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Employment Law

The Essential HR *Desk Reference*

- Federal employment laws
- U.S. Supreme Court cases
- Key employment and labor law terms

Lisa Guerin, J.D.

Nolo's Quick Reference Series

1st edition

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The Essential HR Desk Reference

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A

absenteeism

Absenteeism refers to an employee's pattern of failing to show up at work or to the rate at which a group of employees don't show up for work. (For example, if a company or department has a 10% absenteeism rate, that means one in ten of its employees are likely to be absent on any given day.)

The term is usually reserved for employees who are absent so often that it causes problems at work, employees whose absences are suspicious in some way (for example, who routinely call in sick at the end of a vacation or long weekend), or employees who do not follow required procedures for absences (like calling in sick or giving notice of vacation). An employee who is out of work for a few days with the flu would not be accused of "absenteeism," for instance.

What companies do about absenteeism. Companies use a number of strategies to manage absenteeism, including adopting procedures employees must follow to take time off, disciplining employees who ignore the rules, having supervisors follow up with employees who call in sick, and combining vacation, sick, and other leave into one paid time-off entitlement, which means an employee who calls in sick at the last minute is losing a day that could otherwise have been used for vacation. Policies like these make it more difficult—or less appealing—for employees to take unscheduled time off at the last minute, which helps the employer manage its workforce and workload.

Who's Absent the Most?

According to 2009 data from the federal Bureau of Labor Statistics (BLS), the employees who missed the highest percentage of work hours to absences each year work in the health care industry. Government workers had the second highest percentage, followed by a tie for third among protective service employees, community and social service employees, personal care providers, office and administrative support employees, and production workers. (The figures are based on time not worked because of illness, child care problems, personal obligations, and so on; time spent on vacation or holidays wasn't included.)

No-fault attendance policies. Some employers use "no-fault" attendance policies, which typically penalize employees for having more than a set number of unexcused absences per year, whether the employee is sick, has a family emergency, or takes a last-minute personal day. (Some policies count even scheduled absences, such as vacations or time off for scheduled surgery, toward an employee's total, and allow a higher number of absences before discipline kicks in.) For example, a no-fault attendance policy might give employees a point for each unexcused absence, then provide that five points in a year merits a verbal warning, eight points results in a written warning, and ten points in a year is a firing offense.

Policies like these can lead to legal problems if the employee is penalized for absences that are protected under the Family and Medical Leave Act (FMLA) or the Americans with Disabilities Act. The FMLA allows employees to take time off if a serious health condition requires it, even if the need for leave was not foreseeable. For example, if an employee has a chronic condition that flares up and makes it impossible to work, that employee may use FMLA leave. An employer that counts that absence against the employee has violated the FMLA.

EXAMPLE: June Manuel began working for Westlake Polymers Corporation in 1986. Her absenteeism was an ongoing problem during her employment, and she was warned that her job would be in jeopardy if her attendance didn't improve. In 1991, Westlake adopted a no-fault attendance policy, which counted every absence against the employee no matter why the employee missed work. Manuel was warned four times in 1992 that her attendance had to improve immediately or she would be suspended or fired.

In October 1993, Manuel got permission to take a Friday off to have an ingrown toenail removed. She was expected to return to work the following Monday, but suffered complications, including an infection and swelling. She missed more than a month of work following this procedure. When Manuel took a few days off work sick several months later, she was fired.

She sued Westlake and a federal Court of Appeals allowed her lawsuit to go forward. Why? Because the FMLA became law in August 1993, and her month-long absence may have been protected leave under the law. If so, counting that absence against her under the no-fault attendance policy was a violation of the FMLA. Westlake argued that Manuel didn't give notice of her need for leave, as the statute requires, because she never mentioned the FMLA. The court found that this didn't matter: Once the employee gives notice of leave for a medical condition, it's up to the employer to figure out whether the FMLA applies. (The court didn't offer an opinion as to whether Manuel's ingrown toenail was a serious health condition covered by the FMLA.) *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (1995).

Related terms: Americans with Disabilities Act; Family and Medical Leave Act; paid time off (PTO); presenteeism; sick leave; vacation.

ADA

See Americans with Disabilities Act.

ADAAA

See Americans with Disabilities Act.

ADEA

See Age Discrimination in Employment Act.

administrative employee

Although many people refer to secretaries and others who keep an office running smoothly as "administrative employees" (or "admins," for short), this term has a more specific legal meaning. It refers to a category of employees who are exempt from the minimum wage and overtime requirements of the federal Fair Labor Standards Act (FLSA). Even if they work more than 40 hours a week, these employees aren't entitled to get overtime.

Two requirements must be met for a worker to qualify as an administrative employee: a salary test and a job duties test. Under the salary test, the employee must earn at least $455 per week and be paid on a salary basis. Workers are paid on a salary basis if they receive their full salary for any week in which they perform any work, regardless of how many hours they work or the quality or amount of work they do. (There are a handful of exceptions to this rule, covered in "pay docking.")

An employee must also perform certain job duties to qualify. An administrative employee's primary duty must be office or other nonmanual work directly related to the management or general business operations of the employer or its customers. Examples include performing functions like tax, finance, human resources, marketing, regulatory compliance, auditing, or insurance. This work must include the exercise of discretion and independent judgment regarding matters of significance. This might include the authority to make decisions, set policy, carry out important assignments, or commit the employer to a particular course of action with a significant financial impact on the company.

Related terms: exempt employee; Fair Labor Standards Act; minimum wage; overtime; pay docking; professional employee.

affirmative action

Practices that are intended to promote opportunity for members of historically disadvantaged classes are referred to as affirmative action. Although most often associated with promoting opportunities for candidates of color and women, affirmative action may assist any disadvantaged group. For example, some affirmative action programs benefit people with disabilities or military veterans.

Affirmative action is most common in employment, government contracts, education, and business. In the employment field, the federal, state, or local government might implement affirmative action measures, either when the government acts as an employer or when the government contracts with, or provides grants to, private business. Private employers may also adopt their own affirmative action programs.

Affirmative action measures run the gamut from steps to make sure that candidates from historically disadvantaged groups have an equal opportunity to contend for jobs and promotions (such as posting jobs in areas with high numbers of minority job seekers, developing outreach efforts to find qualified female candidates, and supporting training programs for candidates or employees in protected categories) to giving members of historically disadvantaged classes an edge in employment decisions by taking gender, race, or another protected characteristic into account as a factor in the selection process.

The controversy over affirmative action. As noted above, some affirmative action measures don't take race, gender, or other protected characteristics into account in the selection process, but seek only to widen the field of qualified applicants through outreach and search efforts. When the employer in this type of program reaches the point of actually selecting candidates, the process is color- and gender-blind. These measures have not met with much legal or social resistance.

However, measures that give an edge to particular applicants based on race, gender, or another protected characteristic have historically been more controversial. These measures might include:

- using race as a "plus" factor in hiring (so that an African American applicant would be preferred over a white applicant with the same qualifications)
- using lower cutoffs for test scores for minority or female candidates, or
- setting hiring goals or quotas (that 30% of the workforce in a traditionally male profession be female by 2020, say).

Measures like these provide a benefit to members of one group that comes at the expense of members of another. Proponents of affirmative action argue that this is fair and appropriate, given our country's long history of discrimination, and is the only way to create truly equal opportunity for groups that are disadvantaged. Opponents argue that discrimination is unfair, no matter who it helps or hurts, and that (primarily) white men should not have to pay the price for historical discrimination.

Affirmative action for federal contractors. Executive Order 11246 requires certain federal contractors to adopt affirmative action programs. Among other things, contractors must analyze their workforce, target any areas where members of protected groups are underrepresented, and come up with specific goals to help address the problem. Contractors must make good faith efforts to achieve these goals, which might include outreach and recruitment programs, training, and other strategies to expand the pool of qualified candidates. Executive Order 11246 is administered and enforced by the Office of Federal Contract Compliance Programs (OFCCP), www.dol.gov/ofccp.

Affirmative action in other government settings. When a government uses affirmative action as an employer, it is subject to the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. When governments make distinctions based on race, the Equal Protection Clause requires them to have a compelling interest that

“Reverse Discrimination” in the Supreme Court

The U.S. Supreme Court has decided a number of affirmative action cases in the last 40 years. Typically, these cases have been “reverse discrimination” claims, brought by potential students or employees who believe they were denied opportunities because a school’s or an employer’s affirmative action program favored minority or female candidates. Here are a few of the most widely publicized cases:

- *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), in which the Supreme Court held (by 5-4 vote) that the admissions program of the medical school at the University of California at Davis was unconstitutional because it excluded applicants on the basis of race.
- *Martin v. Wilks*, 490 U.S. 755 (1989), in which a group of white firefighters sued the city of Birmingham, Alabama, claiming that a consent decree the city entered into with African American firefighters resulted in discrimination in promotions. The Supreme Court decided that the white firefighters could challenge the consent decree even though they knew about the earlier lawsuit and could have gotten involved then.
- *Grutter v. Bollinger,* 539 U.S. 306 (2003), in which the Supreme Court ruled that the University of Michigan could consider race in deciding which applicants to accept, as long as it did not use quotas and the program was narrowly tailored to further the school’s compelling interest in providing students with the educational benefits of diversity; the Court also noted that affirmative action measures should be temporary.
- *Ricci v. DeStefano* 129 S.Ct. 2658 (2009), in which the Court held that the city of New Haven, Connecticut, could not ignore promotion test results, even though white applicants generally scored so much higher on the test than African American and Hispanic applicants that the city feared it would be sued for race discrimination if it used the results. The Court found that the city could refuse to certify the test scores only if it had a “strong basis in evidence” to believe that they were discriminatory.

is served by the distinction, and the means chosen must be narrowly tailored to further that interest.

The U.S. Supreme Court has held that a desire to remedy the effects of societal discrimination is not a sufficient justification for race-based classifications, nor is a desire to provide nonwhite role models. Instead, a government entity that seeks to implement affirmative action must show that it has a history of past discrimination or perhaps that it has been a passive participant in societal discrimination, which the affirmative action program seeks to remedy.

Even if a government entity has a sufficient factual basis to adopt an affirmative action plan, the plan might still be illegal unless it is narrowly tailored to meet those goals. For example, a plan that lasts longer than necessary, confers benefits on people outside of the group that has been discriminated against (for example, benefits all minorities when there is proof of discrimination only against African Americans), or sets goals that go beyond the proven discrimination might be struck down.

Affirmative action by private employers. Private employers are not subject to the Equal Protection Clause, but their affirmative action plans must meet the requirements of Title VII. The Supreme Court has developed a three-part test to evaluate the legality of private affirmative action:

1. **There must be a factual basis (of discrimination) for the plan.** The employer doesn't have to admit that it discriminated in the past to adopt an affirmative action plan (although such an admission would meet this requirement). For private plans, statistical evidence might also be sufficient, if it shows a "manifest imbalance" in traditionally segregated fields or it would be sufficient to allow the group that would be benefited by the plan to bring a discrimination lawsuit.
2. **The plan must not "unnecessarily trammel" the interests of employees who don't benefit directly from it.** For example, a plan by which the employer would lay off workers to

make room for a more diverse workforce would be more detrimental to the laid off workers than a plan that addressed recruitment or hiring.

3. **The plan must be temporary.** Affirmative action measures may last only as long as necessary to undo the effects of past discrimination.

Related terms: Civil Rights Act of 1991; discrimination; disparate impact; disparate treatment; protected class; Title VII.

after-acquired evidence

After-acquired evidence refers to information an employer learns after firing an employee that would have justified firing the employee in the first place. After-acquired evidence may be used by the employer in a wrongful termination lawsuit to limit the damages available to an employee who was wrongfully fired.

You can be fired after you're fired? Here's how it works. Let's say an employer fires its chief financial officer (CFO) because it wants to hire someone younger for the job. The employee files an age discrimination lawsuit. During the discovery phrase of trial preparations, when the parties gather and exchange information and documents, the employer learns that the employee falsified her resume, which said that she graduated from Yale University and received an MBA from Harvard Business School. In fact, the employee dropped out of Yale after two years, never completed her undergraduate degree, and never attended business school. The company required all applicants for the CFO position to have a college degree and an MBA, and would not have hired the employee had it known that her credentials were false. Even if the employee has a slam-dunk age discrimination case, her damages will be limited to what she would have earned between when she was wrongfully fired (because of her age) and when the employer discovered the evidence for which it could have fired her legally (résumé fraud).

Copying Confidential Documents Leads to Limited Damages

The U.S. Supreme Court first recognized the after-acquired evidence theory in *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352 (1995), an age discrimination case. Christine McKennon, a 30-year employee grew concerned that she might be fired because of her age. She photocopied several confidential documents relating to the company's financial condition, brought them home, and showed them to her husband as "insurance" and "protection" against losing her job. The company terminated her employment, claiming that it was part of a reduction in force plan to cut costs; McKennon believed it was age discrimination and filed a lawsuit.

During her pretrial deposition, McKennon revealed that she had taken the financial documents. The company filed a motion for summary judgment, claiming that even if it had been motivated by age discrimination when it discharged McKennon, her misconduct gave the company good cause to fire her. Therefore, the company argued, McKennon wasn't entitled to win her age discrimination claim. The company won its motion, and McKennon appealed all the way to the Supreme Court.

The Supreme Court first found that after-acquired evidence doesn't affect the employer's liability for discrimination. If the employer had discriminatory motives for firing the employee, later evidence of the employee's misconduct doesn't change that fact. However, the Court also found that after-acquired evidence should be considered in determining damages. Back pay, for example, should be measured from the date of the discriminatory firing until the date the employer discovered the after-acquired evidence. Beyond that date, the employer had a legitimate reason to fire the employee, so it shouldn't be liable for her continuing lost wages.

An employer who wants to rely on the after-acquired evidence defense must be able to show that it would have fired or never hired the employee if it had known about the employee's fraud or misconduct sooner. If, for example, the company's past two CFOs didn't have MBAs or college degrees either, the company might have a harder time proving that it wouldn't have hired the CFO if it knew her credentials were false. If, on the other hand, the company's employee handbook states that résumé fraud is grounds for termination, and the company has fired other employees when it learned that they had falsified their credentials, the company would more likely be entitled to rely on this defense.

Related terms: age discrimination; wrongful termination.

age discrimination

An employer commits age discrimination when it treats an employee or applicant differently because of the person's age. The federal Age Discrimination in Employment Act (ADEA) prohibits age discrimination against those who are at least 40 years old. Most states also have laws prohibiting age discrimination, and some don't apply this 40-year-old age limit. A few states protect employees only until their 70th birthday.

Age discrimination can happen at any stage of the employment process, from hiring to promotions, benefits, compensation, and layoffs. Often, age discrimination cases include evidence of age-related stereotypes or comments that indicate a lack of respect for older workers, such as statements about "senior moments" or old dogs who can't learn new tricks; comments about wanting to bring in younger (or more "energetic" or "youthful") employees; and assumptions about older workers' knowledge or skills (for example, that they aren't tech-savvy or up-to-date on the latest trends).

Related terms: Age Discrimination in Employment Act; Older Workers Benefit Protection Act.

54 Is the New "Old Fuddy-Duddy": Google Sued for Age Discrimination

The California Supreme Court reinstated a fired manager's age discrimination lawsuit against the search-engine giant Google, finding that the trial court shouldn't have thrown the case out before a jury heard the facts. Brian Reid, who was fired at the grand old age of 54, claimed that he was demoted into a dead-end position and later fired because of his age.

- **Age-related comments.** He was referred to as an "old man," an "old guy," and an "old fuddy-duddy," told he was "slow," "fuzzy," "sluggish," and "lethargic," and told that his ideas were "obsolete" and "too old to matter." He was also told that he should replace the CD jewel case that served as his office placard with an LP. (Apparently, when only 2% of a company's workforce has celebrated a 41st birthday, as was true of Google at the time, those in their 50s start looking like visitors from the Stone Age.)
- **Email messages suggesting that Google's managers were trying to get their stories straight.** One message said that the company's decision to give Reid no bonus might not be "consistent with all similarly situated performers"; if that wasn't clear enough, the message also suggested giving Reid a bonus and severance package "to avoid a judge concluding we acted harshly." A company vice president asked for guidance on what to say if Reid asked for a position in another department, asking that the HR Director "make sure I am completely prepped" and "get me clear on this" before she had to talk to Reid. After much back and forth, the HR Director concluded, "We'll all agree on the job elimination angle."
- **Statistical evidence.** As a company that's perhaps best known for an algorithm, Google will need an answer for the claims of Reid's expert witness, a statistician who reported a statistically significant negative correlation between age and performance rating, as well as age and bonus amount, at Google. For every ten-year increase in age, the statistician found a corresponding decrease in performance rating and a 29% decrease in bonus.

Reid v. Google, 113 Cal. Rptr. 3d 327 (Cal. Supreme Court 2010).

A

Age Discrimination in Employment Act

The federal Age Discrimination in Employment Act (ADEA) was passed in 1967 to address the difficulties older employees face in the workplace, including mandatory retirement cutoffs and discrimination in hiring. The ADEA prohibits discrimination in every aspect of employment against employees and applicants who are at least 40 years old, with a few limited exceptions to recognize that advanced age may, in some circumstances, affect our ability to perform certain jobs effectively.

Congress amended the ADEA in 1990 when it passed the Older Workers Benefit Protection Act (OWBPA), which added detailed provisions on employment benefits (some of which may become more costly for employers to provide as employees age) and waivers. That law is covered in a separate entry.

Who the ADEA covers. The ADEA applies to federal and local governments, as well as private employers that have at least 20 employees. State government employees are also protected by the law, but they don't have the right to sue their employers to enforce those rights; only the Equal Employment Opportunity Commission may sue a state to protect state employees from age discrimination.

Discrimination prohibited by the ADEA. The ADEA protects employees who are at least 40 years old from harassment or discrimination based on their age. If an employee or applicant is denied a benefit (such as a job, promotion, or job-related perk) because of his or her age, it doesn't matter if the employee who received the benefit is also at least 40 years old.

> **EXAMPLE:** A company decides to promote a 45-year-old employee rather than a 65-year-old employee, based on age. Under the ADEA, that's age discrimination, even though the younger employee is old enough to be protected by the ADEA.

Employees may not claim "reverse" age discrimination even if they are 40 or older. For example, a 45-year-old employee may not claim age discrimination because older workers received better benefits. If the older worker is treated better, the ADEA has not been violated.

Actually, you really *are* too old. Employers may use age as a basis for employment decisions in a few limited circumstances. If an employer who relies on one of these exceptions is sued for age discrimination, it will bear the burden of proving that its actions fell within the exception:

- **Bona fide seniority system.** An employer may rely on a bona fide seniority system (one that gives a preference to employees who have more tenure with the company) as a basis for employment decisions, even if that results in more favorable treatment of younger workers. Because older workers tend to have more seniority than younger workers, however, they are unlikely to be disadvantaged by an employer's reliance on its seniority system, which makes this a seldom-used exception.
- **Bona fide occupational qualification (BFOQ).** An employer may discriminate based on age in filling a position if the job, by its very nature, must be filled by an employee of a certain age. This typically comes up in regards to age limits for a job. To prove a BFOQ, the employer must show that the age limit is reasonably necessary to the essence of the employer's business, and that (1) all or substantially all people who are older than the age limit would be unable to perform the job, or (2) some people who are older than the age limit would be unable to perform the job and testing each person individually to determine whether he or she could perform the job would be impossible or highly impractical. If the employer's goal in using the BFOQ is public safety, the employer must show not only that the challenged age limit achieves that goal, but also that there is no acceptable alternative that is less discriminatory.
- **Bona fide employee benefit plan.** In some situations, an employer may reduce benefits paid to older workers if the employer acts in accordance with a benefit plan (see below).

- **Firefighters and peace officers.** State and local governments may adopt a mandatory retirement age of 55 or older for firefighters and law enforcement officers.
- **Bona fide executives and high policymakers.** Employers may require a high-ranking employee to retire or step down to a lesser position if all of the following are true:
  - The employee is at least 65 years old.
  - The employee has worked for at least the last two years in that position.
  - The employee is entitled to an immediate, nonforfeitable annual benefit of at least $44,000 from the employer. A benefit is "immediate" if payments start (or could have started, at the employee's election) within 60 days after retirement. A benefit is "nonforfeitable" if no plan provisions could cause payments to stop. For example, if the plan requires payments to be suspended if the employee files a lawsuit, that benefit is forfeitable.

Special rules for disparate impact claims. Employees claiming age discrimination may make a disparate impact claim, alleging that a facially neutral policy or practice had a disproportionate negative impact on older workers. To win a claim like this, the employee must point to a specific practice that led to the difference in treatment. If the employee identifies such a practice, the employer may escape liability by proving that the practice was based on a "reasonable factor other than age" (RFOA).

ADEA enforcement. Like Title VII, the federal law that prohibits discrimination on the basis of race, color, national origin, gender, and religion, the ADEA is enforced by the Equal Employment Opportunity Commission (EEOC). Employees who want to file an age discrimination lawsuit under the ADEA must first file a charge with the EEOC in order to preserve their right to sue.

ADEA damages. If a court finds that an employer has violated the ADEA, the employer may be ordered to do any or all of the following:

- Pay the employee all wages, benefits, and other forms of compensation lost as a result of the discrimination.
- Take action to remedy the results of the discrimination by, for example, reinstating or promoting the employee. If the court finds that such action is impractical (for example, if the employee's position has been eliminated or the work relationship is irrevocably poisoned), the court may require the employer to pay front pay—compensation for future lost earnings—instead.
- Pay a penalty (called "liquidated damages") equal to all of the wages, benefits, and other compensation owed the employee at the time of trial. This remedy is available only if the employer knew that its conduct was illegal or showed reckless disregard as to whether its conduct violated the ADEA.
- Pay the employee's court costs and attorney fees.

Related terms: age discrimination; bona fide seniority system; disparate treatment; disparate impact; Equal Employment Opportunity Commission: Older Workers Benefit Protection Act: reasonable factor other than age; Title VII.

agency shop

An agency shop is an establishment in which all workers must either be members of the union or pay fees to the union as a condition of getting or keeping a job. An agency shop is created through a union security agreement between the employer and the union, by which the employer agrees that it will fire any worker who does not either join or pay fees to the union. The union is obligated to represent everyone in the bargaining unit, regardless of their union membership. By requiring everyone to either join or financially support the union, these agreements prevent "free riders," employees who benefit from the union's work without having to pay for it.

Some states have passed laws, called "right to work" statutes, which prohibit union security agreements. In these states, every unionized workplace must be an "open shop": one in which employees are free to choose whether or not to join or support the union.

Related terms: bargaining unit; closed shop; open shop; right to work laws; union security agreement.

alternative base period

See base period.

alternative dispute resolution

The many ways people can work out their problems without going to court (or short of receiving a verdict) are referred to as alternative dispute resolution, or ADR.

Court-ordered ADR. Sometimes, ADR is required by a court. Many court systems require the parties to a lawsuit to try to resolve things through ADR before the trial begins. For example, some courts use an early neutral evaluation (ENE) program, in which an outside third party sits down with both sides, listens to their explanation of the issues, and tries to help them resolve the dispute, often by giving them a frank assessment of the strengths and weaknesses of their evidence.

Contractual ADR. ADR may also be required by contract. An employment agreement may provide that the parties will use particular types of ADR to resolve any disputes that arise under the contract, rather than going to court. Some employers require new employees to sign arbitration agreements, in which they agree to resolve any disputes over the employment relationship in arbitration. Typically, these agreements require employees to give up their right to sue.

Voluntary ADR. Parties to a dispute can also voluntarily choose ADR, whether or not a lawsuit has been filed. For example, a company might hire a mediator to help resolve some communication problems among members of the executive team. Or, an employee who has filed a lawsuit against an employer might propose that the two sides try to mediate the dispute before it goes to trial.

When most people refer to ADR, they are usually thinking of either mediation or arbitration.

Mediation. In mediation, a neutral third person helps the parties try to come to a mutual resolution of their dispute. The mediator has no power to order anyone to do anything; rather, the mediator facilitates discussions and negotiations between the parties, trying to help them identify areas of possible agreement and compromise. If the parties reach an agreement, they often memorialize it in a written settlement or contract.

Arbitration. Arbitration is more like a court proceeding, in that there is a decision maker (the arbitrator or panel of arbitrators), evidence is presented, and the arbitrator makes a final decision that both parties must abide by (if the arbitration is "binding").

ADR within a company. Some employers adopt ADR-type systems employees can use to raise complaints or concerns within the company. These systems might include:

- **Open-door policies.** These policies invite employees to bring their concerns and ideas to their immediate supervisor or to others within the company (such as any company officer or the human resource department).
- **Ombudsperson programs.** Some companies designate an ombudsperson to be available to employees who have complaints or concerns. Typically, the ombudsperson operates outside of the company's formal management structure, offering counseling, options for handling workplace problems, and the possibility of bringing in the employee's manager or coworkers to resolve issues. They are most common in large institutionalized settings (such as colleges and hospitals) and larger companies, where individuals can easily feel lost in the shuffle. Having a place to get help with their concerns can help diminish the feeling of being just another cog in the machine.
- **Peer review programs.** In a peer review program, employee complaints that cannot be resolved informally are heard by a group, typically composed of some employees and some

managers, which decides how the issue should be handled. Companies often limit the issues a peer review panel can decide in order to reserve management's right to make policy and personnel decisions. For example, a peer review panel might have the authority to decree that an employee should report to a different supervisor, but not that the supervisor should be fired or demoted.

- **Step grievance procedures.** Modeled on union grievance programs, a step grievance procedure is a set of increasingly more formal options for handling complaints, each offered as a way to take a complaint further if the prior step doesn't resolve the issue to the employee's satisfaction. For example, the process might begin by asking the employee to discuss the issue with a manager. If the employee isn't satisfied, he or she might have the option of filing a formal complaint, to be heard by a peer review panel. After that, an appeal might be available, followed by mediation or arbitration.

Related terms: arbitration; mediation.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) is a landmark civil rights law, passed in 1990, which protects people with disabilities from discrimination in many contexts, including employment, government services, public accommodations, and telecommunications. The ADA's main employment provisions prohibit employers from discriminating against qualified people with disabilities. This prohibition applies to all terms, conditions, and privileges of employment, and protects both applicants and current employees. The ADA also requires employers to provide reasonable accommodations—modifications to the job or work environment—to enable qualified people with disabilities to perform their jobs.

The Americans with Disabilities Act Amendments Act (ADAAA). In 2008, President Bush signed the ADAAA, which makes a number of changes and clarifications to the ADA. The stated purpose of the ADAAA was to make clear that Congress intended for the term "disability" to be interpreted broadly, as a national mandate to end discrimination against people with disabilities. Several Supreme Court decisions had limited the scope of the ADA, and the ADAAA explicitly overturns those decisions.

Who has to follow the ADA? The following employers have to comply with the ADA's employment provisions:

- private employers with 15 or more employees
- employment agencies
- labor organizations
- joint labor/management committees, and
- local governments.

The ADA doesn't cover the federal government when it acts as an employer, but a similar law—the Rehabilitation Act of 1973—does.

State employers are required to follow the ADA, but unlike private employees, state employees may not sue their employer for money damages for violating the law. However, state employees may sue their employers for injunctive relief; that is, the employees may ask the court to require the state to take some action or refrain from taking some action. For example, a job applicant could sue the state to prohibit it from requiring all applicants to take a physical, or to require it to provide reasonable test-taking accommodations to applicants who must take civil service exams. State employees may also be able to sue their employers under state antidiscrimination laws. And, the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for interpreting and enforcing federal antidiscrimination laws, may sue state employers on behalf of state employees whose ADA rights have been violated.

Who is protected by the ADA? The ADA protects all qualified people with disabilities who are either current or prospective employees of a covered employer, including part-time and probationary employees. To get the benefits of the ADA, a person must be qualified for the position and must have a disability as defined by the ADA.

Qualified for the position. A person is qualified for a position only if both of the following are true:

- The person satisfies the prerequisites for the position. For example, the person has the required educational degrees, employment experience, skills, licenses, and training.
- The person is able to perform the essential functions of the position, with or without a reasonable accommodation from the employer. Essential functions are the fundamental duties of a job; marginal or minor responsibilities don't count. A function is essential if, for example, the job exists to perform that function (as a pilot's essential function is to fly a plane), only a few employees can perform the function, or the function is so highly specialized that the employer hires people into the position because of their expertise in performing that function.

EXAMPLE 1: Rob has a disability that limits his use of his hands. He applies for a position as a legal secretary. Using a computer for word processing, data entry, and calendaring is an essential function of the job: It's the primary purpose of his position. Rob is physically unable to type, but he can do everything he needs to do using voice-activated software, a reasonable accommodation.

EXAMPLE 2: Rob applies for a job as an electrician. He worked as an electrician before his disability developed, and he has extensive knowledge of the field. Because he can no longer use his hands, Rob proposes that other employees should do all of the physical labor, while he plans projects, directs the work, and interacts with the clients. However, the company already has enough project managers; the job it's trying to fill is for an on-site electrician. Rob isn't qualified for the job because he can't perform its essential functions.

What is a disability? The ADA defines a disability as a physical or mental impairment that substantially limits a major life activity.

Major life activities are those functions that are of central importance to daily life, such as seeing, breathing, working, and caring for oneself. Major bodily functions are also major life activities: If a person's immune system, normal cell growth, or digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, or reproductive functions are impaired, that constitutes a disability.

An impairment qualifies as a disability even if it is episodic or in remission, as long as it substantially limits a major life activity when it is active. This rule, added by the ADAAA, is intended to ensure that obviously serious conditions, like cancer and multiple sclerosis, are treated as disabilities, even if the degree to which they impair someone's day-to-day functioning waxes and wanes.

Another rule added by the ADAAA has to do with "mitigating" measures: drugs, prosthetic devices, implements (such as a cane, wheelchair, or hearing aid), and other items a person uses to counteract the effects of an impairment. Other than ordinary prescription glasses and contact lenses, the ADAAA says that mitigating measures may not be considered when determining whether someone has a disability. Under previous Supreme Court cases, the employer could take mitigating measures into account when assessing someone's condition, which left many people with serious impairments outside of the ADA's protections. For example, someone whose diabetes or epilepsy was controlled with medication would not have been considered to have a disability before the ADAAA.

Alcohol and drug use. Someone who currently uses illegal drugs isn't protected by the ADA, even if the person is addicted. However, someone who no longer uses drugs illegally and is participating in or has completed a drug rehabilitation program is protected from discrimination. An employee who is an alcoholic is also protected by the ADA, but the employer may apply its usual standards of behavior and performance. For example, an employer may discipline an employee who misses work without notice, even if the employee is an alcoholic and was absent because of a binge-drinking episode. What the employer may not do is punish the employee simply for being an alcoholic (for example, because the employee attends

Alcoholics Anonymous meetings or takes prescription medication to curb the urge to drink).

Past and perceived impairments also count. The ADA doesn't just protect those who currently have a disability. It also protects those with a history of disability (for example, someone who had a stroke or suffered an episode of postpartum depression in the past). And, it protects those who are perceived, even incorrectly, as having a disability (these are referred to as "regarded as" claims). Although those who are incorrectly regarded as having a disability aren't entitled to a reasonable accommodation (because they don't actually have a disability), they are protected from discrimination.

> **EXAMPLE:** Jonas has a discernible stutter. He is able to speak clearly and be understood; he just occasionally gets stuck on a word. Jonas is up for a promotion that would require him to give a monthly report to a company's board of directors. His manager decides not to promote him, based on the incorrect belief that Jonas's stutter would prevent him from doing the presentations. Jonas isn't entitled to a reasonable accommodation because he doesn't need one: He is perfectly capable of giving a monthly report without any assistance. But Jonas is entitled to be protected from discrimination based on perceptions about his condition, which means he shouldn't be denied the promotion based on his stutter.

Rules for medical examinations and medical records. Under the ADA, an employer may require job applicants to take a medical exam only if all four of these requirements are met:

- The exam may be required only after the employer has made a conditional offer of employment.
- All applicants must be required to take the exam, whether or not they have a disability.
- The exam must be the final stage in the screening process.
- The results of the exam must be kept in separate, confidential medical files.

This final requirement applies to all records relating to an applicant's or employee's disability, not just records of medical exams. These records must be kept confidential, and may be revealed only under limited circumstances.

Related terms: Americans with Disabilities Act Amendments Act; disability; reasonable accommodation.

Americans with Disabilities Act Amendments Act

The Americans with Disabilities Act Amendments Act (ADAAA), signed by President Bush in 2008, makes a number of changes to the Americans with Disabilities Act (ADA). The ADAAA signaled Congress's frustration with the narrow way in which courts—particularly the U.S. Supreme Court—were interpreting the ADA, with the result that many people who should have been helped by the law were seeing their cases thrown out of court.

The ADAAA states that Congress intended for the term "disability" to be interpreted broadly, as a national mandate to end discrimination against people with disabilities. The law indicates that the courts have ignored this mandate, instead interpreting the term "disability" in such a limited way that very few people qualify for the ADA's protections. The law directs courts that their primary focus in ADA cases should be on whether the employer met its obligations under the law, and that determining whether the employee or applicant has a disability should not require extensive analysis.

To ensure that the ADA is interpreted more expansively, the ADAAA includes these changes:

- To ensure that more people are protected by the ADA, the EEOC is directed to change its interpretation of "substantially limits a major life activity" (the legal definition of a disability) to set a less restrictive standard for coverage.
- Major life activities include major bodily functions, such as the proper functioning of the immune system and normal cell growth.

The Case That Broke Congress's Back: *Toyota Motor Manufacturing v. Williams*

Ella Williams worked on the Quality Control Inspections Operations (QCIO) team at Toyota, checking the shell and paint on cars passing on a conveyer. Williams was diagnosed with bilateral carpal tunnel syndrome and tendinitis while working on an engine assembly line. Initially, her work on the QCIO team included only two tasks, which she was able to perform.

But when additional tasks were added that required her to hold her hand and arms at shoulder height for several hours at a time, Williams developed additional problems, which caused her pain in the neck and shoulders. Williams asked Toyota to let her do only the two tasks that didn't cause her pain. Toyota refused, and Williams was eventually fired for poor attendance. Williams then sued Toyota for refusing to accommodate her disability.

Under the ADA, an employee has a disability if she has a physical or mental impairment that substantially limits one or more of her major life activities. Williams argued that her medical conditions substantially limited her ability to perform manual tasks. The Court of Appeals for the 6th Circuit agreed, finding that Williams's conditions substantially limited her ability to perform a class of manual activities related to her tasks at work. Toyota then appealed to the Supreme Court.

The Supreme Court found that it is not enough for an employee to show that she cannot perform the manual tasks her job requires: instead, she must show that her condition prevents or severely restricts her ability to do manual activities of central importance to most people's daily lives—like household chores, bathing, and brushing their teeth. The Court pointed out that some jobs require unique manual tasks that are not part of daily life and to say that people who can't perform these tasks are disabled would expand the reach of the ADA beyond what Congress intended when it passed the law.

Congress's response? Don't be so quick to tell us what we intended, Supreme Court. Congress mentions this case four times in the ADAAA, all with a strong tone of disapproval. In fact, one of the stated purposes of the ADAAA is to reject the standards of "substantially limits" and "major life activities" expressed in the *Toyota* case; another is to express the sense of Congress that the *Toyota* case "creates an inappropriately high level of limitation necessary to obtain coverage under the ADA." So there.

- Impairments can be disabilities even if they are in remission or episodic, as long as they substantially limit a major life activity when they are active.
- An employee may not make a "regarded as" claim of disability discrimination based on a minor and transitory impairment (one with an expected duration of six months or less). (In a "regarded as" claim, the employee argues that the employer discriminated against the employee not because the employee actually had a disability, but because the employer incorrectly regarded the employee as having a disability.)
- Mitigating measures, other than ordinary prescription glasses and contact lenses, may not be considered in determining whether an employee has a disability.
- Employees or applicants who qualify for the ADA's protection solely because their employer "regards" them as having a disability (in other words, employees who do not actually have a disability) are not entitled to reasonable accommodations.

Related terms: Americans with Disabilities Act; disability; major life activity; reasonable accommodation.

arbitration

Arbitration is an out-of-court procedure for resolving disputes in which one or more neutral third parties (called an arbitrator or arbitration panel) hears evidence and arguments from both sides, and then reaches a decision. (Because it's an alternative to litigation, arbitration is a form of alternative dispute resolution or ADR.) Arbitration has long been used to resolve commercial and labor disputes, but its popularity is growing as a means of resolving problems of all kinds.

Arbitration can be binding or nonbinding. In binding arbitration, the arbitrator or panel issues a decision that both parties are legally obligated to follow, just like a court order. Typically, it's difficult to appeal an arbitrator's ruling, except in cases where the arbitrator had a conflict of interest or was biased in some way. In nonbinding arbitration, either party is free to reject the arbitrator's decision and take the dispute to court, as if the arbitration had never taken place. Binding arbitration is far more common, particularly in employment disputes.

Although arbitration may be required by statute or court order, it's most often contractual. Sometimes, both parties agree ahead of time that it makes more sense to resolve their disputes outside of court. Sometimes, one side insists, as a condition of entering into an employment relationship, consumer agreement, or other contract, that the other side must give up its right to take disputes to court, and instead agree to resolve disagreements through arbitration. In the latter case, if the employee, consumer, or other person on the receiving end of the arbitration agreement later wants to sue, that person will have to prove that the arbitration provision is invalid.

Arbitration as a condition of employment. Contractual arbitration occurs only if both parties agree to it, and only according to their agreement. In employment disputes, however, arbitration usually works somewhat differently. Typically, an employee is asked to sign a standard arbitration agreement upon beginning employment, and there's no room for negotiation. The employee has the choice of signing the agreement as is, with terms of the employer's choosing, and keeping the job; or refusing to sign the agreement and looking for other work.

Because of the disparity in bargaining power between employers and employees, and because arbitration agreements require employees to give up a significant right—to take their disputes to court—these agreement are examined more closely when challenged in court than an arbitration agreement between equal parties (two businesses, for example). This is particularly so when an employer wants to compel an employee to give up the right to litigate claims over important statutory rights, such as the rights created by laws that prohibit discrimination and harassment.

Types of Arbitration

There are some hybrid forms of arbitration, including:

- **Med/arb** (pronounced "meed-arb"). The parties agree to try to resolve their dispute through mediation. However, they also agree that if the mediation doesn't result in a settlement, the mediator (or another neutral party) can act as an arbitrator and make a binding decision. Med/arb gives the assurance that the dispute will be resolved, one way or the other. The parties will either reach their own agreement or one will be imposed on them.
- **High-low arbitration.** Like most types of arbitration, high-low arbitration is binding on both parties. However, to reduce the risk of an unacceptable award, the parties agree in advance to high and low limits on the arbitrator's authority. For example, they might agree that the arbitrator can award no less than $300,000 and no more than $500,000 to the wining party.
- **Baseball arbitration.** Along with evidence and arguments, each side gives the arbitrator a figure for which he or she would be willing to settle the case. The arbitrator must then choose one party's figure or the other; no other award can be made.
- **Night baseball arbitration.** As in baseball arbitration, each side chooses a value for the case and exchanges it with the other side. However, these figures are not revealed to the arbitrator (the arbitrator is kept *in the dark*, get it?) The arbitrator makes a decision about the value of the case, and then the parties must accept whichever of their own figures is closer to the arbitrator's award.

The Supreme Court has held that employees may be required to arbitrate (rather than litigate) claims arising out of their employment if they have contractually agreed to do so. However, these arbitration agreements are enforceable only if they meet certain minimum standards, intended to make sure that the underlying rights at issue are preserved and enforced. No one factor or combination of factors is dispositive; instead, courts tend to evaluate all of the circumstances to decide whether the agreement is weighted so heavily in the employer's favor as to be unconscionable, given the disparity in bargaining power. The factors courts consider include:

- **Who pays the cost.** Agreements that require employees to pay more to arbitrate than they would have to pay to litigate a case are frowned upon.
- **How much discovery is allowed.** Giving the parties only limited rights to discovery—the process of exchanging documents, testimony, and evidence before the dispute is argued—tends to favor employers, who already have access to company records, employees, and managers.
- **What damages are allowed.** Agreements that limit the amount an employee can win to far less than the employee could be awarded in court might not be enforced.
- **Who has to arbitrate (and which claims).** Agreements that require employees to arbitrate all claims against the company but allow the company to take all or some claims to litigation might not pass legal muster. Some companies try to get around this requirement by not mentioning who must arbitrate, but only which claims must be arbitrated—and explicitly allowing litigation for claims typically brought only by employers (such as disputes over theft of trade secrets or violation of the duty of loyalty).

Related terms: alternative dispute resolution; mediation.

at-will employment

An employee who works at will may quit at any time, and can be fired at any time, for any reason that is not illegal. (Illegal reasons for firing include discrimination or retaliation, for example.) An at-will employee has no job security: The employee or the employer can end the employment relationship at any time, with or without cause, as long as neither breaks the law in doing so.

In every state but Montana, employees are legally presumed to work at will unless they can prove otherwise. Such proof usually takes the form of documents or oral statements by the employer. (In Montana, employees who have completed an initial probationary period—or have worked for the employer for at least six months, if the employer doesn't use a probationary period—may not be fired without cause.)

Employment documents. Many employers take pains to point out, in their written policies, applications, handbooks, job evaluations, or other employment-related documents, that their employees work at will. If an employee has signed a document agreeing that he or she is an at-will employee, that determines the issue. If the employee manual or other written workplace policies state that employees can be fired at any time or can be fired without cause, that's evidence of at-will status, even if the term "at will" isn't used. On the other hand, some employers have written policies that require good cause to fire, provide an exclusive list of reasons for which employees can be fired, or otherwise provide employees some job protections. If an employer has adopted these kinds of policies, they may undo the at-will presumption.

Similarly, an employee who has signed an employment contract that promises job security is not employed at will. For example, if an employee has a two-year contract that states the employee can be fired during the contract term only for committing a crime, then he is not an at-will employee. If the employee is fired for any reason not specified in the contract, he may well have a legal claim against the employer for breach of contract.

Statements by the employer. If an employer makes any statements, either during the hiring process or after, indicating that employees will be fired only for good cause, that may also undo the employee's at-will status. For example, an employer might say, "You'll always have a home here as long as you do a good job," or "We only fire employees who are unable to meet our performance standards, even after coaching and training." In this situation, especially if the comments have been made repeatedly or played a big role in the employee's decision to take the job, the employer may have restricted its ability to fire at will.

On the other hand, if an employee is told during the hiring process or afterwards that he or she will be an at-will employee, the employer will certainly rely on that statement as proof that it reserved the right to fire for any reason, if it later has to defend a wrongful termination lawsuit.

Related terms: employment contract; good cause; implied contract; wrongful termination.

B

back pay

An employee who wins a lawsuit against a current or former employer may be awarded damages for “back pay”: what the employee would have earned, through the date of the judgment in the lawsuit, if the employer hadn’t done something wrong. This might be the difference between what the employee earned and what she would have earned had she not been illegally denied a promotion or paid less than the minimum wage, or the amount an employee would have earned had he not been illegally fired.

EXAMPLE: Bob is fired from his job on March 1, 2011. At the time, he was earning a monthly salary of $5,000. He files a wrongful termination lawsuit claiming that he was illegally fired for whistleblowing. He wins the lawsuit on June 1, 2012. Bob could be awarded back pay damages of $75,000 because he lost 15 months of his salary.

Employees have to look for work. Fired employees who sue for back pay have a legal obligation to “mitigate” their damages by looking for work. In other words, an employee can’t simply sit idle for months, waiting to win a lawsuit. Instead, the employee must make diligent efforts to find another job. And, if those efforts pay off, the amount the employee actually earned is subtracted from the award. If the employee doesn’t even try to find another job, the former employer might try to have the damages award reduced by the amount the employee would have earned had he or she really looked for another job.

EXAMPLE: Let's say Bob was previously employed as a finish carpenter. He tries for months to find a comparable position, but no one is hiring. After nine months, he accepts a position with a landscaping company, earning $2,500 a month. His back pay award would be $60,000: nine months of lost pay at $5,000 per month, plus six months of back pay at $2,500 per month (the $5,000 he used to earn minus the $2,500 he is earning now). Bob's former employer would have a tough time proving that he should have earned more, given Bob's diligent job search, recession-struck profession, and willingness to take a job that paid a lot less.

Now let's say that the market for finish carpenters in Bob's area is going gangbusters, but he sat around for nine months before looking for work. In the second week of his job search, he was offered a full-time position at about what he used to earn, but he decides to work part-time instead, so he can attend law school. In this situation, Bob's back pay award would be pretty small. Although he didn't actually earn much, he didn't look for work—and he didn't take a comparable position when it was offered. In this situation, Bob's former employer has a good argument that Bob's failure to earn more after he was fired is due to Bob's choices, not the employer's actions.

background check

When an employer runs a background check, it typically verifies that the information the applicant supplied is accurate and complete. For example, an employer might check an applicant's academic records and contact an applicant's former employers to make sure that the applicant has the degrees and experience claimed on his or her resume.

Background checks can also go beyond the information an applicant provides. For example, if the employer is hiring a delivery driver, it might check applicants' driving records. Some employers check applicant credit reports or criminal records, as well.

Employers that hire a third party (such as a private investigator or background checking firm) to conduct background checks must comply with the Fair Credit Reporting Act (FCRA). Among other things, this means the employer must get the applicant's consent in advance and provide certain information to the applicant. Even if the employer does the checking, it still must comply with the FCRA if it gets a report on the applicant from an outside business that compiles such reports regularly, such as a credit bureau.

Related term: Fair Credit Reporting Act.

bargaining unit

A bargaining unit is a group of employees whom a union represents (or seeks to represent) in collective bargaining with an employer. What constitutes an appropriate bargaining unit is often a source of dispute between labor and management, because a union may represent a group of employees only if it receives the support of a majority of employees in the bargaining unit.

To be part of the same bargaining unit, employees must have "a community of interests." In other words, their concerns and circumstances must be sufficiently common that it makes sense for one union to negotiate on behalf of all of the unit's members. Some of the factors a court or the National Labor Relations Board will consider when deciding whether a bargaining unit is appropriate include whether the employees are similar in respect to skills, job duties, supervision, working conditions, work site, and benefits. Usually professional and nonprofessional employees will not be combined in a single bargaining unit.

A single workplace may contain more than one bargaining unit (for example, the butchers, checkers, and janitors in a grocery store might all be members of different bargaining units). A bargaining unit can also include employees from different facilities (for example, all of the cashiers in a chain of retail stores). Employees of different employers may also be combined into one bargaining unit, if the employers have formed an association or banded together for purposes of bargaining with the union.

Related terms: collective bargaining; manager; National Labor Relations Board.

base period

To determine whether an employee is entitled to unemployment insurance benefits, each state establishes a base period, typically a one-year stretch. Depending on the state's rules, an employee must have worked a certain number of weeks, earned a certain amount of compensation, or both, during the base period in order to be eligible for unemployment. In almost every state, the base period is the earliest four of the last five complete quarters of the calendar year immediately before the employee lost his or her job.

> **EXAMPLE:** Kwame is laid off in August 2011. The base period for his unemployment claim is April 1, 2010 through March 31, 2011. The last complete quarter of the calendar year before he was laid off was April 1, 2011 through June 30, 2011, so the base period is the four quarters preceding that one.

What about the last six months? As you can see, the way the base period is measured doesn't count the employee's most recent employment. Depending on when an out-of-work employee files a claim for unemployment, almost six months of work might not be included in the base period. Recognizing this, many states have created an exception for workers who don't have enough hours of work or earnings in the base period to qualify. In these states, employees don't have to skip the last complete calendar quarter. Instead, they can use an alternative base period that includes the last four calendar quarters. This measurement will include more of their most recent work history.

Employees on medical leave may get a longer base period. Some states also have an exception for those who have been out of work for a longer period, typically because of a job-related illness, injury, or disability. These former employees may be entitled to an extended base period, which looks at the worker's hours and earnings before the worker was injured, even if that work history falls outside of the usual base period.

Work and earnings requirements. Some states require employees to have worked a certain amount of time during the base period to be eligible for benefits. In almost every state that imposes this requirement, the employee must have done some work in at least two of the four calendar quarters that make up the base period.

Most states impose an earnings requirement for the base period—either instead of or in addition to the work requirement—before an employee will be eligible for unemployment compensation. States measure the minimum earnings requirement in a variety of ways. Here are the most common:

- **Flat dollar amount.** Some states require workers to earn a minimum amount of wages ($2,500, for example) during the base period.
- **High-quarter wages.** Some states require workers to earn a set minimum during their highest paid quarter of the base period. This requirement may stand alone (for example, the employee must have earned at least $1,300 during the highest paid quarter of the base period to qualify) or may be combined with an additional requirement for the entire base period. In some states, for instance, employees must not only earn a minimum amount during the highest paid quarter, but must also earn a multiple of that amount during the entire base period. This is another way of ensuring that the employee worked at least two quarters during the base period.

EXAMPLE: In Washington, DC, employees must earn at least $1,300 during the highest paid quarter of the base period and at least 1½ times their wages for the highest paid quarter in the entire base period. If Claudette earns $2,200 in her highest paid quarter, she must earn a total of $3,300 during the entire base period to qualify for benefits.

- **Multiple of the weekly benefit amount.** In some states, a worker must earn at least a certain multiple of the weekly benefit he or she would receive in order to qualify. The multiple is generally between 30 and 40.

  EXAMPLE: In Wisconsin, the weekly benefit is 4% of the employee's total wages in the highest paid quarter. If Russ earned $5,000 in this highest paid quarter, his weekly benefit would be $200. To be eligible to earn that benefit, Russ must have earned at least 35 times that amount, or $7,000, in the entire base period. Again, this type of requirement ensures that the employee has earnings in at least two quarters of the base period.

Related term: unemployment benefits.

benefits

Benefits are a type of compensation other than wages or salary. Benefits include things like:

- paid time off (vacation time, holidays, sick time, parental leave, and so on)
- insurance coverage (health insurance, dental coverage, vision insurance, disability insurance, and life insurance, for example)
- retirement plans (such as pensions or 401(k) plans)
- payment or subsidies for items or services the employee would otherwise have to buy (for instance, commuting costs, dry cleaning service, or meals in a company cafeteria), or
- items provided by the employer (including a company car, cell phone, or laptop).

Related terms: Consolidated Omnibus Reconciliation Act of 1985 (COBRA); EAP; health care reform; paid time off (PTO); sick leave; vacation.

Who Gets Benefits—And Who Pays for Them?

According to a March 2010 study by the Bureau of Labor Statistics (BLS), medical benefits are available to 71% of employees in the private sector. However, employers don't foot the whole bill for health care coverage: On average, the employer pays 80% of the premium for single coverage, and 70% of the premium for family coverage, with employees picking up the rest of the cost. (You can see the whole report at www.bls.gov.)

Almost two-thirds of employees in private industry have access to some type of retirement benefits, but that doesn't necessarily mean employers are paying the tab. These statistics could include, for example, companies that make a 401(k) plan available for employee contributions, but don't provide a match—as a growing number of companies have chosen to do in the current economic climate. According to a June 2010 study by the consulting firm Towers Watson, 18% of surveyed companies suspended or reduced their 401(k) match since September 2008, and about half of them hadn't restored their match by Spring of 2010.

bereavement leave

Bereavement leave is time off work to attend the funeral or deal with practical matters relating to someone's death. Employees in the United States have no legal right to bereavement leave, so employers that offer it are free to set limits as they see fit. Some employers that choose to offer bereavement leave provide it only for the death of an immediate family member or only to attend the funeral or memorial service, for example, while others are more generous.

BFOQ

See bona fide occupational qualification.

blacklisting

Blacklisting means trying to prevent someone from being hired or finding work (as in, "You'll never work in this town again!") More than half of the states have laws that prohibit employers from taking certain actions to prevent former employees from getting a new job. Some prohibit employers from actually creating or circulating a "blacklist" (made up, for example, of employees who are union organizers or supporters). Others are less literal, and prohibit a variety of actions a former employer might take to prevent employees from finding work or to get them fired from a new job. To violate this second type of law, the former employer typically has to make threats or false statements. An employer who is asked to give a reference and makes honest, good faith statements about the reasons an employee was fired isn't guilty of blacklisting.

The Hollywood Ten. A famous historical blacklist took effect in the entertainment industry after World War II. Actors, directors, screenwriters, and others who refused to testify before the House Un-American Activities Committee (HUAC) in 1947 regarding their current or former membership in the Communist party were the first names on the blacklist, the so-called "Hollywood Ten." Shortly after their refusal to testify before HUAC, a group of film industry executives announced that all ten would be fired and would not again be hired until they had sworn that they were not Communists. As HUAC continued its work, the blacklist grew to include others who refused to testify or who were accused of Communist tendencies.

Related terms: defamation; reference.

bona fide occupational qualification

A bona fide occupational qualification (or BFOQ for short) is a very narrow exception to Title VII, the primary federal law that prohibits employment discrimination. Title VII prohibits employers from making employment decisions (such as whom to hire, promote, or fire) on the basis of protected characteristics, including race, color, gender, religion, and national origin. The BFOQ exception allows employers to make decisions on the basis of gender, religion, or national origin (but not race or color) if that characteristic is "a bona fide occupational qualification reasonably necessary to the normal operation of that business or enterprise." In other words, if the nature of the job is such that it can be done only by a woman or a Catholic, the employer may use those criteria in filling the job.

What's a BFOQ? Here are some circumstances in which courts and agencies have found that an employer may rely on the BFOQ defense:

- When hiring prison guards who will perform intimate searches of inmates, an employer may choose employees of the same gender as the inmates.
- When conducting layoffs of nursing staff, a hospital may decide to keep a certain number of male nurses, to make sure they are available to assist with procedures in which male patients must be naked.
- A Jesuit university may reserve a certain number of teaching positions in its philosophy department for Jesuit professors.
- A director may consider only female actors to play a female role (such as Hamlet's mother) in a traditional stage production.

What isn't a BFOQ? Here are some BFOQ arguments that haven't worked:

- Customers prefer to see only women or only men in a particular job position. Courts haven't allowed this one. For example, airlines used to argue that it should be able to hire only female flight attendants, because that's what passengers wanted; courts disagreed.
- Gender stereotypes dictate that only men or women hold certain jobs—for example, that the waiters in high-class restaurants must be men or those working in the nursing profession must be women.

Related terms: religious discrimination; sex discrimination; Title VII.

Childbearing and the BFOQ: The *Johnson Controls* Case

The Johnson Controls Company, which manufactures batteries (among other things), prohibited women of child-bearing age from working in jobs that would or could expose them to lead. The company defined "women of child-bearing age" as all women except those whose infertility was medically documented. A group of women brought a class action challenging this fetal protection policy as illegal gender discrimination.

No one disputed that the intentions behind Johnson Controls' policy were good: The company wanted to prevent birth defects. However, the Supreme Court found that the policy was discriminatory. It excluded only women from these jobs, even though evidence shows that men's reproductive systems can also be harmed by lead exposure. Therefore, the policy was illegal unless Johnson Controls could prove a BFOQ defense.

The Supreme Court found that it could not. Johnson Controls argued that it was necessary to exclude women for their own safety (and the safety of their future children). However, the Court found that the BFOQ defense was available only if the protected characteristic in question (here, a woman's reproductive capacity) prevented those employees from doing the job. There was no dispute that women with the ability to bear children could make batteries just as well as anyone else.

The Court pointed out that decisions that could affect the welfare of future children had to be left to the parents, not their employer. The policy, which, as the Court put it, allowed the employer to fire a woman "because of her refusal to submit to sterilization" was illegal:

"It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."

International Union, UAW v. Johnson Controls, 499 U.S. 187 (1991).

bona fide seniority system

A bona fide seniority system is one that uses length of service with the employer as the primary criterion for deciding who will receive employment opportunities and benefits. For a system to be "bona fide," its essential terms and conditions must be communicated to employees and applied uniformly to everyone.

As a defense to discrimination claims. Under federal antidiscrimination law, an employer may make job decisions based on a bona fide seniority system even if there's an adverse impact on a protected class of employees, as long as the employer had no intent to discriminate.

> **EXAMPLE:** A manufacturing employer in Lewiston, Maine, has to lay off a large number of workers, and it selects employees for layoff strictly based on seniority. Lewiston has seen a huge influx of immigrants from Somalia in the last ten years, and many are employed with the company. Even if a disproportionately large number of employees of Somalian descent lose their jobs in the layoff, it will not be discriminatory as long as the selection was based on seniority, without intent to discriminate.

Related terms: Age Discrimination in Employment Act; Title VII.

boycott

When consumers refuse to patronize a company (or a person or country) because of its policies or practices, that's commonly known as a boycott. For example, many Californians boycotted table grapes grown in the state in the 1960s and '70s, to protest the treatment of farmworkers. Typically, the goal of a boycott is to create pressure for change.

That's Mr. Boycott to You

The term "boycott" comes from Captain Charles Cunningham Boycott, a farmer and a land agent for an English landlord in Ireland. After he refused to reduce tenant rents following a poor harvest (and evicted tenants who could not pay), he was subjected to the first recorded boycott. No one in the town, from laborers to merchants to the postman, would have anything to do with him.

Secondary boycotts. Under the National Labor Relations Act, unions may not engage in secondary boycotts. A secondary boycott is one in which the union tries to pressure another company to boycott the company with which it is having a dispute. For example, say the union is striking over wage cuts at a grocery store chain. If the union picketed a large dairy facility to try to get it to stop doing business with the chain, as a way to force the chain to give in to the union's demands, that would be an illegal secondary boycott.

Related term: unfair labor practice.

business necessity

Business necessity is a shorthand term for an employer's defense to a discrimination claim based on disparate impact. An employee who brings a disparate impact claim alleges that an employment policy or practice that appears to be nonbiased (or is "facially neutral") has a disproportionately negative effect on employees with a particular protected characteristic. For example, an employee might claim that requiring all applicants for promotion to achieve a minimum score on a written test had a disparate impact on African American and Latino candidates, or that requiring all applicants to be able to lift 50 pounds disqualified disproportionate numbers of women.

But what if the job requires it? Of course, job requirements like these may be perfectly legitimate. For example, a person who works loading and unloading heavy packages must have some strength to do the job, a police officer must be able to chase suspects, a litigator must have passed the state bar exam, and a public speaker must be fluent in the language(s) the audience speaks. Recognizing this, the law allows employers to defend against a disparate impact claim by showing that the policy or requirement is job related and consistent with business necessity.

How necessary is that necessity? Precisely what qualifies as a "business necessity" is in some dispute. The Supreme Court has said that, when the criteria for job selection are challenged as having a disparate impact, the employer must be able to show that the criteria are necessary to safe and efficient performance of the job. However, other courts have disagreed over whether it's enough for an employer to show that the challenged policy or practice is legitimately related to successful performance of the job or whether something more is required—for example, that meeting the criteria is essential to job performance or that the job itself is essential to the employer's business operations.

Even if the employer can prove business necessity, the employee can still win by showing that there is a less discriminatory alternative—another practice that would satisfy the employer's legitimate business interest with less disparate impact—which the employer is aware of and refuses to adopt.

The *Wards Cove* Case (Temporarily) Changes the Rules for Business Necessity

In the case of *Wards Cove Packing Co. v. Atonio*, the Supreme Court decided against a group of employees in a disparate impact case. The employees worked in Wards Cove's Alaskan salmon canneries. They claimed that the company's selection practices had resulted in a skewed workforce, in which most of the cannery line jobs were filled by nonwhite employees (primarily Alaska natives and Filipinos), while most of the higher paid cannery jobs that didn't involve actually working the line were filled by white employees. To add to the racial overtones, those who worked the line and those who did not were

The *Wards Cove* Case (Temporarily) Changes the Rules for Business Necessity (continued)

housed in separate dormitories and ate in separate cafeteria facilities, which led to segregation outside of work hours as well.

The Court decided a number of issues in the *Wards Cove* case, all of them controversial. For example, the Court found that, in order to prove a disparate impact, the employees had to prove that specific selection criteria caused the discrepancy; it wasn't enough to show a significant disparity in the ultimate outcome of who got hired for particular jobs.

The Court also took on the business necessity defense, finding that the employer had to present evidence that the challenged practice "serves, in a significant way, the legitimate employment goals of the employer." The Court went on to say that, once the employer presented some evidence in support of its business necessity defense, the employees bore the ultimate burden of disproving that defense. These controversial holdings were overturned by the Civil Rights Act of 1991, which explicitly stated that disparate impact and the business necessity defense were to be interpreted as they existed before the *Wards Cove* case.

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

Related terms: Civil Rights Act of 1991; disparate impact; Title VII.

Byrne v. Avon Products Inc.

See Family and Medical Leave Act.

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