**SHRM Employment Law**

Module 3: Discrimination





Time:  2 minutes

Running time: 2 minutes

**Objective**: Introduce the topic of Discrimination.

**Description**:  Introduction to the topic and why it is important.

**Instructional Method**: Lecture/ice breaker

**Script:**

Naturally flowing from the body of Equal Opportunity Employment laws we discussed in Module Two are the realities of trying to enforce EEO laws. In spite of so many federal, state, and local laws, many types of discrimination still exist in our workplaces. In this module, we will describe various types of discrimination and how to get help if you are discriminated against in the workplace.

**Facilitator Notes:**

Add your name or any other information to this slide in the subtitle.

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Time:  2 minutes

Running time: 4 minutes

**Objective**: Introduce the learning objectives.

**Description**: Show the objectives.  Answer any questions.

**Instructional Method**: Lecture

**Script**:

Here are the student objectives for this module:

* Define the key terms related to discrimination
* Determine the appropriate laws to apply to given employment situations.
* Differentiate between disparate impact and disparate treatment.
* Discuss how bona fide occupational qualifications are applied in the workplace.
* Identify various types of discrimination.
* Recognize the appropriate steps for filing a complaint when employment rights are violated.

**Facilitator Notes:**

Use the objectives topics to create evaluation for the review.

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Time:  15 minutes

Running time: 19 minutes

**Objective**: Define key terms for Discrimination

**Description**: Identify and define key terms for Discrimination

**Instructional Method**: Game

**Script**:

Let’s play a game to define some key terms used in the compensation and benefits profession.

**Exercise**:  Key terms Game

**Note**: The winning group will have the most key terms listed and defined. Hint: There are 35 and many have Latin names.

5 Minutes

1. Put students into groups of 3 - 6
2. Have students list terms that are important to know when disusing discrimination.
3. Have students define their terms.

10 minutes

1. Click to show the terms on the slide (click twice)
2. Have different groups define
3. The team with the most is the winner.

Facilitator Notes:

Key Terms

1. **Adverse action**- An action taken by an employer that has negative consequences for the employee, typically as a result of discrimination and/or retaliation.
2. **Back pay**- Wages awarded to an employee that were lost due to illegal conduct on the part of the employer.
3. **Bias**- A conscious or unconscious treatment of certain individuals in either a positive or negative fashion that is driven by another individual’s pre-conceived ideals, attitudes, and practices and based on a factor unrelated to an individual’s ability to perform job duties.
4. **Bona fide occupational qualification (BFOQ)**- “Provides an exception to prohibition of discrimination based on sex, religion, or national origin. That exception recognizes that in some extremely rare instances a person's sex, religion, or national origin may be reasonably necessary to carrying out a particular job function in the normal operation of an employer's business or enterprise. The protected class of race is not included in the statutory exception and clearly cannot, under any circumstances, be considered a BFOQ for any job” (EEOC.gov).
5. **Bona fide seniority system**- A exception to Title VII’s non-discrimination statute and allows employers to “apply different standards of compensation, or different terms, conditions, or privileges of employment” (EEOC.gov) if it does so under the terms of a bona fide seniority system that rewards employees for longevity with the employer.
6. **Business Necessity**- A legal defense to a claim of disparate impact discrimination. The employer has a legitimate business need for an employment requirement that may disproportionately impact a protected class of applicants.
7. **Circumstantial evidence**- Information that makes it appear that discrimination has occurred, but is not enough evidence to prove that it happened.
8. **Compensatory damages**- Financial compensation awarded to victims of discrimination or other harm. The individual/organization who caused/allowed the harm to occur is responsible for compensating the victim.
9. ***de minimis***- an insignificant cost for an employer to make an accommodation or a very minor violation of laws or regulations.
10. **Direct evidence**- Proof of discrimination or harassment, such as video evidence.
11. **Discrimination**- “acts and omissions by employers, universities, providers of public transportation and accommodations, and others resulting in treated a protected person or class of persons in ways prohibited by law” (Fields & Chessman, 2022, p. 719).
12. **Disparate Impact**-When an employment policy or practice has a negative or discriminatory impact on any protected employee or group of employees. This is an unintentional consequence of a seemingly neutral policy or practice.
13. **Disparate Treatment**- When an employment policy or practice has an intentional negative or discriminatory impact on any protected employee or group of employees.
14. **English-only rules**- A rule that requires that employees speak only English in the workplace.
15. **Essential job function**- The group of tasks that make up any job description. This group of tasks must be successfully completed by the employee with or without accommodation.
16. **Genetic information**- Any medical information that is available that would reveal protected health information that might indicate the development of future medical conditions.
17. **Genetic testing**- Medical testing to determine if a person has a predisposition to develop certain types of medical conditions.
18. **Harassment-** An act of intentional discrimination (disparate treatment) based on a person’s protected characteristic.
19. **Hostile work environment**- A work environment that has been so influenced by discrimination and/or harassment as to become untenable to work in.
20. **Major life activity**- “Major life activities are those functions that are important to most people’s daily lives. Examples of major life activities are breathing, walking, talking, hearing, seeing, sleeping, caring for one’s self, performing manual tasks, and working. Major life activities also include major bodily functions such as immune system functions, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions” (adata.org).
21. **Ministerial exception**- When a faith-based organization exercises an exception to laws concerning religious discrimination.
22. **National origin group or ethnic group**- the country or place from which you and/or your ancestors originated from.
23. **Prima facie case**- The protected employee must first establish sufficient evidence to support their claim that discrimination occurred.
24. **Protected class**- Individuals that are protected by the various EEO laws in the U.S.
25. **Punitive damages**-Extra compensation awarded that is intended to not only make the plaintiff whole but to punish the defendant.
26. ***quid pro quo* sexual harassment**- A Latin phrase that means “this for that”. This type of sexual harassment is committed by a supervisor or someone who has hiring, firing, promotion, work assignments, and other authority or strong influence over the victim.
27. **Retaliation**- Adverse action taken against an employee who complains about discrimination.
28. **Right to sue letter**- A letter from the EEOC that gives an employee who has been discriminated against the right to sue in Federal courts.
29. **Reasonable accommodation- “**modification or adjustment to a job, the work environment, or the way things are usually done during the hiring process. These modifications enable an individual with a disability to have an equal opportunity not only to get a job but successfully perform their job tasks to the same extent as people without disabilities” (DOL.gov)..
30. **Regarded as having an impairment**- the assumption that a person has a physical or mental disability due to rumors and/or physical/mental symptoms or appearance of symptoms.
31. **Religion-** a set of closely-held beliefs and practices, typically held by a group of people.
32. **Sex discrimination**- Discrimination on the basis of sex; including gender, gender identity, and sexual orientation.
33. **Sex-plus discrimination- “**Discrimination based on gender and some additional factor such as marital status or children” (Bennett-Alexander, 2022, p.966).
34. **Stereotypes-** A belief or attitude that all persons of a certain race, sex, nationality, religion, or other group of people all share a common trait.
35. **Undue Hardship-** “Accommodations that are unduly costly, extensive, substantial, or disruptive or that would require fundamental alteration of the nature or operation of the business” (Walsh, 2018, p. 759).

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Time:  1 minutes

Running time: 20 minutes

**Objective**: Review the definition for Discrimination.

**Description**: Review the definition for Discrimination.

**Instructional Method**: Lecture

**Script**:

Before we can discuss ***discrimination***, we need to establish a firm definition of what the word discrimination means. Discrimination is any ***adverse action*** that takes place against any employee that is a member of a ***protected class***. This can include a wide variety of behaviors from subtle comments to outright violence. In this module, we are going to discuss the discriminatory behaviors that are prohibited by the EEO laws presented in Module Two. The behaviors listed and used as examples are not intended to be exhaustive of every type of discriminatory behavior that one might encounter in the workplace.

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Time:  5 minutes

Running time: 25 minutes

**Objective**: Differentiate between disparate impact and disparate treatment.

**Description**: Define these key terms related to discrimination

**Instructional Method**: Lecture - Large Group discussion

**Script**:

First, discriminatory activity falls into one of two categories, ***disparate impact***, and ***disparate treatment.***

***Disparate impact*** is unintentional discrimination against a protected class of persons. This means that while the employer didn’t necessarily intend to discriminate against a protected class of persons, some part of their employment policies or practices had the unintentional impact of being discriminatory.

Disparate Treatment

***Disparate Treatment*** is exactly the opposite of disparate impact. Disparate treatment is the conscious, intentional adverse treatment of a person who is in a protected class.

This type of treatment is overt and obvious as illustrated in the photos below. When we see old photo images like these, it might lead us to believe that disparate treatment of protected people is no longer occurring, but that is unfortunately not the case.

**Ask**: What are examples of disparate impact and disparate treatment that you have heard about or experienced?

**Facilitator Notes:**   
An example of disparate impact can be reviewed in the details of [*U.S. EEOC v. CSX Transportation, Inc*](https://www.eeoc.gov/newsroom/csx-transportation-pay-32-million-settle-eeoc-disparate-impact-sex-discrimination-case)*. Case no. 3:17-cv-03731*. In this case, “CSX Transportation, Inc., a provider of rail-based transportation services with operations throughout the eastern half of the United States, violated federal law by implementing a physical abilities test battery that causes a class-wide disparate impact on female workers seeking a range of jobs at CSX” ([EEOC.gov](https://www.eeoc.gov/newsroom/csx-transportation-pay-32-million-settle-eeoc-disparate-impact-sex-discrimination-case)).

Essentially, the company required a wide range of strength and endurance tests for a number of positions that were not job-related or required in order to be able to perform the essential functions of jobs such as conductor, material handler/clerk, and others. These unrelated job tests had a disparate impact against female employees who historically scored much lower than male applicants, thereby creating the effect of discriminating against female workers and applicants- even if it wasn’t a conscious, deliberate action.

Any type of employment test must be job-related and directly tied to the essential functions necessary to successfully perform the job by any employee hired to perform those duties. A worker’s sex is protected under [Title VII of the Civil Rights Act of 1964](https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964) and may not be used as a reason to deny employment except in rare circumstances as discussed in more detail below.

[Photo - https://planetolios.com/2019/08/02/gop-blacks-need-not-apply/](https://planetolios.com/2019/08/02/gop-blacks-need-not-apply/)

Photo:  <https://associated.org/shinealight/>

Graphical user interface

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Time:  2 minutes

Running time: 27 minutes

**Objective**: Discuss the appropriate laws to apply to given discrimination situations.

**Description**: Explain Business Necessity and how it applies to discrimination.

**Instructional Method**: Lecture and transition

**Script**:

Business Necessity is the only legal defense to a claim of disparate impact discrimination. The employer must have a legitimate business need for an employment requirement that may disproportionately impact a protected class of applicants.

For example, a company may require delivery drivers to be at least 25 years old because it is the requirement of the insurance company that covers the delivery vehicles.

Each year, the EEOC provides a variety of data to the general public. One such report is the [Fiscal Year 2020 Enforcement and Litigation Data Report](https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data) which was released on February 26, 2021.

Total Number of Charge Receipts and Resolutions

FY 2016 - FY 2020

<https://www.eeoc.gov/data/data-visualizations-all-charge-data>

FY 2016 – FY 2020:

* Total receipts decreased by 24,055 (-26.3%)
* Total resolutions decreased by 26,639 (-27.3%)

\*Charge data includes all charges filed by individuals in the private sector and state and local government workplaces; it does not include discrimination complaints in the federal sector.

\*\*For all definitions of terms please go to: <https://www.eeoc.gov/enforcement/definitions-terms>.

While this visual doesn’t show a complete picture of the impacts of claims of discrimination, it does show plainly that discriminatory actions are still taking place all across the nation, every day. Keep in mind that the sharp decrease in claims in 2020 may be reflective of the COVID-19 pandemic.  
  
  
Let’s take a closer look at the various types of discrimination that are covered by EEO laws.

Chart, diagram

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Time:  14 minutes

Running time: 41 minutes

**Objective**: Identify various types of discrimination.

**Description**: Identify and discuss various types of discrimination.

**Instructional Method**: Exercise - Discussions

**Script**:

Let’s discuss the various types of Discrimination.

**Exercise**: Types of discrimination (14 minutes)

1. Assign students to 1 of 7 groups.
2. Have students discuss questions.
3. Have each group answer the questions on the slide – use a flip chart (or whiteboard) to document answers.
4. Walk around the room (or breakout rooms) to add anything else.
5. Have students walk to each group’s document and take notes/discuss.

**Note**: Answer any questions or review important information that was discussed.

Refer to EL Study aid 3: Types of Discrimination

**Facilitator Notes:**

Race/Color

“[Race discrimination](https://www.eeoc.gov/racecolor-discrimination) involves treating someone (an applicant or employee) unfavorably because he/she/they are of a certain race or because of personal characteristics associated with race (such as hair texture, skin color, or certain facial features). Color discrimination involves treating someone unfavorably because of skin color complexion” ([EEOC.gov](https://www.eeoc.gov/racecolor-discrimination)). This law applies to employers having 15 or more employees.

Refusing to hire a person based on race characteristics such as color is against the law, just as refusing to pay similar wages, promote, and terminate on the basis of such a protected characteristic.

An example of racial discrimination can be viewed in the details of [*EEOC v. Prewett Enterprises*](https://www.eeoc.gov/newsroom/prewett-enterprises-desoto-marine-pay-quarter-million-settle-eeoc-race-harassment-lawsuit). In this case, “supervisors and managers subjected African American employees to daily ***harassment*** and humiliation because of their race by calling them racially offensive and derogatory names and assigned Black employees the more dangerous job duties” ([EEOC.gov](https://www.eeoc.gov/newsroom/prewett-enterprises-desoto-marine-pay-quarter-million-settle-eeoc-race-harassment-lawsuit)). The company was found liable and ordered to pay $250,000 and make changes in their employment practices.

There is additional legislation that passed the U.S. House of Representatives on March 18, 2022. It’s called the [*Creating a Respectful and Open World for Natural Hair Act of 2022*](https://www.congress.gov/bill/117th-congress/house-bill/2116) or the CROWN Act of 2022. This bill would make it illegal to discriminate on the basis of a “person’s hair texture or hairstyle if that style or texture is commonly associated with a particular race or national origin” ([congress.gov](https://www.congress.gov/bill/117th-congress/house-bill/2116)). Several states have already passed their own versions of the bill as well.

[In 2021, the EEOC received 20,908 charges of discrimination based on race](https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021), so this problem has not been eradicated in our workplaces yet in spite of a variety of laws and [Affirmative Action](https://www.dol.gov/general/topic/hiring/affirmativeact).  
  
**What does this mean for employers?**

* An employer may not advertise for applicants of a certain race, and may not exclude any race from applying for an open position.
* An employer may not participate in or allow racial slurs and/or derogatory comments about a person’s race or color, and cannot allow the display of racially offensive symbols.
* An employer may not use race as a determining factor in any “aspect of employment, including firing, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or conditions of employment” ([EEOC.gov](https://www.eeoc.gov/racecolor-discrimination)).
* An employer may not create a policy or practice that has an impact of being discriminatory against persons of color.

Religion

[Religious discrimination](https://www.eeoc.gov/religious-discrimination) is the act of treating someone poorly due to their religious beliefs. The law doesn’t apply only to mainstream religions that everyone is familiar with, but also to the “sincerely held religious, ethical or moral beliefs” ([EEOC.gov](https://www.eeoc.gov/religious-discrimination)). The law applies to employers with 15 or more employees and applies to all aspects of employment.

Employees are free to exercise their faith in the workplace unless doing so would place an ***undue hardship*** on the employer. This means they can wear clothing that aligns with their faith- even if uniforms are required. For example, a Muslim woman can wear a hijab in addition to the required uniform, as well as make an accommodation to wear a skirt if that is required by a person’s faith.

A 2022 example of religious discrimination can be found in the case [*EEOC v. United Airlines Inc., Civil Action No. 20-cv-9110*](https://www.eeoc.gov/newsroom/united-airlines-pay-305000-settle-eeoc-religious-discrimination-lawsuit)*.* In this case, a United Airlines pilot (who is Buddhist) lost his medical license to fly due to a diagnosis of alcohol dependency. United required all pilots with substance abuse problems to attend Alcoholics Anonymous as part of the process of re-earning their medical clearance. The pilot objected to the religious teachings of AA and asked to substitute a Buddhism-based peer support group instead, and United refused to allow the substitution. The pilot was unable to renew his medical clearance as a result, so he filed a complaint with the EEOC for religious discrimination.

Here’s the result from the [EEOC.gov](https://www.eeoc.gov/newsroom/united-airlines-pay-305000-settle-eeoc-religious-discrimination-lawsuit) website:

Under the consent decree that resolves the lawsuit, United will pay the pilot $305,000 in back pay and damages and will reinstate him into its HIMS Program while allowing him to attend a non-12-step peer recovery program. The company will also accept religious accommo­dation requests in its HIMS Program going forward, institute a new policy on religious accom­modations, and train its employees.

*Ministerial Exception*

Some organizations, such as churches, faith-based hospitals, faith-based charities, etc. can claim the [***Ministerial Exception***](https://constitution.congress.gov/browse/essay/amdt1-2-3-4/ALDE_00013117/) rule which allows employers to discriminate on the basis of religion and gender. For example, a private school owned by the Catholic Church can choose to hire only Catholic Nuns and Catholic Priests as teachers. In that same vein of thought, the Catholic Church can hire only men to be priests and only women to be nuns because they are protected from discrimination laws because of their closely-held religious beliefs.

**What does this mean for employers?**

* An employer may not treat employees adversely on the basis of religion, lack of religion, or assumed religion.
* An employer may not allow offensive comments to be made concerning an employee’s religious faith.
* An employer cannot force an employee to participate (or not participate) in a religious activity as a condition of employment.
* Employers must allow employees to practice their faith in the workplace.
* Employers must accommodate an employee’s religious beliefs and practices in terms of dress, facial hair, head coverings, time for prayers, etc.

Sex

[Sex discrimination](https://www.eeoc.gov/sex-based-discrimination) is the act of taking adverse action in employment against a person because of that person’s sex. Employers having 15 or more employees are covered by the law. Employers may not discriminate on the basis of sex in any aspect of employment.

Examples of this would be refusing to hire women in traditionally male roles (or vice versa) when they are clearly qualified for the position otherwise.

Another example would be only promoting men into upper management positions.

*Sexual Orientation and Gender Identity*

Discrimination against an employee because of their [gender identity, transgender status, or sexual orientation](https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination) is also covered under the sex discrimination prohibition of Title VII of the Civil Rights Act of 1964.

In [*EEOC v. Neighborhood Restaurant Partners Florida, LLC, Case No. 8:21-cv-01931-VMC-JSS*](https://www.eeoc.gov/newsroom/applebees-pay-100000-settle-eeoc-lawsuit-over-sexual-orientation-and-race-discrimination)*,* the court has ordered Abblebee’s to pay $100,000 to settle the EEOC lawsuit filed against them for sexual orientation and race discrimination, as well as retaliation. The case details that members of the staff verbally harassed a black employee using racial and homophobic epithets regularly, and wearing Confederate flag symbols on clothing. Complaints to multiple managers at various levels went unanswered and after the employee contacted the corporate offices to complain, his hours were cut and he was forced to quit.

According to the [EEOC press release](https://www.eeoc.gov/newsroom/applebees-pay-100000-settle-eeoc-lawsuit-over-sexual-orientation-and-race-discrimination) on July 11, 2022:

“No employee should have to endure homophobic and racist harassment by co-workers,” said EEOC Regional Attorney Robert E. Weisberg. “Failing to take corrective action to correct a work environment permeated with racial and homophobic slurs, and, even worse, punishing an employee for reporting harassment, will not be tolerated.

Sexual Harassment

Sexual Harassment is the act of harassing a person on the basis of their sex, sexual orientation, gender identity, or pregnancy.

“Harassment can include "sexual harassment" such as unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex, including the person's sexual orientation, gender identity, or pregnancy” ([EEOC.gov](https://www.eeoc.gov/sex-based-discrimination)).

There are two types of sexual harassment, ***quid pro quo harassment,*** and ***hostile work environment*** sexual harassment.

***Quid pro quo***

*Quid pro quo* is a Latin phrase that means “something for something” (Investopedia.com). This type of harassment is perpetrated by a supervisor (or someone who has substantial authority) against an employee. Examples of this might include a supervisor asking for sexual favors in exchange for choice working hours, projects, promotions, etc. The supervisor asks for “something” of a sexual nature and in return, the victim receives “something” related to a gain in employment in return.

An example of this type of harassment is shown in [*EEOC v. Koerner Management Group, Inc. (KMG) (Case No. 1:21-cv-00652GLR)*](https://www.eeoc.gov/newsroom/ihop-franchisee-pays-125000-settle-eeoc-sexual-harassment-lawsuit) which operates IHOP Restaurants. In this case, two female teenage employees were “[subjected to pervasive sexual harassment by a male manage](https://www.eeoc.gov/newsroom/ihop-franchisee-pays-125000-settle-eeoc-sexual-harassment-lawsuit)r” (EEOC.gov). The girls were shown pornographic images, groped, and questioned about their sex lives, in addition to having adverse employment conditions applied by the manager when sexual propositions were declined. The company knew about the situation and failed to take action. They ended up paying $125,000 for their failure to take appropriate actions to stop the harassment.

According to the [EEOC press release](https://www.eeoc.gov/newsroom/ihop-franchisee-pays-125000-settle-eeoc-sexual-harassment-lawsuit) on September 22, 2022:

All employers have an obligation to protect their employees from sexual harassment,” said EEOC Philadelphia District Regional Attorney Debra M. Lawrence. “This obligation is especially acute in the food service and similar industries where employees -- and for that matter, managers -- are often young and in­experienced. For many, it’s their first job. In such an environment, it is critical that employers take proactive steps to train and educate staff, ensure oversight and promptly correct any harassment.

***Hostile Work Environment***

A hostile work environment is created when an employer allows harassing comments and actions to occur in the workplace without interference. Examples of this can vary from the display of suggestive photos in an employee cubicle, to derogatory comments based on sex, to exclusion from after-hours group activities, to outright threats and intimidation.

***Impact of Sexual Harassment***

We don’t have time in this course to do a deep dive into the impact of sexual harassment. Victims of sexual harassment often report similar emotional responses as other victims of sexual crimes. The impact on the workplace is higher rates of tardiness and absenteeism, as well as general dissatisfaction and disengagement.

In 2021, the [EEOC received 5,531 claims of sexual harassment](https://www.eeoc.gov/data/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2021). The monetary impact on the organizations found liable was $61.6 million dollars.

Sexual harassment can be reduced and eliminated through consistent, effective education and quality policies and practices that are practiced throughout the organization and supported by upper management.

**What does this mean for employers?**

* An employer may not advertise for applicants of one gender or another.
* An employer may not use sex as a determining factor for filling a position.
* An employer may not allow denigrating remarks against any employee on the basis of sex- including gender identity and sexual orientation.
* An employer may not require sexual favors in exchange for any condition of employment.
* An employer may not allow a harassing and intimidating work environment to exist and must take immediate action to eliminate harassment when it occurs.

National Origin

“[National origin discrimination](https://www.eeoc.gov/national-origin-discrimination) involves treating people (applicants or employees) unfavorably because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background (even if they are not)” ([EEOC.gov](https://www.eeoc.gov/national-origin-discrimination)).

This type of discrimination doesn’t necessarily have to be against persons who have descent from foreign countries, either. Across the U.S., people from the South may be considered ‘stupid’, while those from the North may be considered ‘rude’. A person can have blond hair and blue eyes and speak only Spanish. Origin discrimination could even be attributed to people from ‘certain’ parts of town.

This law applies to employers with 15 or more employees and applies to all aspects of employment.

*English-Only Rules*

Employers might like to require that ***English only*** is spoken in their workplace. However, under the law, this requirement is only allowable if the ability to speak and understand English clearly is directly related to the job in terms of employee safety and the efficient operation of the business.

An example of National Origin Discrimination can be reviewed in the case [*Equal Employment Opportunity Commission v. Employbridge of Dallas, Inc. d/b/a ResourceMFG, Civil Action No. CIV-22-499-C*](https://www.eeoc.gov/newsroom/eeoc-sues-staffing-company-national-origin-discrimination)*.* In this case, the employer (a staffing agency) told an employee that they must present a U.S. birth certificate to prove U.S. citizenship. The employee explained she did not have a U.S. birth certificate but did have documents to prove U.S. Citizenship. The company stopped the hiring process and told the applicant she could not be hired because she was not born in the U.S.

According to the [EEOC press release](https://www.eeoc.gov/newsroom/eeoc-sues-staffing-company-national-origin-discrimination) on June 17, 2022:

“Citizenship requirements are permitted only where required by law, regulation, or government contract,” said Andrea G. Baran, regional attorney for the EEOC’s St. Louis District office. “But staffing companies providing workers to government contractors cannot add additional requirements, such as U.S. birth, to their selection process.”

**What does this mean for employers?**

* An employer may not use the national origin of an applicant to make any employment decisions.
* An employer may not inquire about an applicant’s national origin.
* An employer may not allow harassment on the basis of national origin in any manner.
* An employer may not require that employees speak fluent English unless it is necessary to perform the job effectively and safely.

Pregnancy

The [Pregnancy Discrimination Act](https://www.eeoc.gov/pregnancy-discrimination) and the Americans with Disabilities Act both cover pregnancy discrimination. The PDA applies to employers with 15 or more employees and can be based on any of the following:

[Current pregnancy](https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues)- An employer may not refuse to hire, may not fire, or take any adverse employment action because a woman is pregnant- regardless of her ability to perform the job duties.

[Past pregnancy](https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues)- An employer may not terminate an employee while on pregnancy or parental leave.

[Potential pregnancy](https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues)- An employer may not discriminate against a woman on the basis that she may become pregnant.

[Medical condition related to pregnancy or childbirth](https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues) including [breastfeeding/lactation](https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues)- an employer may not discriminate against women with a “medical condition relating to pregnancy or childbirth and must treat her the same as others who are similar in their ability or inability to work but are not affected by pregnancy, childbirth, or related medical conditions.” Employers also must allow lactating women in a private, non-bathroom area to pump breast milk for up to a year after the birth of a child.

[Having or choosing not to have an abortion](https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues)- Under Title VII, an employer cannot fire an employee for having or thinking about having an abortion. Since the overturn of Roe v. Wade, however, this may be challenged in the near future. Refer to the discussion from Module 1 for more information.

[Birth Control (Contraception)](https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues)- Employers may not discriminate against an employee based on her decision to use or not use contraceptives.

The Americans with Disabilities Act “prohibits discrimination against an applicant or employee based on a disability, including a disability related to a pregnancy such as diabetes that develops during pregnancy” ([EEOC.gov](https://www.eeoc.gov/statutes/pregnancy-discrimination-act-1978)).

During [fiscal year 2021, the EEOC received 2,261 charges of pregnancy discrimination and resolved 2,417 of those](https://www.eeoc.gov/data/pregnancy-discrimination-charges-fy-2010-fy-2021). Those settlements summed about 14 million dollars.

In November 2022, a ruling was issued in the case of [*EEOC v. Keystone Foods LLC, Case No. 2:21-cv-00629-MHT-JTA*](https://www.eeoc.gov/newsroom/keystone-foods-llc-pay-60000-settle-eeoc-pregnancy-discrimination-lawsuit)*.* In this case, Keystone Foods extended job offers to 17 former employees during a job fair but rescinded the offer following a review of a female former employee’s employment record which revealed that she had previously filed a complaint of pregnancy discrimination and an EEOC charge against the employer. “Title VII of the Civil Rights Act of 1964 protects pregnant workers from employment discrimination and bars employers from retaliating against employees who report pregnancy discrimination or file an EEOC charge against their employer” ([EEOC.gov](https://www.eeoc.gov/newsroom/keystone-foods-llc-pay-60000-settle-eeoc-pregnancy-discrimination-lawsuit)). Keystone Foods was ordered to pay $60,000 to settle the suit. This case isn’t only about pregnancy discrimination, however. It is also about retaliation for making a complaint against an employer.

According to the [EEOC press release](https://www.eeoc.gov/newsroom/keystone-foods-llc-pay-60000-settle-eeoc-pregnancy-discrimination-lawsuit) on November 12, 2022:

“Retaliation remains the most common type of charge filed with the EEOC. Retaliation claims account for over 56% of the total charges,” said EEOC Birmingham District Director Bradley Anderson.  “As this case demonstrates, employers would do well to recognize that Title VII’s anti-retaliation provisions protect both current and former employees.”

**What does this mean for employers?**

* Employers may not refuse to hire an applicant solely on the basis of her pregnancy.
* Employers may not refuse to hire young women because they are more likely to become pregnant.
* Employers must accommodate a pregnant employee as they would any other person with a temporary medical condition.
* Employers must provide paid or unpaid leave (according to company policy and state and local laws) and accommodations to a female employee no matter how many times she becomes pregnant.
* Employers must provide a private place that is not a bathroom to pump breast milk as necessary for up to one year after the birth of a child.

Age

“The [Age Discrimination in Employment Act](https://www.eeoc.gov/laws/guidance/fact-sheet-age-discrimination) (ADEA) prohibits discrimination against those age 40 and older in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, benefits, and any other term or condition of employment” ([EEOC.gov](https://www.eeoc.gov/laws/guidance/fact-sheet-age-discrimination)). This law applies to employers having 20 or more employees as well as federal, state, and local government, employment agencies, and labor organizations.

Age discrimination can also include harassing activities such as making comments about age, calling someone “old man” or “old gal”, inquiring as to when the employee plans to retire, and even planning ‘team-building’ activities that are only high-intensity activities that would likely preclude older or those employees with disabilities from participating.

In the case, [Jones v. Oklahoma City Public Schools 617 F.3d 1273 (10th Cir. 2010)](https://casetext.com/case/jones-voklahoma-city-public-schools), the plaintiff Judy Jones (age 60) was demoted and then ultimately replaced by a younger employee with highly similar qualifications.

**What does this mean for employers?**

* Employers may not ask for an applicant’s birthdate or graduation date on an application.
* Employers may not ask an applicant how old they are during an interview or at any time in the pre-hire phase.
* Employers may not use age (over 40) to make determinations about any employment-related decision.
* Employers may not advertise for “young” employees.

Equal Pay/Compensation

“The Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work” ([EEOC.gov](https://www.eeoc.gov/equal-paycompensation-discrimination)). Make no mistake that transgender, gender-neutral, and nonbinary persons are also covered under the spirit of this law (if not the specific language).

There are equal pay laws that overlap each other in terms of federal, state, and local laws. In spite of having so many laws demanding that men and women receive equal pay for equal work, women still only make about 83% of what men are making as this graphic from the U.S. Census Bureau.

See Chart p.51 - Female to Male Earnings Ratio - Put in appendix

[https://www.census.gov/newsroom/stories/equal-pay-day.html#:~:text=The%202022%20Equal%20Pay%20Day%20is%20Tuesday%2C%20March,earn%20what%20men%20earned%20in%20the%20previous%20year](https://www.census.gov/newsroom/stories/equal-pay-day.html).

The statistics are more discouraging for women of color. The reality is that in spite of laws that apply to virtually every employer in the U.S., women are still discriminated against in every area of employment.

EEOC Equal Pay charges received in 2021 was 885, down considerably for the first time since 2007 ([EEOC.gov](https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021)). This may be due in part to the fact that so many people are working remotely following the COVID-19 pandemic and remote work may provide an equalization that has previously been unseen in the workplace (Kantamneni, 2020).

It’s important to remember that equal pay applies to all aspects of employment. However, we find that the biggest disparity is in the highest-paid employees more than average employees. Fortune.com reported on August 3, 2022, that female CEOs run only 4.8% of the world’s largest businesses on the Global 500 ([Fortune.com](https://fortune.com/2022/08/03/female-ceos-global-500-thyssenkrupp-martina-merz-cvs-karen-lynch/)).

An example of this type of discrimination can be reviewed in [*EEOC v. First Metropolitan Financial Services, Inc., 1;18-cv-177 (N.D. Miss. march 18, 2021)*](https://www.eeoc.gov/fact-sheet-notable-eeoc-litigation-involving-pay-discrimination-0). In this case, a female bank manager complained because she was paid significantly less than a male bank manager. The bank was ordered to pay $100,000 in restitution.

Of course, the law does allow for legitimate differences in compensation for the same job based on level of skill, effort, responsibility, working conditions, and establishment. For example, under a ***bona fide seniority system***, it is fair to have different rates of pay for employees who perform highly similar jobs if one employee has more seniority than another employee.

From the Department of Labor website:

1. **Skill- “**Measured by factors such as the experience, ability, education, and training required to perform the job. The issue is what skills are required for the job, not what skills the individual employees may have” (DOL.gov).
2. **Effort- “**The amount of physical or mental exertion needed to perform a job” (DOL.gov).
3. **Responsibility- “**The degree of accountability required to perform the job” (DOL.gov).
4. **Working Conditions**- “This encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards” (DOL.gov).
5. **Establishment-** “The prohibition against compensation discrimination under the EPA applies only to jobs within an establishment. An establishment is a distinct physical place of business rather than an entire business or enterprise consisting of several places of business. In some circumstances, physically separate places of business may be treated as one establishment. For example, if a central administrative unit hires employees, sets their compensation, and assigns them to separate work locations, the separate work sites can be considered part of one establishment” (DOL.gov).

**What does this mean for employers?**

* An employer may not pay different rates to employees who perform essentially the same work based on their gender.
* An employer may not base promotion opportunities on an employee’s gender.
* Employers must establish pay policies that eliminate opportunities for equal pay issues to exist.
* Employers must base compensation & rewards differences, promotion decisions, and other differences that might impact equal pay on legally-established standards such as skill, effort, responsibility, working conditions, education, seniority, experience, etc.

Disability

The Americans with Disabilities Act prohibits discrimination in employment based on an individual’s disability. Employees must be able to perform the ***essential functions*** of the position, with or without***reasonable accommodations*** from the employer.

“Disability discrimination occurs when an employer covered by Title I of the Americans with Disabilities Act or the Rehabilitation Act treats a qualified employee or applicant unfavorably because of a disability” [(EEOC.gov)](https://www.eeoc.gov/disability-discrimination-and-employment-decisions).

Therefore, an employer must not make employment decisions based on a person’s disability and/or perceived disability. A perceived disability is when a person is ***regarded as having an impairment*** due to assumptions or symptoms.

Persons with disabilities live with the impairment of one or more ***major life activities***, which are the basic functions of life, such as walking, talking, breathing, seeing, hearing, and more.

The Americans with Disabilities Act of 1990 does not provide an exhaustive list of every kind of disability, it does provide a list of medical conditions that would be considered a disability under the law.

According to [SHRM.org](https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/cms_011495.aspx), the following medical conditions are almost always covered under the law:

* Deafness.
* Blindness.
* Diabetes.
* Cancer.
* Epilepsy.
* Intellectual disabilities.
* Partial or completely missing limbs.
* Mobility impairments requiring the use of a wheelchair.
* Autism.
* Cerebral palsy.
* HIV infection.
* Multiple sclerosis.
* Muscular dystrophy.
* Major depressive disorder.
* Bipolar disorder.
* Post-traumatic stress disorder.
* Obsessive-compulsive disorder.
* Schizophrenia.

Additionally, the regulations provide guidance concerning specific conditions that are not considered disabilities under the Americans with Disabilities Act:

* Homosexuality and bisexuality.
* Compulsive gambling.
* Kleptomania.
* Pyromania.
* Exhibitionism.
* Pedophilia.
* Voyeurism.
* Sexual behavior disorders.
* Physical characteristics (eye color, hair color, left-handedness, etc.).
* Common personality traits.
* Psychoactive substance use disorders resulting from current illegal use of drugs.
* Transvestism
* Transexualism
* Gender identity disorders not resulting from physical impairments ([SHRM.org](https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/cms_011495.aspx)).

When an employee requests an accommodation under the ADA regulations, employers must try to provide the accommodation so long as it is a ***de minimis*** impact on the employer. A *de minimus* impact means that the accommodation does not place undue hardship on the employer.  For example, an employee with a vision impairment may request a special filter for their computer, or an employee with a hearing impairment may request a telephone that will provide readable captions to enhance the employee’s ability to successfully perform their job duties.

An example of disability discrimination can be reviewed in the 2022 settlement between the [EEOC and Circle K Stores, Inc](https://www.eeoc.gov/newsroom/circle-k-pay-8-million-resolve-eeoc-disability-pregnancy-and-retaliation-charges). The resolution resolves multiple charges of discrimination based on Circle K’s failure to provide reasonable accommodations to pregnant employees and those with disabilities, retaliation, and even terminations based on protected disabilities. Circle K Stores, Inc. will pay $8 million to resolve the matter and must also update its policies.

**What does this mean for employers?**

* An employer may not as job applicants or employees to answer disability-related questions or require them to take a medical exam prior to making an offer of employment.
* An employer may not allow harassment of an employee with a past or current disability.
* An employer must provide reasonable accommodations for employees who request them.
* An employer may not retaliate against an employee for requesting accommodations for disabilities.

Genetic Information

[Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA)](https://www.eeoc.gov/genetic-information-discrimination) prohibits discrimination based on ***genetic information***. Genetic information is medical information that would reveal protected health information that could indicate the development of future medical conditions.

According to [EEOC.gov](https://www.eeoc.gov/laws/guidance/fact-sheet-genetic-information-nondiscrimination-act), genetic information means

* Information about an individual's genetic tests;
* Information about the genetic test of a family member;
* Family medical history;
* Requests for and receipt of genetic services by an individual or a family member; and
* Genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.

For example, a female employee’s mother is diagnosed with breast cancer, so the employee undergoes ***genetic testing*** to determine if she also has a predisposition for breast cancer. If the employer becomes aware of this information, they may not use this information to decide to terminate the employee on the grounds that she is more likely to develop breast cancer, which could result in increased healthcare costs.

The law applies to employers having 15 or more employees and is enforced by the EEOC.

“An employer may never use genetic information to make an employment decision because genetic information is not relevant to an individual's current ability to work” [(EEOC.gov](https://www.eeoc.gov/genetic-information-discrimination))*.*

In October 2016, the EEOC won a case against BNV Home Care Agency, Inc. in [*EEOC v. BNV Home Care Agency, Inc.*, No. 1:14-cv-05441, complaint (E.D.N.Y., Sep. 17, 2014)](https://www.thenjemploymentlawfirmblog.com/eeoc-settles-genetic-discrimination-lawsuit-125000/). In this case, the employer required applicants to complete a form called an “Employee Health Assessment- which included 29 health conditions, such as diabetes, heart disease, and cancer” ([thenjemploymentlawfirmblog.com](https://www.thenjemploymentlawfirmblog.com/eeoc-settles-genetic-discrimination-lawsuit-125000/)). The employer form asked applicants to reveal this information about themselves and family members upon a conditional offer of employment and was required to be completed annually.

**What does this mean for employers?**

* An employer may not request, require, or purchase genetic information.
* An employer may not use acquired genetic information to make employment decisions.
* An employer may not harass or allow an employee to be harassed on the basis of genetic information.
* An employer may not retaliate against an applicant or employee who files a charge of discrimination.

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Time:  4 minutes

Running time: 45 minutes

**Objective**: Identify various types of discrimination

**Description**: Explain how retaliation is dealt with with various types of discrimination.

**Instructional Method**: Lecture

**Script**:     
Retaliation is an adverse action taken against an employee who complains about discrimination and is a highly common problem in both private and public employers. Employers may not retaliate against employees for making a personal complaint about an EEOC violation, supports a co-worker in their complaint about an EEOC violation, or criticizes the company about their handling of an EEOC complaint or violation.

**Facilitator Notes:**

According to the [EEOC.gov](https://www.eeoc.gov/retaliation) website:

The EEO laws prohibit punishing job applicants or employees for asserting their rights to be free from employment discrimination including harassment.  Asserting these EEO rights is called "protected activity," and it can take many forms.  For example, it is unlawful to retaliate against applicants or employees for:

* filing or being a witness in an EEO charge, complaint, investigation, or lawsuit
* communicating with a supervisor or manager about employment discrimination, including harassment
* answering questions during an employer investigation of alleged harassment
* refusing to follow orders that would result in discrimination
* resisting sexual advances, or intervening to protect others
* requesting accommodation of a disability or for a religious practice
* asking managers or co-workers about salary information to uncover potentially discriminatory wages.

In the case, [DeMasters v. Carilion Clinic 796 F.3d 409 (4th Cir. 2015)](https://casetext.com/case/demasters-v-carilion-clinic-1), the employee was terminated for supporting a fellow employee’s sexual harassment complaint and criticizing the way the employer handled the situation. This was a blatant case of *quid pro quo* harassment where the supervisor had exposed himself to the employee, requested sexual favors, and even masturbated in front of the employee twice on the hospital property. DeMasters, who worked as an Employee Assistance Program consultant for the company found out about the situation through the course of his normal job duties and informed the victim that this was sexual harassment in violation of the law and company policy. DeMaster’s revealed the information to HR to start an investigation (as required). Ultimately, DeMaster’s felt the HR department was not handling the situation appropriately and two years later, was terminated for his involvement with the matter because he did not take a “pro-employer side” on the matter rather than supporting the victim employee.

**What does this mean for employers?**

* An employer may not give an employee a negative performance evaluation because that employee made or supported a fellow employee in a complaint.
* An employer may not transfer the employee to a less desirable position because that employee made or supported a fellow employee in a complaint.
* An employer may not engage in verbal or physical abuse and may not allow anyone else to do so because an employee made or supported a fellow employee in a complaint.
* An employer may not make an employee’s job more difficult because that employee made or supported a fellow employee in a complaint.

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Time:  2 minutes

Running time: 47 minutes

**Objective**: Identify positive vs negative bias.

**Description**: Have students give examples of positive and negative bias in the workplace.

**Instructional Method**: Lecture - Discussion

**Script**:     
**Bias** is the conscious or unconscious treatment of certain individuals in either a positive or negative fashion that is driven by another individual’s pre-conceived ideals, attitudes, and practices and based on a factor unrelated to an individual’s ability to perform job duties.

For example, your grandmother may consider you good-looking even if you are not exceptionally so. She is biased toward you in a positive manner because she has a pre-conceived attitude based on her love for you.

Conversely, a negative form of bias would be refusing to interview applicants who have Hispanic-sounding names because the interviewer grew up in a family that is prejudiced against Hispanic peoples.

**Ask**: What are some of your positive and negative biases?

**Note**: Point out which exact type of bias the students are describing (below)

**Facilitator Notes:**

Conscious bias is deliberate. A person knows they are biased against a person on the basis of some protected characteristic. A recognizable example would be someone who affiliates themselves with the Klu Klux Klan (KKK) because they feel negatively towards African Americans and other persons of color.

Unconscious bias (sometimes called implicit bias), is unconscious attitudes, behaviors, and actions (or inactions) that a person may be completely unaware they possess. An example of this might be preferring to hire only women into secretarial roles because you subconsciously believe that men shouldn’t be employed until those types of jobs.

There are multiple types of bias that exist in the workplace. Each has a specific risk to the employer and an impact on the employee.

* **Affect heuristics-** This type of bias is based on something superficial such as preferring natural hair color over bright colors, a first name (though this can also be racial discrimination), or the preference of a particular height of the individual. An example of this would be not interviewing women whose first name is Michelle because your husband’s ex-wife’s name is Michelle.
* **Affinity bias-** This type of bias leads to preferential treatment of someone with whom you have something in common. Perhaps the manager and employee both were members of the same fraternity so the manager gives the employee the first choice of job assignments.
* **Attribution bias-** Believing someone achieved some reward due to luck rather than hard work, or experienced a failure because they were less qualified than they claimed to be. Therefore, they might receive favorable or unfavorable performance reviews or miss an opportunity for advancement.
* **Beauty bias-** Preferring attractive persons to those less attractive which can result in discrimination based on appearance. This is particularly risky if combined with a bias against persons of color so that a person believes that only white people can be attractive.
* **Confirmation bias-** This type of bias assumes your judgement is correct in spite of evidence to the contrary. For example, a hiring committee member argues for a particular candidate because they felt a strong positive impression duing the interview and in spite of other candidate’s having stronger qualities, they remain committed to the candidate because they want to be right about their first impression.
* **Conformity bias-** Feeling pressured to conform to popular opinion. For example, a person on a hiring committee might not be comfortable with an applicant but is reluctant to speak up because the attitude of the rest of the committee is positive.
* **Contrast effect-** Comparing one applicant or employee to another rather than to the job description.
* **Halo effect-** This type of bias occurs when one strong positive quality or personal accomplishment overshadows any negative aspects of the candidate. An example would be overlooking an applicant’s lack of work experience because they won a prestigious scholarship in college.
* **Horns effect-** This is the opposite of the halo effect. In this case, some negative aspect overshadows the positive traits of an employee. For example, an applicant comes into the interview reeking of cigarette smoke, so the interviewer views everything the applicant says because they find the odor offensive.
* **Intuition bias-** This type of bias relies on a gut instinct rather than the facts and information available. For example, an interviewee who has excellent credentials and references but gives the interviewer a bad “vibe” might disclose that the interviewer is biased.
* **Similarity bias-** This type of bias occurs because an employee or applicant is highly similar to the interviewer. For example, you may come from the same hometown, attend the same church, or both love snowboarding.

An example of bias discrimination can be reviewed in the case of [EEOC v. Thomson Consumer Electronics, Inc. and the International Brotherhood of Electrical Workers, Union Local Nos. 1424 and 1048 (JBEW)](https://www.eeoc.gov/newsroom/eeoc-settles-major-age-bias-lawsuit-71-million-thomson-consumer-electronics-and-local). This case is about age bias. The employer discriminated against the oldest employees in a plant closing agreement by basing severance packages on the employee’s age so that older employees received lower severance packages.

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Time:  3 minutes

Running time: 50 minutes

**Objective**: Give examples of stereotypes in the workplace.

**Description**: Define stereotypes and have students give examples.

**Instructional Method**: Lecture - Discussion

**Script**:    
A stereotype is a belief or attitude that all persons of a certain race, sex, nationality, religion, or other groups of people share a common trait. This belief influences actions towards applicants or employees. For example, Asians are smart.

These types of false assumptions can seriously impact employment decisions for applicants and employees and should not be allowed to influence employers in any way. If an organization discovers that a person who has any influence over employees strongly believes in particular stereotypes that could influence employment decisions, it should take immediate steps to document, educate, and/or eliminate the situation so that discriminatory actions are avoided.

**Ask**:

1. What are some examples of stereotype both positive and negative?
2. How can this lead to discrimination?

**Facilitator Notes:**

Examples might include:

* Blonds are dumb.
* Women are bad drivers.
* Asians are smart.
* Texans own horses.
* Girls should play with dolls, and boys should play with trucks.
* People of Middle-Eastern descent have terrorist ties.
* Mexicans beat their wives.
* Southerners are stupid and uneducated.

This type of discrimination can be reviewed in the case of [Lewis v. Heartland Inns of America 591 F.3d 1033 (8th Cir. 2010)](https://casetext.com/case/lewis-v-heartland-inns-of-america/). In this case, the employer refused to promote a female employee who did not fit the employer’s ideal of a stereotypical “Mid-Western Girl” because they viewed her as too masculine in spite of a record of stellar job performance.

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Time:  5 minutes

Running time: 55 minutes

**Objective**: Discuss how bona fide occupational qualifications are applied in the workplace.

**Description**: Discuss what is and is not BFOQ and how it is applied in the workplace.

**Instructional Method**: Lecture - Discussion

**Script**:     
There is a very narrow-interpreted exception to EEO laws. This exception called a ***bonafide occupational qualification*** allows employers to base some employment decisions for a particular position on normally protected categories such as sex, religion, or national origin. This exception cannot be applied to race under any circumstances.

**Ask**: Which of these positions could be BFOQ? Actress for a 20s movie playing a flapper or Flight Attendant for United Airlines?

**Facilitator Notes:**   
The [BambooHR website](https://www.bamboohr.com/hr-glossary/bona-fide-occupational-qualification/) offers the following guidance

Some examples of allowable BFOQ are:

* Airline pilots and bus drivers who are assigned a mandatory retirement age.
* Church employees who must be a member of the denomination to fulfill job duties.
* Models or actors who need to show authenticity in a role.

As you can see, the scope of allowance is quite narrow when it comes to bona fide occupational qualifications, and race is never allowed as a BFOQ.

For additional context, here are some examples of *invalid* BFOQ claims:

* Females can’t do the work.
* The job is too dangerous or unpleasant for women.
* The employer or its managers, other employees, clients, or customers prefer males/females even though the work isn’t reliant on a specific gender to fulfill a job role.
* There are no separate restroom/changing room facilities available.
* It’s too hard/time-consuming to qualify male/female job applicants.
* The job requirement states the applicant must speak, read, and write fluent Hebrew, therefore they must be Israeli-born.
* The duties require someone younger because the job requires heavy lifting.
* The business owner is Catholic and doesn’t want to employ a Scientologist.

When a claim of BFOQ is made, the employer must take the following steps to verify their stance:

1. List reasons for the exclusion of a person.
2. Identify the “essence” of the business.
3. Determine how the business “essence” would be undermined without BFOQ.
4. Determine whether the job has been successfully performed by someone else with a BFOQ identifying characteristic, whether for the employer or similar employers.
5. Interview the people who currently hold or have held in the past the job position about whether the BFOQ is required for successfully performing the job.

[Ambat v. City & County of San Francisco 757 F.3d 1017 (9th Cir. 2014)](https://casetext.com/case/ambat-v-city-of-sf-1) is an example of a violation of a bona fide occupational qualification. In this case, sheriff’s deputies (male and female) sued their employer following a reorganization of the inmate housing facilities into male-only and female-only housing units. Then, the Sheriff decided that only female guards could work in the female housing units and only men could work in the male housing units. This caused multiple issues in terms of employee safety, ability to staff, security of the facility, and access to choice shifts. The employer argued that the actions were not discriminatory but were necessary to endure the safety of female prisoners and guards.

However, the court [ruled](https://casetext.com/case/ambat-v-city-of-sf-1)

A statutory defense to liability under both Title VII and FEHA exists when sex is a BFOQ that is "reasonably necessary to the normal operation of that particular business or enterprise." [42 U.S.C. § 2000e-2(e)](https://casetext.com/statute/united-states-code/title-42-the-public-health-and-welfare/chapter-21-civil-rights/subchapter-vi-equal-employment-opportunities/section-2000e-2-unlawful-employment-practices); [Cal. Gov. Code § 12940](https://casetext.com/statute/california-codes/california-government-code/title-2-government-of-the-state-of-california/division-3-executive-department/part-28-department-of-fair-employment-and-housing/chapter-6-discrimination-prohibited/article-1-unlawful-practices-generally/section-12940-unlawful-employment-practices). The BFOQ defense is available only under limited circumstances. First, the employer must show that the "essence" or "central mission" of its business would be undermined if the employer did not impose the qualification.

The employer did not take sufficient actions to prove that removing male guards from supervising female prisoners was necessary to be able to complete the essential job duties.

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Time:  5 minutes

Running time: 60 minutes

**Objective**: Recognize the appropriate steps for filing a complaint when employment rights are violated.

**Description**: Describe the steps and processes for enforcing laws. We will use this in the final spotlight.

**Instructional Method**: Lecture

**Script**:

How do we go about Enforcing Employment Laws? Proving **Discrimination** can be difficult.

(Lecture in your own words – use slide for main points)

**Facilitator Notes:**

Employees who believe they have been discriminated against have three ways of proving that their employers discriminated against them.

The first is ***direct evidence***. This is factual proof that discrimination occurred. This type of proof comes in the form of video evidence, text messages, audio recordings, eyewitnesses, emails, or other documents. This type of evidence is typically hard to obtain as most employers are intelligent enough not to document discriminatory actions. However, if an employee finds themselves in a situation where discrimination is occurring, it is a perfectly reasonable response to pull out a cell phone and start recording. In most states, you can record any conversation you are a party to. You cannot record conversations between other parties that you are not involved in, but you can typically record any conversation in which you are participating.

Next are the policies and practices of the employer. It is difficult for an employer to argue they are non-discriminatory if they have established policies and practices that are discriminatory in nature. The court will review the history and employment documents to ascertain if policies and practices are discriminatory in nature.

Finally, we must consider ***circumstantial evidence***. This is information that makes it appear that discrimination has occurred, but it is not as blatant as direct evidence. The courts use the [McDonnell-Douglas Framework](https://supreme.justia.com/cases/federal/us/411/792/) to evaluate circumstantial evidence. First, there are several facts that must be established.

1. The employee must be a member of a protected class.
2. The employee must be qualified for the position they are applying for or is employed in.
3. The employee must have suffered adverse employment action.

Once these are established, a ***prima facie case*** is established and the burden of proof shifts to the employer to prove that their actions were not discriminatory, perhaps because of a bona fide occupational qualification.

What to do when you believe your rights have been violated

The first step that must be taken is to follow the established policies of the employer for filing a complaint. An employee must allow the employer the opportunity to address discriminatory actions and take corrective action. An employee does not have to follow the chain of command in a situation where the employee’s supervisor is the perpetrator of the discriminatory behavior. In that instance, an employee is free to go directly to HR or a higher-level supervisor to make the complaint. The employer should be given a reasonable amount of time to conduct an investigation and no retaliatory actions must occur toward the complaining party while the investigation is ongoing.

If an employer fails to take action on the complaint, at that point an employee has the right to file a [charge of discrimination](https://www.eeoc.gov/filing-charge-discrimination) with the Equal Employment Opportunity Commission. All the laws that the EEOC enforces, with the exception of the Equal Pay Act, require you to file a charge of discrimination before you can sue your employer directly.

From the [EEOC.gov website](https://www.eeoc.gov/filing-charge-discrimination):

Many states and local jurisdictions have their own anti-discrimination laws, and agencies responsible for enforcing those laws ([Fair Employment Practices Agencies](https://www.eeoc.gov/fair-employment-practices-agencies-fepas-and-dual-filing), or FEPAs). If you file a charge with a FEPA, it will automatically be "dual-filed" with EEOC  if federal laws apply. You do not need to file with both agencies.

The [EEOC Public Portal](https://publicportal.eeoc.gov/Portal/Login.aspx) provides instructions on how to submit a charge of discrimination. Within 10 days of filing the charge, the EEOC will notify the employer and will often ask both the employee and the employer to participate in a [mediation program](https://www.eeoc.gov/mediation). If an employee and employer both agree to mediation, then a neutral mediator will work with them to come to a mutually beneficial agreement.

Employers may not retaliate in any manner against an employee who files a charge of discrimination. This includes the time that the employee may remain employed after the process concludes.

Time Limits

An employee does not have an unlimited amount of time to file a claim of discrimination.

According to the EEOC website:

The anti-discrimination laws give you a limited amount of time to file a charge of discrimination. In general, you need to file a charge within 180 calendar days from the day the discrimination took place. The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. The rules are slightly different for age discrimination charges. For age discrimination, the filing deadline is only extended to 300 days if there is a state law prohibiting age discrimination in employment and a state agency or authority enforcing that law. The deadline is not extended if only a local law prohibits age discrimination.

It is important that these time limits are met so that employees don’t lose the opportunity to receive help from the EEOC.

Filing a lawsuit

After the EEOC reviews the facts of each case, they may decide not to prosecute the case themselves, but instead, issue a notice of your right to sue. If an employee filed a charge of discrimination under Title VII, or the ADA, they MUST have a notice of a right to sue from the EEOC before a lawsuit can be filed in federal court.

A ***right to sue letter*** is a letter from the EEOC that gives an employee who has been discriminated against the right to sue in Federal courts.

Complaints under the Age Discrimination in Employment Act do not require a notice of right to sue and employees may file a lawsuit in federal court 60 days after filing a charge with the EEOC, regardless of the status of that claim.

Complaints under the Equal Pay Act also don’t require a notice of right to sue and employees have two years from the date the last discriminatory paycheck was received to file a lawsuit in federal court.

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Time:  5 minutes

Running time: 65 minutes

**Objective**: Recognize the appropriate steps for filing a complaint when employment rights are violated.

**Description**: Discuss Remedies for Employment Discrimination

**Instructional Method**: Lecture - Discussion

**Script**:     
The point of [financial remedies](https://www.eeoc.gov/remedies-employment-discrimination) is to make the employee whole, or to put them back into the same position (or a highly similar one) that they would have been in if the discrimination had not occurred. Additionally, some types of rewards are designed to punish the offenders, especially in the most severe cases of intentional discrimination.

There are several types of financial relief an employee might receive:

***Back pay*** is wages that are awarded to an employee that were lost due to illegal conduct on the part of the employer.

***Compensatory damages*** is financial compensation awarded to victims of discrimination or other harm. The individual/organization who caused/allowed the harm to occur is responsible for compensating the victim.

***Punitive damages*** are extra compensation awarded that is intended to not only make the plaintiff whole but to punish the defendant.

An employer will also have to stop discriminatory actions and take preventative actions to ensure that it doesn’t happen again.

**Ask**: What are some of the ways you have heard of employees winning lawsuits for discrimination?

**Facilitator Notes:**

From the [EEOC website](https://www.eeoc.gov/remedies-employment-discrimination):

There are limits on the amount of compensatory and punitive damages a person can recover. These limits vary depending on the size of the employer:

* For employers with 15-100 employees, the limit is $50,000.
* For employers with 101-200 employees, the limit is $100,000.
* For employers with 201-500 employees, the limit is $200,000.
* For employers with more than 500 employees, the limit is $300,000.

In cases involving intentional age discrimination, or in cases involving intentional sex-based wage discrimination under the Equal Pay Act, victims cannot recover either compensatory or punitive damages, but may be entitled to "liquidated damages."

Liquidated damages may be awarded to punish an especially malicious or reckless act of discrimination. The amount of liquidated damages that may be awarded is equal to the amount of back pay awarded the victim.

While these remedies can be substantial for an employer, they might be only small portion of the ultimate costs to an employer due to discriminatory activities. The negative impact to an organization’s reputation might result in the loss of customers, brand image, and reputation as well.

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Time: 15 minutes

Running time: 80 minutes

**Objective**: Determine the appropriate laws to apply to given employment situations.

**Description**: Students will review the material by answering the questions on the slide.

**Instructional Method**: Pair and share discussions, exercises, homework

**Script:** Now, let’s dive deeper into discrimination.

**Exercise**:

1. Pair students
2. Have students discuss and answer the first question on the slide.
3. Have students share their answers.

Individual Exercise:

1. Have each student write a one-page answer to question #2
2. Have students get into to groups of 3-5 and discuss their answers
3. Have students share with the entire class (optional)

**Facilitator Notes:**

**State Employment Law Focus:**

Which states have stricter discrimination laws than the federal laws? Review the SHRM article [Not All State Employment Discrimination Laws Are Created Equal](https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/state-employment-discrimination-laws.aspx) and consider how the states discussed have been successful in enforcing these laws. What types of remedies are offered to victims at the state level?

**Discussion Prompts:**

1. Why isn’t race included in the bona fide occupational qualification exception to Title VII’s prohibition of discrimination? Provide an example of when it would be appropriate to apply the BFOQ exception to an employment situation not involving race.
2. Have you ever experienced discrimination in the workplace? If you’d like, share your experience and discuss the legal aspects of why the actions were discriminatory. If you’ve never felt discriminated against in the workplace, write about a friend or family member who has felt that way.

**HR Skills Exercise:**

Review the discrimination laws in your state and create a short presentation to educate employees about their rights under those laws.

**Relevant Laws**

* ADA Amendments Act of 2008 (ADAAA)
* Age Discrimination in Employment Act of 1967 (ADEA)
* Americans with Disabilities Act of 1990 (ADA)
* Equal Pay Act of 1963 (EPA)
* Genetic Information Nondiscrimination Act of 2008 (GINA)
* Pregnancy Discrimination Act of 1978 (PDA)
* Title VII of the Civil Rights Act of 1964

**Case Law in the Spotlight**

* Ambat v. City & County of San Francisco 757 F.3d 1017 (9th Cir. 2014)- [Bonafide Occupational Qualification](https://casetext.com/case/ambat-v-city-of-sf)
* DeMasters v. Carilion Clinic 796 F.3d 409 (4th Cir. 2015)- [Engaging in protected activities.](https://casetext.com/case/demasters-v-carilion-clinic-1)
* *EEOC v. BNV Home Care Agency, Inc., No. 1:14-cv-05441, complaint (E.D.N.Y., Sep. 17, 2014)-* [*Genetic Information Discrimination*](https://www.thenjemploymentlawfirmblog.com/eeoc-settles-genetic-discrimination-lawsuit-125000/)
* *Equal Employment Opportunity Commission v. Employbridge of Dallas, Inc. d/b/a ResourceMFG, Civil Action No. CIV-22-499-C*- [National Origin Discrimination](https://www.eeoc.gov/newsroom/eeoc-sues-staffing-company-national-origin-discrimination)
* *EEOC v. First Metropolitan Financial Servies, Inc., 1:18-cv-177 (N.D> Miss. march 18, 2011)-* [*Equal Pay Discrimination*](https://www.eeoc.gov/fact-sheet-notable-eeoc-litigation-involving-pay-discrimination-0)
* *EEOC v. Keystone Foods LLC, Case No. 2:21-cv-00629-MHT-JTA (2022)-* [Pregnancy Discrimination and Retaliation](https://www.eeoc.gov/newsroom/keystone-foods-llc-pay-60000-settle-eeoc-pregnancy-discrimination-lawsuit)
* *EEOC v. Koerner Management Group, Inc. (KMG) (Case No. 1:21-cv-00652GLR)-* [Sexual Harassment](https://www.eeoc.gov/newsroom/ihop-franchisee-pays-125000-settle-eeoc-sexual-harassment-lawsuit)
* *EEOC v. Neighborhood Restaurant Partners Florida, LLC, Case No. -8:21-cv-01931-VMC-JSS*- [Sexual Orientation Discrimination](https://www.eeoc.gov/newsroom/applebees-pay-100000-settle-eeoc-lawsuit-over-sexual-orientation-and-race-discrimination)
* *EEOC v. Prewett Enterprises, Inc. d/b/a B&P Enterprises, and Desoto Marine, LLC*, Civil Action No. 3:18-cv-213 (N.D. Miss. Mar. 18, 2020)- [Racial Discrimination](https://www.eeoc.gov/newsroom/prewett-enterprises-desoto-marine-pay-quarter-million-settle-eeoc-race-harassment-lawsuit).
* *EEOC v. United Airlines Inc., Civil Action No. 20-cv-9110 (2022)*- [Religious Discrimination](https://www.eeoc.gov/newsroom/united-airlines-pay-305000-settle-eeoc-religious-discrimination-lawsuit)
* Griggs v. Duke Power Co. (1971)- [Disparate impact](https://supreme.justia.com/cases/federal/us/401/424/)
* Jones v. Oklahoma City Public Schools 617 F.3d 1273 (10th Cir. 2010)- [Age Discrimination in Employment](https://casetext.com/case/jones-voklahoma-city-public-schools)
* Lewis b. Heartland Inns of America 591 F.3d 1033 (8th Cir. 2010)- [Sex Discrimination](https://casetext.com/case/lewis-v-heartland-inns-of-america)
* NAACP v. North Hudson Regional Fire & Rescue 665 F.3d 464 (3d Cir. 2011)- [Disparate impact-Race](https://casetext.com/case/naacp-v-north-hudson-regional-fire-rescue)
* McDonnell Douglas Corp. v. Green 411 W.S. 792 (1973)- [Protected activity](https://supreme.justia.com/cases/federal/us/411/792/)
* Phillips v. Martin Marietta Corp. (1971)- [Discrimination on the basis of sex.](https://supreme.justia.com/cases/federal/us/400/542/)
* Shea v. Kerry 796 F. 3d 42 (D.C. Cir. 2015)- [Reverse discrimination](https://casetext.com/case/shea-v-kerry-4)
* *U.S. EEOC v. CSX Transportation, Inc. Case no. 3:17-cv-03731 (2018)-* [Disparate Impact Sex Discrimination Case](https://www.eeoc.gov/newsroom/csx-transportation-pay-32-million-settle-eeoc-disparate-impact-sex-discrimination-case)
* Vasquez v. Empress Ambulance Service 835 F.3d (2nd Cir. 2016)- [Retaliation](https://casetext.com/case/vasquez-v-empress-ambulance-serv-inc-2)

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Time:  10 minutes

Running time: 90 minutes

**Objective**: Review main points in this module. Determine the appropriate laws to apply to discrimination.

**Description**:  Be sure that students have a fun way to remember the material.

**Instructional Method**: Game – Review

**Script**:

Let’s see how much we remember about this module.

**Facilitator Notes:**

Review Exercise:  Create a fun game to review the material.  Remember to use the objectives to measure learning:

* Define the key terms related to discrimination
* Determine the appropriate laws to apply to given employment situations.
* Differentiate between disparate impact and disparate treatment.
* Discuss how bona fide occupational qualifications are applied in the workplace.
* Identify various types of discrimination.
* Recognize the appropriate steps for filing a complaint when employment rights are violated.
* Have each student submit a question on a piece of paper, crumple it up and toss it in a bucket (clean wastebasket), Instructor will then read them and give points to each team with the correct answer.
* Any game show – Family Feud, Jeopardy, $10,000 pyramid, Password, Tic Tac Toe
* Extra credit quizzes

There are many ways to review material virtually or in person.  Students can use their phones or computers to navigate to various online review websites.

A few are:

* Kahoot
* Quizlet