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Chapter 3. Understanding Equal Opportunity and the Legal Environment

CHAPTER OVERVIEW

This chapter examines the aspects of HR law and regulations. The goal is to identify and discuss the laws themselves and how best to comply with them and do what is best for the organization. The chapter unveils why understanding the legal environment is important and the context in which HR regulation occurs. The chapter further explores the challenges to legal compliance. It ends with ways for the effective manager to avoid the pitfalls in the equal employment opportunity (EEO) legal environment.

CHALLENGES

After reading this chapter, students should be able to deal more effectively with the following challenges:
1. Recognize why understanding the legal environment is important.
2. Become aware of conflicting strategies for fair employment.
3. Gain mastery of the equal employment opportunity laws.
4. Understand EEO enforcement and compliance.
5. Have familiarity with other important laws.
6. Ensure avoiding pitfalls in EEO.

ANNOTATED OUTLINE

CHALLENGE 1
Recognize why understanding the legal environment is important.
I. Why Understanding the Legal Environment Is Important

Understanding and complying with HR law is important for three reasons. It helps the company to do the right thing, it helps to realize the limitations of the HR and legal departments, and it limits potential liability.

A. Doing the Right Thing

Compliance with the law is the right thing to do. The primary requirement of these laws is to mandate good management practice. Operating within these laws has benefits beyond simple legal compliance. Discriminatory practices not only create potential legal liability, but also lead to poor employee morale and low job satisfaction, which can lead to poor job performance.

B. Realizing the Limitations of the HR and Legal Departments

If managers make poor decisions, the HR department will not always be able to resolve the situation. Nor can a firm’s legal department solve problems created by managers. The function of the legal department is to try to limit damage after it has already occurred.

C. Limiting Potential Liability

Considerable financial liabilities can occur when HR laws are broken or perceived to be broken.

II. Challenges to Legal Compliance

A dynamic legal landscape, complex laws, conflicting strategies for fair employment, and unintended consequences are among the challenges confronting managers attempting to comply with HR law.

A. A Dynamic Legal Landscape

In addition to the many HR-related laws that have been passed, there have been a myriad of opinions handed down in court cases that have affected the HR legal environment. The legal landscape is changing quickly.

B. The Complexity of Laws

Each individual law is accompanied by a set of regulations that can be quite lengthy. Nonetheless, the gist of most HR law is fairly straightforward. Managers should be able to understand the basic intention of all such laws without too much difficulty.

CHALLENGE 2
Become aware of conflicting strategies for fair employment.

III. Conflicting Strategies for Fair Employment

Society at large, political representatives, government employees, and judges all have different views regarding the best ways to achieve equitable HR laws. The goal of EEO legislation and government is fair employment. Two main strategies of achieving fair employment are discussed: “blind” hiring practices and affirmative action.

A. Unintended Consequences

It is very common for a law, government program, or an organizational policy to have numerous unanticipated consequences, some of which turn out to be quite negative. The challenge to managers is to anticipate and deal with both the intended and unintended consequences of law.

CHALLENGE 3
Gain mastery of the equal employment opportunity laws.

IV. Equal Employment Opportunity Laws

The laws affecting HRM can be divided into two broad categories: equal employment opportunity (EEO) laws and other laws. The major EEO laws cut across nearly every aspect of managing human resources. They include the Equal Pay Act of 1963 (EPA), Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), and the Americans with Disabilities Act of 1990 (ADA). The other laws tend to be more specifically focused. They include laws governing union activities, safety and health, and so on.

A. The Equal Pay Act of 1963

This law requires the same pay for men and women who do the same job in the same organization. The law specifies that jobs are the same if equal in four areas: effort, skill, responsibilities, and working conditions.

B. Title VII of the Civil Rights Act of 1964

1. General Provisions: This mandates that the employment decision not be based on race, color, religion, sex, or national origin. The idea of a protected class was introduced in this legislation.
2. Discrimination Defined: There are two types of discrimination, disparate treatment and adverse impact (also known as disparate impact). Disparate treatment occurs when individuals are treated differently because of their
membership in a protected class. Adverse impact occurs when the equal application of an employment standard has an unequal effect on a protected class. Two important court cases are discussed: *Griggs vs. Duke Power* and *Albemarle Paper Company vs. Moody*.

C. **Defense of Discrimination Charges**

The McDonnell-Douglas test and the four-fifths rule are techniques used to establish that discrimination may have occurred. There are several well-established defenses organizations can use to protect themselves from charges of discrimination. The following defenses are discussed: job relatedness, bona fide occupational qualification (BFOQ), seniority, and business necessity.

D. **Title VII and Pregnancy**

The Pregnancy Discrimination Act of 1978 requires employers to treat an employee who is pregnant the same way as any other employee who has a medical condition.

E. **Sexual Harassment**

The types of sexual harassment are quid pro quo sexual harassment and hostile work environment sexual harassment. Failure on the organization’s part to investigate a sexual harassment complaint can result in employer liability if the case goes to court. The consequences of this can be very costly to the company.

F. **The Civil Rights Act of 1991**

Congress believed that the Supreme Court was beginning to convolute the original purpose of the CRA of 1964. In response to this Congress passed a set of amendments to reaffirm and protect the rights of individuals in protected classes. Some of the most important aspects of the new legislation included a clearer definition of who bears the burden of proof, making quotas illegal, and allowing plaintiffs to sue for compensatory and punitive damages.

G. **Executive Order 11246**

Issued by President Johnson, it prohibits discrimination against the same categories established by Title VII but goes beyond Title VII by requiring all government agencies and organizations with contracts of $50,000 or more with the federal government to create affirmative action plans to promote employment diversity.

H. **The Age Discrimination in Employment Act of 1967**
This prohibits discrimination against people who are 40 or older. The large majority of ADEA complaints are filed by employees who have been terminated.

I. The Americans with Disabilities Act of 1990

The ADA has three major sections. Title I contains the employment provisions. Titles II and III concern the operation of state and local governments and places of public accommodation such as hotels, restaurants, and grocery stores. ADA applies to all employers with 15 or more employees and prohibits discrimination against individuals with disabilities who are able to perform the essential functions of the job with or without reasonable accommodation. This definition and its parts are broken down into greater detail.

1. Individual with disabilities are people who have a physical or mental impairment that substantially affects one or more major life activities such as walking or speaking.
2. Essential functions are job duties that every employee must do or must be able to do to be an effective employee. Marginal functions are job duties that are required of only some employees or that are not critical to job performance.
3. Reasonable accommodation is an action taken to allow disabled employees to work for the employer.

J. The Vocational Rehabilitation Act of 1973

This is a precursor to the ADA of 1990 but it only applied to federal contractors. It required them to have an affirmative action plan.

K. The Vietnam Era Veterans Readjustment Act of 1974

Federal contractors are prohibited from discriminating against Vietnam-era veterans and must create an affirmative action plan to promote employment decisions regarding this protected class.

CHALLENGE 4
Understand EEO enforcement and compliance.

V. EEO Enforcement and Compliance

The executive branch of the government is responsible for the enforcement of EEO Laws.

A. Regulatory Agencies

In order to accomplish this, the executive branch establishes regulatory agencies. Such agencies enforce EEO and other laws, attempt to resolve
complaints, issue regulatory guidelines, and require organizations of 100 or more employees to file reports (EEO-1).

1. The Equal Employment Opportunity Commission (EEOC) has three major functions. The first is to investigate claims. If the claims are found valid the second function of the EEOC is to negotiate among the parties to reach a settlement that avoids a trial. This is called conciliation. The third purpose is to litigate on the behalf of the wronged individual if conciliation is not possible.

2. The Office of Federal Contract Compliance Programs (OFCCP) is responsible for monitoring compliance with laws and executive orders that apply to the federal government and its contractors. Many of the regulations written by the OFCCP are very similar to those issued by the EEOC.

B. Affirmative Action Plan (AAP)

AAPs are required of government agencies and many federal contractors. There are three steps in an AAP. The first is a utilization analysis, which describes the organization’s current workforce relative to the pool of qualified workers in the labor force. The next step is creating goals and timetables for correcting an underutilization, and the last step is to create an AAP, which describes exactly what action will be taken. AAPs can result in reverse discrimination, which has received attention in the courts recently.

CHALLENGE 5

Have familiarity with other important laws.

VI. Other Important Laws

A. Immigration Reform and Control Act of 1986

This act was intended to reduce the inflow of illegal immigrants to the United States. The law mandates employers only hire people legally allowed to work in the United States.

B. Immigration Act of 1990

This act was created to make it easier for skilled immigrants to enter this country.

C. Drug Free Workplace Act of 1988

The Drug Free Workplace Act requires federal contractors to attempt to ensure their workplaces are free from drug use. Employers are required to educate employees and to prevent illegal drug use.
D. Uniformed Services Employment and Reemployment Rights Act of 1994

This act protects the rights of people who take short-term leave from private-sector employers to engage in military service. It also protects military personnel from discrimination in employment practices.

**CHALLENGE 6**

*Ensure avoiding pitfalls in EEO.*

VII. Avoiding Pitfalls in EEO

Almost any decision made by a manager that affects a worker's employment status can be challenged in a court of law. In most cases, sound management practices will not only help managers avoid EEO lawsuits but will contribute to the organization's bottom line. Five specific management practices are recommended: provide training, establish a compliant resolution process, document decisions, be honest, and ask only for information you need to know.

ANSWERS TO END-OF-CHAPTER DISCUSSION QUESTIONS

Suggested responses to the starred questions in this section can be found in MyManagementLab.

3-1. Explain why HR decisions are heavily regulated. Based on your analysis of current social forces, what new laws or regulations do you think will be passed or issued in the next few years?

HR decisions are heavily regulated based on the fact that there is a public consensus that "something needs to be done about an issue." Because of the public consensus that gender, ethnicity, color, race, age, religion, and disability are sources of unfair treatment and impact in the workplace, laws were passed to prohibit employment discrimination based on those factors.

Responses to the second part of this question may prove to be very interesting. Some students may say that there will be laws protecting young persons' rights to equal employment opportunity. Most of them are shunned when it comes to the more serious management positions. Other laws may be passed to protect homosexuals (an expansion of Title VII), to protect a person's right to speak his or her native language at work (an expansion of free speech), adoptive parenting medical coverage (an expansion of the Pregnancy Discrimination Act), and so on.

3-2. You own a small construction business. One of your workers is 55 years old and had heart bypass surgery about six months ago. He wants to come back to work, but you are concerned that he will not be able to handle the job's physical
tasks. What should you do? What are you prohibited from doing? What laws apply in this case?

In this situation, the employer should allow a doctor to determine what tasks the employee can perform and from that ascertain whether the employee can do the essential job functions. The employer has the right to request a release for work from the employee's doctor or to have a doctor hired by the employer make an evaluation. The ADA requires that employers make decisions about applicants or employees with disabilities solely on the basis of their ability to perform essential job functions. Organizations are also required to make reasonable accommodations to allow disabled employees to work for them.

Other laws that may apply to this case include the Vietnam Era Veterans Readjustment Act of 1974 and the Age Discrimination in Employment Act (as amended in 1986).

*3-3. What is adverse impact? How does it differ from adverse treatment?

3-4. How can an individual show prima facie evidence for adverse impact discrimination? How would an employer defend itself from this evidence?

A prima facie case of adverse impact is shown by the use of statistics that demonstrate that a protected class is more adversely affected by a policy or procedure than other classes. The definition of more adversely impacted is when the hiring rate of a protected class is less than four-fifths the hiring rate of a majority group. An employer can defend against this evidence by showing that the tool, policy, or practice is a valid predictor of job success or is necessary for good job performance.

*3-5. Many companies in the United States have recently put an end to the practice of giving an annual employee Christmas party due to complaints by employees with non-Christian religious backgrounds or spiritual values who claimed the Christmas party was a discriminatory employment practice. These employees argued that the employer who celebrated by paying for an employee Christmas party favored Christianity over other religions and belief systems. Do you think non-Christian employees are treated illegally or unethically when the employer decides to give a Christmas party for all the employees? Why? What would be a reasonable accommodation that an employer could make to satisfy both the Christian and non-Christian employees?

MyManagementLab Assisted-graded and Auto-graded Questions. Responses to these questions can be found in MyManagementLab.

3-6. Kate has severe diabetes that seriously limits her ability to eat. Even when taking insulin to help manage her diabetes, Kate must test her blood sugar several
times a day, and strictly monitor the availability of food, the time she eats, and the
type and quantity of food she eats to avoid serious medical consequences. Does Kate
have a disability under the ADA? Explain your answer.

3-7. Under the ADA, is an obese individual considered to have a disability and
therefore be eligible for coverage? Explain.

3-8. What are bona fide occupational qualifications (BFOQs)? What is a business
necessity? Can race be a BFOQ? Can it be a business necessity? Why or why not?

You Manage It! 1: Emerging Trends
Walgreens Leads the Way in Utilizing Workers with Disabilities

Critical Thinking Questions

3-9. What are the tangible and intangible benefits that Walgreens receives by being
a leader in hiring employees with disabilities?

Tangible benefits range from tax incentives, to quality work of employees, to
positive publicity associated with hiring individuals with disabilities. Intangible
benefits might include providing self-worth and improving the self-efficacy of
disabled employees, exposing customers who might not otherwise be exposed to
disabled individuals, and creating customer goodwill.

3-10. Only about half of the disabled people who want to work are employed. What
barriers do people with disabilities face in obtaining employment that are not
concerns of other groups protected by the EEOC, such as minorities, women, or the
aged?

The barriers faced by individuals with disabilities wanting to work are many. These
are not limited to a lack of understanding of the value provided by disabled
employees, a misunderstanding of the positive societal impact provided by
providing employment for those who truly desire particular types of work, and the
understanding of the broad range of inexpensive accommodations available to
individuals with disabilities.

You Manage It! 2: Customer-Driven HR
Can an Employer Refuse to Hire or Retain Employees Who Wear Tattoos?

Critical Thinking Questions

3-13. If a corporation restricts its employees from displaying visible tattoos in the
workplace and faces a court challenge of employment discrimination under EEOC
regulations, on what basis can the corporation defend its employment practice?
Refer to the information in this case as well as in this chapter in the section
“Defense of Discrimination Charges” to answer this question.
Student answers will vary to some degree. Some will find it hard to believe that a company can have such requirements. Despite the students’ personal feelings, their answers should be fully supported.

3-14. A company’s sales representative obtained a highly visible tattoo on her neck after being employed at that company. The company has a dress code policy that restricts the display of visible tattoos for work that has close contact with customers. What would be a reasonable accommodation to present to this employee that would balance the need for enforcement of the dress code policy with a goal of being fair and acting in good faith to company employees?

Answers from students will vary but the answers may discuss creative ways of “hiding” the tattoo during encounters with customers.

You Manage It! 3: Discussion
Are Women Breaking through the Glass Ceiling?

Critical Thinking Questions

3-17. Go to the Web sites of IBM (www.ibm.com), PepsiCo (www.pepsico.com), and Xerox (www.xerox.com), and explore the sites to learn more about the women who are either the CEO or chairman at these companies. Several of the Web sites have a “biography of executives” feature to learn more about the CEO and other top executives. Another possibility is to use a search engine such as Yahoo! and search on the company name and name of the CEO or chairman to gather some background on careers of executive women. Based on the information you gather, develop a rationale to explain how these women overcame the “glass ceiling” and attained the top executive role in a major U.S. corporation.

One of the common threads in the biographies of these female executives is their leadership styles. Each is described as determined, driven, self-disciplined, and ambitious, with the demonstrated ability to focus on the bottom line, coupled with the necessary skills of communication, relationship building, and people-oriented leadership practices, which are essential competencies in current leadership models. Additionally, the breadth and depth of experience of each of these women is impressive. Almost all hold advanced educational degrees; all have served in a variety of line and executive roles within their own organizations or with competitors. The credibility factor is high with these individuals when one considers both their credentials and experience.

3-18. Some male senior executives avoid becoming mentors to younger women because of their fear of the possible sexual harassment claims against them (as retribution for a romantic relationship that ends badly) or office gossip suggesting that the mentoring pair are having a romance. Do you think it is reasonable for male executives to have these fears about what could evolve or be suggested about professional relationships with female managers? How could a woman seeking a mentor go about cultivating a mentoring relationship with a male senior executive,
being aware that some men have reservations about establishing close professional relationships with women due to office gossip or the possibility that a romantic relationship results in the male having to defend himself against charges of sexual harassment?

Students will have varying opinions on this question. In terms of it being reasonable or unreasonable for male executives to have these fears, the issue at hand is really whether those fears are well founded and based on facts.

Research has shown that although mentoring is critical for women, women face greater barriers to securing mentors than men. Many of the barriers involve the fact that women are more likely than their male counterparts to be in cross-gender mentoring relationships, and these relationships are much more challenging than those involving partners of the same gender. Most of the men can invite their male mentors to go out for a beer after work and debrief on the day's activities, but this is less likely to happen with a male mentor and female protégé.

Despite the challenges that women face in seeking mentoring relationships with male senior executives, they can cultivate a mentoring relationship by following a well-structured program and making it a formal part of their goals and objectives that are measured by the organization’s performance development system. In this way, the mentoring relationship gains objectivity and has visibility, and results can be measured and reported.

You Manage It! 4: Ethics/Social Responsibility
Are Employee Noncompete Agreements Legally Enforceable? It Depends

Critical Thinking Questions

3-21. What is the purpose of a noncompete agreement? Do you think it is ethical for a company to require its employees to sign a noncompete agreement as a condition of employment? Under what conditions do you consider it to be acceptable for an employer to ask an employee to sign a noncompete agreement?

The purpose of a noncompete agreement is to protect the firm from an employee defecting from the organization and causing potential harm to that firm’s market position by the employee taking the knowledge and/or clients served to a competing firm. It is important to note that although much of HR is focused on the rights of the employee, companies have rights too. It should be noted that making a noncompete agreement a condition of employment is commonplace in many fields, and the agreement sometimes contains a time limit or sunset clause. Students will note that there are unique circumstances that make noncompete agreements more or less acceptable. It should also be noted that noncompete agreements are many times negotiable.
3-22. What are alternative ways to manage employee behavior so they do not harm their former employers after they quit? Are there any HR practices that could be used to achieve this outcome?

Most will note that the best “defense” against managing potential former employee harm would be to retain these employees. Although retention is not always realistic, many times the culture of the organization contributes to the extent of employee backlash or distaste for the former employer. For example, a firm with a highly competitive culture or a “win-at-all-costs” mentality would foster employee backlash upon leaving the organization. As in many cases, treating employees in a fair, impartial, and developmental manner can deter employee backlash upon leaving the organization.

Additional Exercises

In-Class or Out-of-Class Group Activities

“Sexual harassment is a problem that occurs between two employees. The company should not be held liable for the actions of misbehaving employees.” Do you agree or disagree with this statement? Explain your answer.

Although some students may agree with this statement, from a human resources as well as legal perspective, the correct response is to disagree. Sexual harassment is a major EEO issue for employers. Recent U.S. Supreme Court sexual harassment rulings have directly affected employer liability in sexual harassment cases. Particularly in cases of supervisor/subordinate relationships, an employer may be held liable for the actions of supervisors toward their subordinate employees even if the offense is not reported to top management.

In a recent ruling, the Supreme Court has established an employer defense against sexual harassment claims. The employer must prove that (1) it exercised reasonable care to prevent and correct sexual harassment problems in a timely manner, and (2) the plaintiff failed to use the internal procedures for reporting sexual harassment. To safeguard against sexual harassment claims, it is recommended that employers develop a zero-tolerance sexual harassment policy, successfully communicate the policy to employees, and ensure that victims can report abuses without fear of retaliation.

Suppose you are a plant manager and one of your employees has trouble controlling his anger and experiences wide swings in emotions due to bipolar disorder (a medical condition). You are aware that he has been under the treatment of a psychiatrist. This employee recently threatened other employees with violence and you placed him on leave until his psychiatrist indicates to you that his emotional condition has stabilized. Can the angry employee use the ADA to see a reasonable accommodation and get reinstated to his job or a modified one? If you need further information to assess this issue, what information would that be?
Sure, the employee can use the ADA to obtain a reasonable accommodation. The question is whether there is a reasonable accommodation to be made. Employers are not required to risk the safety and health of the other employees in order to accommodate an ADA claim. However, if there is an accommodation that can be made that will keep all employees safe, it should be made.

Information that would be useful includes: Are there specific types of situations or incidents that “set the employee off,” or is that not involved in the cause? Are there environments or times of day that contribute to the incidents? Is the employee actually violent or has the employee never actually acted on the emotions? Does the employee or psychiatrist have any suggestions for accommodations?

What three steps are involved in developing an affirmative action program? How much flexibility does an employer have in developing the specific points in such a program?

The three steps involved in developing an affirmative action program are: (1) conducting a utilization analysis, (2) establishing goals and timetables, and (3) determining action options. In the first phase, organizations need to consider eight different pieces of information, which constitutes an availability analysis after having conducted a utilization analysis. In the second phase, the OFCCP explicitly requires that rigid numerical quotas not be set. Rather, the employer should take into consideration the size of the underutilization, how fast the workforce turns over, and whether the workforce is growing or contracting. In the third phase, the OFCCP suggests that companies recruit protected-class members, redesign jobs, provide specialized training, and remove unnecessary employment barriers.

Why should managers be concerned with understanding human resource law instead of leaving it to the experts?

A firm's HR department has considerable responsibilities with respect to human resource law. However, if managers make poor decisions, the HR department will not always be able to resolve the situation. The manager's job is to prevent the damage from happening in the first place. Thus, understanding and complying with HR law helps the manager to do the right thing, realize the limitations of the HR and legal departments, and minimize potential liability.

Working individually or in groups, respond to these three scenarios based on what you learned in Chapter 2. Under what conditions (if any) do you think the following constitute sexual harassment? (a) A female manager fires a male employee because he refuses her request for sexual favors. (b) A male manager refers to female employees as “sweetie” or “baby.” (c) Two male employees are overheard by a third female employee exchanging sexually oriented jokes.
In answering the questions, the students should keep in mind the three main ways sexual harassment can be proved, as well as the steps the employee should take in alerting management.

**Working individually or in groups, discuss how you would set up an affirmative action program.**

It is important that students reach a decision of whether to use the good faith effort strategy or the quota strategy. Most experts would suggest the good faith effort strategy is the most legally acceptable approach. The following list of six actions should be demonstrated in the student plans: increasing the minority or female applicant flow; demonstrating top management support for the equal opportunity policy; demonstrating the equal opportunity commitment to the local community; keeping employees informed about the specifics of the affirmative action program; broadening the work skills of incumbent employees; and institutionalizing the equal employment policy to encourage supervisors’ support of it.

**Compare and contrast the issues presented in Bakke with more recent court rulings on affirmative action. Working individually or in groups, discuss the current direction of affirmative action.**

The basic questions addressed in Bakke focused on when preferential treatment becomes discrimination and under what circumstances discrimination will be temporarily permitted. Neither question was fully answered. Subsequent cases have continued to address these issues and clarify more specifically the scope and intent of affirmative action. For example, in the Paradise case, the court ruled that the courts can impose racial quotas to address the most serious cases of racial discrimination. In Johnson, the court ruled that public and private employers may voluntarily adopt hiring and promotion goals to benefit minorities and women. The Johnson ruling may limit claims of reverse discrimination by white males.

**Working individually or in groups, write a paper entitled “What the manager should know about how the EEOC handles a person’s discrimination charge.”**

The students should include the following information in their papers. The EEOC can either accept the charge or refer it to the state or local agency. After it has been filed, the EEOC has 10 days to serve notice on the employer, and then investigate the charge to determine whether there is reasonable cause to believe it is true within 120 days. If charges are dismissed, the EEOC must issue the charging party a Notice of Right to Sue. The person has 90 days to file suit on his or her own behalf. If the EEOC finds reasonable cause for the charge, it must attempt a conciliation. If conciliation is not satisfactory, it can bring a civil suit in federal district court, or issue a Notice of Right to Sue to the person who filed the charge. Under Title VII, the EEOC has 30 days to work out a conciliation agreement between the parties before bringing suit. If the EEOC is unable to obtain an acceptable conciliation agreement, it may sue the employer in federal district court.
Explain the difference between affirmative action and equal employment opportunity.

Equal employment opportunity aims to ensure that anyone, regardless of race, color, sex, religion, national origin, or age, has an equal chance for a job based on his or her qualifications. Affirmative action requires the employer to make an extra effort to hire and promote those in protected groups and includes specific actions designed to eliminate the present effects of past discrimination.

Assume you are the manager in a small restaurant; you are responsible for hiring employees, supervising them, and recommending them for promotion. Working individually or in groups, compile a list of potentially discriminatory management practices you should avoid.

Acceptable answers include the following:

Ensure that recruitment practices are nondiscriminatory and avoid word-of-mouth dissemination of information about job opportunities when the workforce is substantially white, or all members of some other class.

Avoid giving false or misleading information to members of any group or failing or refusing to advise them of work opportunities. Avoid advertising classifications that specify gender or age unless it is a bona fide occupational qualification for the job.

Avoid asking pre-employment questions about an applicant’s race, color, religion, sex, or national origin.

Do not deny a job to a disabled individual if the person is qualified and able to perform the essential functions of the job. Make reasonable accommodations for candidates that are otherwise qualified but unable to perform an essential function unless doing so would result in a hardship.

Apply tests and performance standards uniformly to all employees and job candidates. Avoid tests if they disproportionately screen out minorities or women and are not job related.

Do not give preference to relatives of current employees if your current employees are substantially nonminority.

Do not establish requirements for physical characteristics unless you can show they are job related.

Do not make pre-employment inquiries about a person’s disability, but do ask questions about the person’s ability to perform specific essential job functions.
Review job application forms, interview procedures, and job descriptions for illegal questions and statements. Check for questions about health, disabilities, medical histories, or previous workers’ compensation claims.

Do not ask applicants whether they have ever been arrested or spent time in jail. However, you can ask about conviction records.

Is it ethical to refuse to give preferential treatment to minorities and women, who have been widely discriminated against in the past?

The goal of an ethical organization should be to reach the point where all employment decisions are made without regard for the race, sex, age, or other characteristics of an employee or applicant, and that, as a result, the organization has a diverse mixture of these characteristics at all levels of the organization. The means to reach that goal are hotly debated and fervently believed by both sides of this issue. If both sides believe that reaching the situation described is, in fact, their goal, the differing tactics to get there in this case are not, in themselves, ethical or unethical.

Some businesses thrive on a sexual theme. For example, "Hooters" attracts customers by marketing a sexual environment. Many ad campaigns have explicit sexual themes. Are such marketing efforts ethical? What effect might these public images have on the working environment at the company that uses them?

The arguments in this area revolve around whether these companies are influencing society, reflecting society, or simply serving a segment of society. In today's society, companies are more and more being expected to "rise above" the simple argument that they are reflecting society or simply servicing a demand. Some would say that those arguments are akin to claiming that prostitution or murder-for-hire was reflecting society or servicing a demand. Companies and managers must make some hard decisions in these areas, and in the marketing arena as well. Companies are being asked, more and more, to help influence society in positive ways.

These types of public images can certainly have an effect on the working environment at companies that use them. "Hooters" has been subjected to lawsuits by employees based on some of these issues. Blatantly promoting and marketing such an image or environment can lead employees or customers to believe that behavior that constitutes sexual harassment is acceptable at those places. This can be a double-edged sword that creates significant trouble.

Is it ethical for a U.S. employer to require all employees speak only English at the workplace?
As with any other work rule, it is important to ascertain if there is a legitimate business reason for the policy. If there is (special public communication issues, etc.), then it would be ethical. If there is not, and the policy is based only on the employer's prejudices or paranoia ("What are they talking about?") , then it should be considered unethical.

**Experiential Exercise: “Space Cadet” or Victim?**

1. Divide the class into groups of three to five students.

2. Each group should develop answers to the following questions:
   
a. Based on what you read in this chapter, on what legal basis could the 61-year-old California attorney claim he was a victim of discrimination?

   Clearly, age discrimination is one of the claims. The ADEA made it unlawful to discriminate against employees who are over 40. Disability discrimination is another potential claim if the claimant relates substandard performance to a disability.

   b. On what laws and legal concepts did the employer apparently base its termination of this 61-year-old attorney?

   Under the legal concept of *management rights*, employers have the right to hire, promote, assign, discipline, and discharge employees. Under management rights is the concept of *at-will employment*, a common law rule used by employers to assert their right to end an employment relationship with an employee at any time for any cause. The employer in this case has based its termination on job performance, with documentation of complaints from association members about his advice, and subsequent complaints over a two-year period from association members, and he was fired for mistreating members and providing inadequate legal advice.

   c. Based on what laws or legal concepts could you take the position that it is legal to fire someone for poor performance even though there may be a discriminatory aspect to the termination (which is not to say that there necessarily was such a discriminatory aspect with this case)?

   A person who feels he or she was discriminated against must prove either that he or she was subjected to unlawful disparate treatment (intentional discrimination) or that the procedure in question has a disparate impact (unintentional discrimination) upon members of his or her protected class (in this case, age). The employer here has provided evidence that its decision to terminate was based on legitimate nondiscriminatory reasons (documented job performance issues) that have nothing to do with the prohibited discrimination alleged. This is a basic defense that is accepted by the courts, and, in fact, was accepted in this case.
d. If you were the judge called on to make a decision on this case, what would your decision be, and why?

Most students will probably come to the same conclusion as the judge in this case, that the employer fired the 61-year-old lawyer because of performance.

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