don't ask applicants about family matters, such as marital status, pregnancy, or the existence of children.
- Don't ask applicants about arrests that did not result in criminal conviction. However, you may ask about convictions for crimes that relate to the job, but not other convictions.

Drug-Related Inquiries & Tests

- Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA.
- Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations.

**The Selection
Process**

Making the selection

- Focus on the essential functions of the job.
- Be as objective as possible in determining who is best qualified to perform those duties.
- Decide in advance what your selection criteria will be.
- Document objective things that you will look for as indicators.

Making the selection

- Document in advance any automatic disqualifying criteria, such as the lack of a particular license or certification (if applicable).
- Document the reason(s) for choosing the selectee and document specific factors which support your conclusion.

Medical Exams & Inquiries

- A job offer may be conditional on the results of a medical exam or inquiry.
 - Only if the exam or inquiry is required for all entering employees in the job, and
 - Only after a conditional offer of employment has been made
- Medical exams or inquiries of employees must be job related and consistent with business needs.

Identifying and Preventing Workplace Harassment

Harassment

- Any unwelcome verbal or physical conduct based on:
 - Race
 - Color
 - Sex
 - Religion
 - National Origin
 - Age
 - Disability

Unwelcome Conduct

- Employee did not solicit or invite the conduct
- Employee regarded the conduct as undesirable
- Recipient determines whether the conduct is welcome

What is Prohibited?

- Unwelcome conduct that alters the conditions of employment
 - Sexual advances/pressure for dates
 - Slurs, comments, jokes, innuendos
 - Threats, inappropriate touching
 - Inappropriate gestures, pictures, graffiti, slang expressions, etc.

What is Not Covered?

- Simple teasing
- Offhand comments
- Minor isolated incidents

Two Types of Harassment

- Tangible Employment Action

- Hostile Work Environment

Tangible Employment Actions

- Only supervisors and managers can subject an employee to tangible employment action harassment because only supervisors and managers have the authority to take a tangible employment action.

Tangible Employment Actions

- Significant change in employment status
 - Hire
 - Discharge
 - Promote or fail to promote
 - Demote
 - Reassign

Hostile Work Environment Harassment

- Does not result in tangible employment action
- Unreasonably interferes with an employee's work performance
- Creates an intimidating, hostile or offensive work environment
- Anyone can commit this type of harassment

Hostile Work Environment Harassment

- Key Issues:
 - Context, frequency and/or severity
 - Reasonable person standard
 - Tangible effect on victim's job not necessary

Hostile Work Environment Harassment

- A hostile work environment can be created by a supervisor, manager, co-worker or non-employee
- Includes jokes, gestures, touching, graffiti, demeaning names or expressions, mocking behavior

Preventing Harassment

- Establish anti-harassment policy and complaint procedures covering all forms of unlawful harassment (race, color, sex-based and sexual, religion, national origin, age, disability or protected activity)

Preventing Harassment

- Clearly define/explain types of prohibited conduct and explain that prohibitions cover harassment by anyone in the workplace --- executives, supervisors, co-workers

Preventing Harassment

- Assure that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation
- Clearly describe a complaint process that provides more than one accessible avenue of complaint

Preventing Harassment

- Assure that employer will protect confidentiality of harassment complainants and witnesses to the extent possible
- Policy should encourage employees to report harassment before it becomes severe or pervasive

Preventing Harassment

- Policy against harassment is worthless unless employees are aware of it
- Provide training to staff on your anti-harassment policy
- Re-distribute the policy from time to time
- Post the policy in prominent locations

Preventing Harassment

- Provide a prompt, thorough and impartial investigation
- Set forth disciplinary consequences and assure that employer will take immediate and appropriate corrective action when it determines that harassment has occurred

Harassment Affects the Workplace

- High legal costs and fines (litigation)
- Damaged organizational image
- Reduced productivity and lower morale
- Higher employer turnover
- Higher costs for hiring and training new employees

Evaluating Employee Performance

Performance Evaluations

- Avoid allegations of discrimination by:
 - Ensuring evaluation systems are:
 - Understood by both supervisors and employees; and
 - Consistently applied.

Performance Standards

- Performance standards should be directly related to the job's duties.
- All employees performing the same job should be subject to the same performance standards.
- Employees should have a copy of their performance standards.
- Employees should confirm in writing that they understand their performance standards.

Document Evaluations with Facts

- Include facts that support conclusions as to whether or not employees met performance standards.
- Subjective standards should be documented with examples.

Handling Performance Problems

- Establish a policy for dealing with performance problems.
- Communicate the policy to all supervisors and employees and apply it CONSISTENTLY.
- Provide notice to employees when performance problems occur.

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Providing Notice

- Give the employee an opportunity to correct the problem.
- The notice should specify the performance problem and document events or other facts that illustrate the performance problem.
- Inform the employee of actions they can take in order to improve.

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Providing Notice--

- Encourage dialogue between supervisors and their employees with performance problems.
- Allow the employee an opportunity to respond to the concerns, including written responses if the employee so desires.

Changing Performance Standards

- If performance standards change, employees should be made aware prospectively to ensure that new standards are not used to evaluate past performance.
- Be sure to inform both employees and supervisors, and highlight significant differences.

Making Promotion Decisions

Promotions--

- Give equal access to career enhancing opportunities that allow employees to prepare for, and demonstrate their readiness for, promotion.
- Ensure that all employees in similar jobs have the same access to any mentoring programs, choice assignments or other career development opportunities.

Promotion Procedures--

- All potential promotion candidates should be informed of the opportunity for promotion and of the minimum eligibility criteria.
- All potential candidates should be informed of the selection procedures, and selection criteria.

Making the Selection--

- Apply selection criteria to each eligible promotion candidate.
- Keep documents/notes that will demonstrate how each candidate satisfies each selection criterion.
- Apply criterion consistently.

Layoffs and Reductions in Force

Layoffs and Reductions in Force--

- Document the reasons for the layoff and the alternatives considered.
- Develop and document specific layoff selection criteria.
 - Selection criteria should meet the company's needs, be objective, and not be related to an EEO factor.

Layoffs (continued)

- Review the layoff process to determine if any EEO group is avoidably impacted.
- Tell the employees, explain necessity.
- Implement the plan consistently and compassionately.

Lessen the Blow--

- Provide advance notice to give employees a better opportunity to plan for the future.
- Be honest about future prospects. Tell employees if the layoff is short term or permanent.
- Provide assistance with unemployment claims and job placement.

Discipline and Discharge

Discipline & Discharge--

- Disciplinary policies should be in writing and distributed to all supervisors and employees.
- The disciplinary policy should be progressive in nature.
- Document facts that support a recommendation or decision to discipline an employee.

Applying the policy--

- Discipline should be implemented in accordance with your discipline policy.
- Consistent application is crucial: similarly-situated employees who commit the same infraction should be given the same punishment.
- Document any rare reasons for deviation.

Avoiding Retaliation--

- Never penalize an employee because the employee filed a charge of discrimination, asserted that a practice or action was discriminatory, or participated in any way in the charge process.

Retain Records--

- Be safe – retain records pertaining to disciplinary actions for three years.
- If an EEO charge challenging a particular disciplinary action is filed, you must keep the relevant records until the matter is resolved, even if that is longer than three years.

Post Separation References

Things you may tell a Prospective Employer

- Quality and Quantity of the former employee's work.
- Reliability of the former employee.
- The degree to which the former employee possesses particular traits (i.e. leadership, initiative).
- Non-discriminatory reasons for discharge.

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Things you may tell a Prospective Employer

- Dates of the former employee's employment.
- The job the former employee held.
- Wage and/or salary the former employee was paid.

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Common Policy--

- Some employers, as a matter of policy, limit the information that they provide prospective employers to the former employee's dates of employment, job title and ending wage or salary.
- Such a neutral reference policy is lawful, so long as it is consistently applied.

Things NOT to say to prospective employers--

- Do not discuss the former employee's race, color, religion, sex, national origin, age or disability.
- Never disclose medical information of any kind, including the frequency of sick leave requests.
- Do not discuss the former employee's need for a reasonable accommodation.

Things NOT to say to prospective employers--

- Do not discuss the former employee's marital status.
- Do not discuss whether (or not) the former employee has children.
- Do not tell a prospective employer that a former employee participated in the EEO process, complained about discrimination, or filed a charge of discrimination.

Key facts to remember when speaking to prospective employers

- Stick to Objective Responses!
- Be Consistent in Your Post Employment Reference Policy Application!
- Never Disclose EEO Information!
- Avoid Retaliatory Descriptions!

What if a Charge is Filed Against My Business?

Jurisdictional Requirements

- Charge must be filed within 300 days of alleged violation
- Number of employees required under each statute
 - Title VII and ADA – 15 or more employees
 - ADEA – 20 or more employees
 - EPA – at least one other employee

Charge Procedures

- Any individual who believes they were subjected to discrimination has an absolute right to file a charge.

Priority Charge Handling Procedures

- “A” Charge
 - Charges where further investigation will probably result in a reasonable cause finding
- “B” Charge
 - Charges requiring additional information/investigation
- “C” Charge
 - Charges suitable for dismissal

Charge Procedures

- Employer notified within 10 days of receipt of charge
- Request for information attached to Charge with a due date for a response
- An offer of mediation may be attached to charge

Mediation

- Must be accepted by both parties
- Voluntary
- Neutral third party mediator
- Confidential
- Informal, non adversarial
- Cost effective
- No judgments about merits of case

Mediation Possible Solutions

- Money
- Policy Changes
- Training
- Apology
- Assistance in finding other employment
- Letter of recommendation
- Accommodations

Investigation of Charge

- Charges processed on individual basis
- Position statement
 - Don't submit a position statement which only admits or denies allegations
 - Do include information about comparable employees
 - Do include information about policies and procedures relevant to allegations
 - Don't assume a late and lengthy position statement is better than a concise & timely one

Investigation of Charge

- On-site visit
- Witness interviews
- Settlement attempt

Letter of Determination

- No Cause
 - There was not sufficient evidence to show that discrimination occurred.
- Cause
 - There is sufficient evidence to show that discrimination occurred.

“No Cause” Letter of Determination

- Charging party is issued a Notice of Right to Sue and file is closed.

**“Cause”
Letter of Determination**

- Employer invited to enter into conciliation discussions
- Conciliation Agreement reached
 - Case resolved
 - Appropriate relief provided
- Conciliation fails
 - EEOC files lawsuit
 - EEOC issues Notice of Right to Sue

Your trainer for today:

Rita B. Coffey
Program Analyst &
Small Business Liaison
EEOC Chicago District Office
500 West Madison Street
Suite 2800
Chicago, Illinois 60661
(312) 353-7254
(312) 886-7496 (fax)
rita.coffey@eoc.gov
