Chapter 1 Outline

Defining Discrimination
   Equal Employment Opportunity Commission
   Departments of Labor and Homeland Security
   Equal Employment Opportunity and Affirmative Action
   The Pros and Cons of Affirmative Action

Evolution of EEO Legislation
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   Title VII of the Civil Rights Act of 1964
   Age Discrimination in Employment Act of 1967
   Vocational Rehabilitation Act of 1973
   Acts Affecting Veterans
   Pregnancy Discrimination Act of 1978
   Retirement Equity Act of 1984
   Immigration Reform and Control Act of 1986
   Employee Polygraph Protection Act of 1988
   Drug-Free Workplace Act of 1988
   The Civil Rights Act of 1991
   Family and Medical Leave Act of 1993

Other Employment Laws and Court Interpretations
   Executive Orders and Affirmative Action
   Major Cases and Interpretations
   State Employment Laws

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   Reverse Discrimination
   Employee Benefits and Sex Discrimination
   Religious Discrimination
   Seniority
   Recruitment Advertising
   Wrongful Discharge

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   Overtime Work Laws
   Impact of Unethical Business
   The Aging Work Force
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   Continuing Education
   Avoiding Lawsuits (and Unionization)
   Using Credit Reports as Employment Checks

Americans with Disabilities Act
   Background
   Defining Disability
   Qualifying for Work
   The ADA's Impact on the Hospitality Industry
   Communicable Diseases

Competencies

1. Describe the EEOC and distinguish between EEO laws and affirmative action. (pp. 3–13)

2. Describe the evolution of EEO legislation from the 1960s through today. (pp. 13–25)

3. List major areas of EEO abuse and litigation, and identify various critical EEO issues. (pp. 25–37)

4. Define disability, and describe the Americans with Disabilities Act (ADA) and its implications for human resource managers at hospitality operations. (pp. 37–43)
Part I

Employment Laws, Planning, and Staffing
Before the 1960s, discrimination in the workplace was widespread in the United States. In fact, only government employees and union members had any type of protection at all. This does not mean, of course, that all employers discriminated against their employees; it does mean, however, that employers could do so with impunity. Because there was almost no regulation of human resource policies, widespread employment discrimination was often the rule, especially for some groups. For instance, women were relegated to positions traditionally viewed as "women's work" and were barred from many employment opportunities. The same was true for minorities.

These rampant inequities eventually led to social unrest. During the civil rights movement of the 1950s and 1960s, various groups engaged in primarily nonviolent civil disobedience and protests that helped lead to the Civil Rights Act of 1964. This legislation radically affected the American work force. The act prohibited discrimination on the basis of race, color, religion, sex, or national origin and became the cornerstone for workplace change. Title VII of the act ensures fair employment standards. This single act is generally credited for initiating the equal employment opportunity (EEO) environment that exists in the United States today. Understanding and following the various EEO laws and regulations requires strong human resources knowledge and focus.

Defining Discrimination

Human resources management is the practice of legal discrimination. There is a difference between legal and illegal discrimination. From a technical standpoint, selection, training, and appraisals are all discriminatory practices, since they all involve choosing one individual over another based on discernible differences. However, only discrimination that follows the guidelines, laws, and regulations of the Equal Employment Opportunity Commission (EEOC) is legal. Practices that do not follow the law are illegal. They may also be very costly.

In 2008, the median jury award for employment-practices liability claims in the United States was $326,000. In recent years, we have seen significant increases in EEOC filings. According to the EEOC:
• The number of workplace discrimination charges filed with the agency increased 15 percent in 2008 to the unprecedented total of 95,402. The EEOC is experiencing the highest level of charge filings since its creation in 1965.

• In 2008, 24,582 age discrimination charges were received by the EEOC, representing a 28.7 percent increase over 2007. The EEOC filed 290 lawsuits, resolved 339 lawsuits, and resolved 81,081 private-sector charges in 2008, according to the agency.

• In 2009 the EEOC filed 93,277 charges by individuals alleging illegal discrimination actions by employers. Race discrimination accounted for 36 percent of charges; sex, 30 percent; national origin, 11.9 percent; religion, 3.6 percent; retaliation, 36 percent; age, 24.4 percent; disability, 23 percent; Equal Pay Act, 1 percent. (Because persons file charges under multiple categories, these percentages exceed 100 percent.)

• Through its combined enforcement, mediation, and litigation programs, the EEOC recovered approximately $376 million in monetary relief for thousands of discrimination victims and obtained significant remedial relief from employers to promote inclusive and discrimination-free workplaces.

Some awards are extremely large. For instance, in *Zubulake v. UBS*, a female employee sued for sex bias and was awarded $9.1 million in actual damages and $20.1 million in punitive damages. *Valentino Las Vegas*, an Italian fine-dining restaurant operated in The Venetian Resort Hotel and Casino by Los Angeles–based Valentino Restaurant Group, reportedly agreed to a $600,000 settlement of a sexual harassment lawsuit involving at least five female employees.

### Equal Employment Opportunity Commission

The EEOC is the federal commission created by the Civil Rights Act of 1964 to establish and monitor employment standards in the United States. The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person’s race, color, religion, sex (including pregnancy), national origin, age (forty or older), disability, or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. Most employers with at least fifteen employees are covered by EEOC laws (twenty employees in age discrimination cases). Most labor unions and employment agencies are also covered. The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits.

This independent agency interprets and enforces Title VII, among other laws (see Exhibit 1). The EEOC is made up of five members appointed by the president of the United States for a term of five years each.

The EEOC plays three principal roles. First, it oversees the administration of existing EEO laws and regulations, referring charges of violation to state or local equal employment opportunity agencies. Someone filing a complaint in Michigan, for instance, would have his or her case referred to the Michigan Civil Rights Department.
Exhibit 1  Laws Enforced by the EEOC

**The Equal Pay Act of 1963**
This law makes it illegal to pay different wages to men and women if they perform equal work in the same workplace. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

**Title VII of the Civil Rights Act of 1964**
This law makes it illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably accommodate applicants' and employees' sincerely held religious beliefs and practices, unless doing so would impose an undue hardship on the operation of the employer's business.

**The Age Discrimination in Employment Act of 1967**
This law protects people who are forty or older from discrimination because of age. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

**Sections 501 and 505 of the Rehabilitation Act of 1973**
This law makes it illegal to discriminate against a qualified person with a disability in the federal government. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of the employer's business.

**The Pregnancy Discrimination Act of 1978**
This law amended Title VII of the Civil Rights Act to make it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.
Exhibit 1  (continued)

Immigration Reform and Control Act of 1986
This law prohibits the recruiting and hiring of aliens not eligible for U.S. employment.

Title I of the Americans with Disabilities Act of 1990
This law makes it illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of the employer's business.

Sections 102 and 103 of the Civil Rights Act of 1991
Among other things, this law amends Title VII of the Civil Rights Act and the ADA to permit jury trials and compensatory and punitive damage awards in intentional discrimination cases.

Family and Medical Leave Act of 1993
This law provides the opportunity for employees to take up to twelve weeks of unpaid leave for the birth or adoption of a child; for caring for elderly parents or an ill parent, spouse, or child; or for undergoing medical treatment. Applies to employers with fifty or more employees.

The Genetic Information Nondiscrimination Act of 2008
This law makes it illegal to discriminate against employees or applicants because of genetic information. Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder, or condition of an individual's family members (i.e., an individual's family medical history). The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.


Exhibit 2 is an example of a charge filed with the EEOC. When an employee files a charge, the employer receives a copy of the paperwork. Regardless of whether the charge is filed with the EEOC or a state enforcement agency, the
**Exhibit 2  Sample Documents Used in a Discrimination Charge**

<table>
<thead>
<tr>
<th>EQUAL EMPLOYMENT OPPORTUNITY COMMISSION</th>
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<tbody>
<tr>
<td>Mr. John Doe</td>
</tr>
<tr>
<td>OWNER</td>
</tr>
<tr>
<td>THE LION'S DEN</td>
</tr>
<tr>
<td>101 PLAY LANE</td>
</tr>
<tr>
<td>SNAPU, USA, 30000</td>
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</table>

<table>
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<tr>
<th>PERSON FILING CHARGE</th>
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<tbody>
<tr>
<td>Debella, Scarlett</td>
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<table>
<thead>
<tr>
<th>THIS PERSON (CHECK ONE)</th>
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</thead>
<tbody>
<tr>
<td>CLAIMING TO BE AGGRESSOR</td>
</tr>
<tr>
<td>IS FILING ON BEHALF OF ANOTHER</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>DATE OF ALLEGED VIOLATION</th>
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</thead>
<tbody>
<tr>
<td>Earliest</td>
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<tr>
<td>10/31/96</td>
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<tr>
<td>Most Recent</td>
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<tr>
<td>10/31/96</td>
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</table>

<table>
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<th>PLACE OF ALLEGED VIOLATION</th>
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<td>SNAPU, USA,</td>
</tr>
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<table>
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<tr>
<th>CHARGE NUMBER</th>
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<tbody>
<tr>
<td>180871234</td>
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</tbody>
</table>

**NOTICE OF CHARGE OF DISCRIMINATION**

(See EEOC "Rules and Regulations" before completing this Form)

You are hereby notified that a charge of employment discrimination has been filed against your organization under:

- [X] TITLE VII OF THE CIVIL RIGHTS ACT OF 1964
- [ ] THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967
- [ ] THE AMERICANS WITH DISABILITIES ACT
- [ ] THE EQUAL PAY ACT (29 U.S.C. SECT. 206(d))

The boxes checked below apply to your organization:

1. [ ] No action is required on your part at this time.

2. [ ] Please submit by ______ a statement of your position with respect to the allegation(s) contained in this charge, with copies of any supporting documentation. This material will be made a part of the file and will be considered at the time that we investigate this charge. Your prompt response to this request will make it easier to conduct and conclude our investigation of this charge.

3. [ ] Please respond fully by ______ to the attached request for information which pertains to the allegations contained in this charge. Such information will be made a part of the file and will be considered by the Commission during the course of its investigation of the charge.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Equal Employment Opportunity Comm
477 Michigan, Room 1540
Detroit, MI 48226

Earl Benson, Enforcement Manager
(Commission Representative)
123-4566 (Telephone Number)

[ ] Enclosure: Copy of Charge

**BASIS OF DISCRIMINATION**

- [ ] RACE
- [ ] COLOR
- [X] SEX
- [ ] RELIGION
- [ ] NAT. ORIGIN
- [X] RETALIATION
- [ ] AGE
- [ ] DISABILITY
- [ ] OTHER

**CIRCUMSTANCES OF ALLEGED VIOLATION**

See enclosed Form 5, Charge of Discrimination.

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<thead>
<tr>
<th>TYPED NAME/TITLE OF AUTHORIZED EEOC OFFICIAL</th>
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<tbody>
<tr>
<td>A. William Schukar, Director</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SIGNATURE</th>
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</thead>
</table>

**RESPONDENT'S COPY**

(continued)
I was employed as a cocktail waitress at the Lion’s Den. From September 1996 until my discharge, I was required to work in a sexually degrading environment and was subjected to unwelcome sexual advances from customers. On October 31, 1996, I was fired in retaliation for complaining about the sexual harassment aspects of my job. Other female cocktail waitresses were also adversely affected by the sexually degrading environment and unwelcome sexual advances from customers.

charge can still be heard in state or federal court. Even if the EEOC or state agency finds that the employer has not discriminated, the person filing the charge can still sue the employer.

The second responsibility of the EEOC is to issue guidelines for Title VII compliance. These guidelines are interpretations of the statute written by Congress. While not technically laws, EEOC regulations have been given the force of law by the courts, and have been viewed by the Supreme Court as important to the effective administration of EEOC operations.

The third role of the EEOC is to gather information. Each organization in the United States with one hundred or more employees must annually file an EEO-1 report to a regional EEOC office. This report outlines the number of women and minorities employed in nine different job categories within the company. The EEOC analyzes these reports to statistically determine patterns of compliance and discrimination in the United States. If patterns of discrimination are found, the EEOC has the added responsibility of filing class action lawsuits to counteract such events. Exhibit 3 shows an EEO-1 form that employers use to report employee information.

Departments of Labor and Homeland Security

The U.S. Department of Labor (DOL) also plays a significant role in the interpretation of labor laws. For instance, the DOL Wage and Hour Division issues opinion letters interpreting the Fair Labor Standards Act (FLSA). The letters address a broad spectrum of issues under the FLSA, including the recent fair-pay regulations. On December 16, 2004, the DOL issued new regulations governing child labor. Under these regulations, 14- and 15-year-olds are allowed to perform kitchen work and other work involved in preparing and serving food and beverages, including operating machines and other devices used in performing such work.

In other regulatory developments, the Department of Homeland Security has expanded its Basic Pilot Employment Verification Program nationwide. The program is a new, voluntary web-based system through which employers can verify the immigration status and employment eligibility of new hires.6

Equal Employment Opportunity and Affirmative Action

EEO and affirmative action are not the same. “EEO” refers to the laws and regulations that protect the rights of an identified group or class. Affirmative action represents an obligation employers have to hire members of protected groups to overcome past discriminatory practices. All employers are required to abide by EEO laws and regulations. However, only employers holding federal (and sometimes state) contracts are required to have affirmative action programs. An example of affirmative action would be a program designed to recruit, hire, or promote qualified members of a protected group, such as women, minorities, Vietnam-era veterans, or people with disabilities.

Affirmative action programs are acceptable only when they consider applicants on an individual basis and do not set rigid quotas that prevent people who are not in protected groups from competing equally. This key point stems from the famous Regents of the University of California v. Bakke case decided by the Supreme Court in
### Exhibit 3  EEO-1 Report

**Joint Reporting Committee**
- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance Programs (Labor)

**EQUAL EMPLOYMENT OPPORTUNITY**

**EMPLOYER INFORMATION REPORT EEO—1**

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#### Section A—TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

   - [ ] Multi-establishment Employer:
     - (1) [ ] Single-establishment Employer Report
     - (2) [ ] Consolidated Report (Required)
     - (3) [ ] Headquarters Unit Report (Required)
     - (4) [ ] Individual Establishment Report (submit one for each establishment with 50 or more employees)
     - (5) [ ] Special Report

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#### Section B—COMPANY IDENTIFICATION (To be answered by all employers)

1. Parent Company
   - a. Name of parent company (owns or controls establishment in item 2) omit if same as label
      - Address (Number and street)
      - City or town
      - State
      - ZIP code

2. Establishment for which this report is filed. (Omit if same as label)
   - a. Name of establishment
      - Address (Number and street)
      - City or Town
      - County
      - State
      - ZIP code

   - b. Employer Identification No. (IRS 9-DIGIT TAX NUMBER)

   - c. Was an EEO-1 report filed for this establishment last year? [ ] Yes [ ] No

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#### Section C—EMPLOYERS WHO ARE REQUIRED TO FILE (To be answered by all employers)

- [ ] Yes [ ] No 1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?

- [ ] Yes [ ] No 2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

- [ ] Yes [ ] No 3. Does the company or any of its establishments (a) have 50 or more employees and (b) is not exempt as provided by 41 CFR 60-1.5, AND either (1) is a prime government contractor or first-tier subcontractor, and has a contract, subcontract, or purchase order amounting to $50,000 or more, or (2) serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes?

   If the response to question C-3 is yes, please enter your Dun and Bradstreet identification number (if you have one): 

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NOTE: If the answer is yes to questions 1, 2, or 3, complete the entire form, otherwise skip to Section G.

(continued)
### Section D—EMPLOYMENT DATA

Employment at this establishment—Report all permanent full-time and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines end in all columns. Blank spaces will be considered as zeros.

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<th>NUMBER OF EMPLOYEES</th>
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<td>D</td>
<td>C</td>
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<td>Technicians</td>
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<td>Sales Workers</td>
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<td>Office and Clerical</td>
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<tr>
<td>Craft Workers (Skilled)</td>
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<tr>
<td>Laborers (Unskilled)</td>
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<td>Service Workers</td>
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Note: Omit questions 1 and 2 on the Consolidated Report.
1. Date(s) of payroll period used: __________________________
2. Does this establishment employ apprentices? ______________
   1 □ Yes 2 □ No

### Section E—ESTABLISHMENT INFORMATION (Omit on the Consolidated Report)

1. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.)

### Section F—REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition of reporting units and other pertinent information.

### Section G—CERTIFICATION (See Instructions G)

Check 1 □ All reports are accurate and were prepared in accordance with the instructions (check on consolidated only)

2 □ This report is accurate and was prepared in accordance with the instructions.

Name of Certifying Official: __________________________
Title: __________________________
Signature: __________________________
Date: __________________________

Name of person to contact regarding this report (Type or print): __________________________
Address (Number and Street): __________________________

Title: __________________________
City and State: __________________________
ZIP Code: __________________________
Telephone Number (Including Area Code): __________________________
Extension: __________________________

All reports and information obtained from individual reports will be kept confidential as required by Section 703(e) of Title VII. WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW, U.S. CODE, TITLE 18, SECTION 1001.

1978. In that case, the medical school at the University of California at Davis set aside sixteen of its one hundred places for incoming students for minorities only. As a result, Bakke—a white male—could compete for only eighty-four spaces in the incoming class, while minorities could compete for the entire one hundred. Since this policy represented a formal, quota-based system in which one group was favored over another, it was ruled 

reverse discrimination

and was overturned.

In recent years the courts have been active in re-interpreting the Bakke case. For instance, in 2003 the U.S. Supreme Court ruled 6-3 in Gratz v. Bollinger that an affirmative action program used by the University of Michigan regarding undergraduate admissions was too mechanistic, and therefore unconstitutional. At issue in the case was the University of Michigan's admissions evaluation policy. The University of Michigan used a 150-point scale to rank applicants, with 100 points needed to guarantee admission. The university gave under-represented ethnic groups, including African-Americans, Hispanics, and Native Americans, an automatic 20-point bonus on this scale, while a perfect SAT score was worth 12 points. Gratz and Hamacher, two white residents of Michigan, applied for admission to the university's College of Literature, Science and Arts. Gratz applied for admission in the fall of 1995 and Hamacher in the fall of 1997. Both were subsequently denied admission to the university. The Center for Individual Rights filed a lawsuit on their behalf in October 1997. Their class-action lawsuit alleged "violations and threatened violations of the rights of the plaintiffs and the class they represent to equal protection of the laws under the Fourteenth Amendment ... and for racial discrimination."

Then, in 2009, the Supreme Court ruled again on reverse discrimination in the Ricci v. DeStefano case. This case arose from a lawsuit brought against the City of New Haven, Connecticut, by nineteen firefighters alleging that the city discriminated against them with regard to promotions. In November and December of 2003, the New Haven Fire Department administered exams to those interested in promotion to captain. A total of 118 firefighters took the exams. Twenty-two firefighters passed the test. Sixty-four percent (16) of the applicants who passed the test were white, 38 percent (3 of 8) were black, and 38 percent (2 of 8) were Hispanic. Therefore, the pass rate for black applicants was approximately half of that of white applicants. Similar scores resulted from tests to become lieutenants in the department. City of New Haven officials invalidated the test results because none of the black firefighters who passed the exam had scored high enough (70 percent correct) to be considered for the positions, so the officials feared a lawsuit over the test's disparate impact on a protected minority. The complainants claimed they were denied promotions because of their race—a form of racial discrimination. The Supreme Court voted 5-4 that the city's action in discarding the tests was a violation of Title VII of the Civil Rights Act of 1964.

The Pros and Cons of Affirmative Action

Affirmative action was debated more intensely in the 1990s than at any other time during its history. In some states, the debate led to ballot measures designed to overturn many aspects of affirmative action. In California, for instance, a referendum to end affirmative action in state and local government was passed by a 54 percent vote in the 1996 elections. Those who favor affirmative action and
Exhibit 4  Pros and Cons of Affirmative Action

Reasons some people give for supporting affirmative action:
- Diversity is desirable and will not always occur by chance.
- Those starting at a disadvantage need help.
- Affirmative action draws people to fields of work and study that they might otherwise not consider.
- Some stereotypes cannot be broken without affirmative action.
- Affirmative action is needed to compensate minorities for centuries of slavery and other unfair treatment.
- It's the law.

Reasons some people give for opposing affirmative action:
- Affirmative action leads to reverse discrimination sometimes.
- Affirmative action lowers standards of accountability and performance.
- Sometimes people are not prepared for the jobs they receive through affirmative action.
- Elimination of the policy would lead to a truly color-blind society.
- It is condescending to say that minorities need help.
- The policy demeans minorities by labeling them as successful only because of affirmative action.

those who oppose it both offer strong arguments (see Exhibit 4). Those who favor affirmative action believe that it is necessary in order to right wrongs suffered by minority groups and others who have been discriminated against in the past; those who oppose affirmative action allege that it uses reverse discrimination to solve the problem of discrimination, which can foster resentment and perpetuate prejudice.

Evolution of EEO Legislation

The evolution of EEO laws follows a pattern. The first set of EEO laws emphasized personnel policies. The second set targeted unequal treatment, while the third targeted perpetuation of the effects of past discrimination. The fourth and, to date, final stage of laws and regulations emphasize the adverse impact on protected groups. Adverse impact relates to those laws designed to reverse the negative effect of past employment practices. We will take a look at some of the major EEO laws in the following sections.

The Equal Pay Act of 1963

Some feel that the passage of the Equal Pay Act of 1963 marked the evolutionary starting point of the EEO movement in the United States. This act was passed as
an amendment to the Fair Labor Standards Act of 1938; it requires that men and women working for the same organization be paid the same rate of pay for work that is substantially equal. Because of continuing disparities in pay between the sexes, this issue is the focus of many court cases and employment discrimination charges.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 applies to employers with fifteen or more employees and prohibits unfair employment discrimination based on race, color, sex, religion, and national origin. Employers with fewer than fifteen employees may still be subject to state antidiscrimination laws that are similar to the federal Civil Rights Act.

There are two possible defenses for charges of discrimination brought under the Civil Rights Act of 1964: business necessity and bona fide occupational qualifications (BFOQs).

The business necessity defense is very limited and narrow. To succeed, the employer must show that the practice is essential to its business. For example, an airline that prohibited pregnant flight attendants from flying probably would not be violating Title VII if it could show that grounding the attendants was essential to its business. The business of an airline is to transport passengers safely. If the airline could show that the pregnant employees were a safety hazard because premature, sudden, or unexpected labor or birth could endanger the flight, it would probably have a successful business necessity defense.

Bona fide occupational qualifications (BFOQs) permit some legal discrimination and are based on the need to hire certain types of people for specific jobs. Under this provision, discrimination based on sex, religion, and national origin is acceptable if a bona fide occupational qualification makes it necessary. Examples of bona fide occupational qualifications include the following:

- Mandatory retirement ages for public bus drivers and airline pilots
- Female attendants in a women’s locker room
- Male models for male clothing
- Native-Hawaiian performers for a Hawaiian luau
- Roman Catholic employees to take care of the altar at a Roman Catholic church

In each of these cases, bona fide occupational qualifications are based on the assumption that the qualification is truly mandatory. One exception would invalidate the entire BFOQ defense. For instance, it would be acceptable for a French restaurant to require that all of its guest-contact personnel speak French. However, if a single employee is hired for a guest-contact position who does not speak French, the BFOQ status is lost. The burden of proof that a BFOQ is required rests with the employer.

Seniority systems and seniority are also permitted under Title VII, as are systems based on merit or incentive—as long as differences are not the result of an intention to discriminate. In a seniority system, for example, employees with more seniority would retain their jobs while others with less seniority in the same
position would be laid off. In a merit-based system, raises or other pay increases are contingent on employee performance.

Pre-employment inquiries involving matters that might be construed as discriminatory (sex, national origin, and religion) are acceptable as long as they can be shown to be job-related. Acceptable examples would include those we used to illustrate BFOQs. For instance, asking applicants to indicate their sex on an employment application is acceptable if the position is for a female attendant in a women's locker room.

Testing of ability is allowed if it can be shown that the test is truly required—and if it is not used to discriminate unfairly. For example, it is allowable to require applicants for a cook's position to perform a cooking test, to ask applicants for a typist position to take a typing test, and to require applicants to take computer or other equipment familiarity tests if knowledge of such equipment is mandatory for the job.

Veterans' preference rights and national security clearances relate only to public employee environments and are not discussed here.

Finally, employers are not required to extend preferential treatment to individuals or groups on the basis of race, color, national origin, sex, or religion. They also do not have to give special treatment to such groups to correct the imbalances of past practices. Some preferential treatment provisions are mandated under affirmative action guidelines for public employers (state and federal government) or for companies with federal contracts.

Violations of Title VII. There are two theories of discrimination under Title VII: disparate treatment and disparate impact. If an employer treats one individual differently from others because of the person's race, sex, color, religion, national origin, or other protected characteristic, that is disparate treatment. If an employer doesn't intend to discriminate, but does something that disadvantages more members of one group than another, that employer may be guilty of disparate impact. The Supreme Court first described this term in its 1971 decision in Griggs v. Duke Power Co., as "practices that are fair in form, but discriminatory in operation." For example, consider what might happen if a restaurant requires dishwashers to have a college degree. By enforcing this standard, the restaurant excludes a larger proportion of African American applicants than white applicants. Furthermore, having a college degree is not really necessary to perform the job. In this case, the restaurant might be guilty of violating Title VII under the disparate impact theory of discrimination. On the other hand, if an employer hires white applicants who do not have a high school education but does not hire African Americans with the same or higher qualifications, the employer is guilty of disparate treatment.

A recent legal case in Mississippi illustrates how convoluted decisions over such issues can become. In this case, an employee of Barden Mississippi Gaming filed a lawsuit claiming that he lost his job at a casino in Tunica, Mississippi, because he was white. The employee alleged, and the court held, that the company had replaced him, a white human resources employee, with an African American employee who had less human resources experience. The court ruled in the employee's favor and required the company to pay $312,000 in damages to him.10

Policies intended to perpetuate an image are generally seen as overtly discriminatory, even though a company deems them necessary. For instance, a
restaurant that hires only young people because it wants to create a youthful image is guilty of discrimination; there is no bona fide occupational qualification that prevents older employees from working in the restaurant.

The uniforms that some hospitality companies require their employees to wear may constitute a violation of the Civil Rights Act. For instance, requiring female servers to wear revealing costumes could be a violation, since male servers are not required to wear the same attire. Such a policy can even be viewed as reinforcing an environment conducive to sexual harassment if the uniforms consistently lead to unwanted advances. The argument does not end here. Uniforms do not have to be skimpy or suggestive to be considered discriminatory. For instance, some religions prohibit their members from wearing slacks or certain types of clothing. Hospitality companies cannot require a female employee to wear slacks if the employee’s religion prohibits such attire; to do so would be viewed as religious discrimination.

Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination on the basis of age against people forty years old or older. As a result, the EEOC views employees who are forty or older as a protected group. All employment actions—hiring, recruiting, appraisals, promotions, advertising, and so on—affecting employees who are forty or older are subject to scrutiny under the ADEA. All private employers with twenty or more employees and all unions with twenty-five or more members must comply.

Examples of age discrimination include passing employees over for promotion for reasons other than ability, providing different benefit programs for different age groups of employees, and forcing older employees to retire. The ADEA will affect hospitality companies more and more in the future as a result of the overall aging of the work force and the industry's increasing reliance on older workers.

Vocational Rehabilitation Act of 1973

The Vocational Rehabilitation Act of 1973 requires all employers holding federal contracts of $25,000 or more to employ “qualified” individuals with disabilities and to make “reasonable accommodations” as needed. If a company holds federal contracts of $50,000 or more, it must also file a written affirmative action report annually with the EEOC that outlines its program of compliance with this act.

According to the provisions of the act, a person is considered to have a disability if he or she has either a physical or mental impairment, has a record of such impairment, and/or is viewed by others as having such an impairment. This law stipulates that an employer cannot refuse to hire or otherwise discriminate against such employees or applicants simply because the company lacks the proper facilities to accommodate the individual’s impairment.

The Americans with Disabilities Act (ADA) has a much wider impact on the hospitality industry. The ADA covers hiring and providing for individuals with disabilities much more extensively than does the Vocational Rehabilitation Act. A more thorough discussion of the ADA is provided later in the chapter.
Acts Affecting Veterans

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 was designed to provide Vietnam veterans with protected group status for a period of four years after their discharge. Under this act, employers with $10,000 or more in federal contracts are required to take affirmative action to employ qualified Vietnam-era veterans. To qualify, a veteran must have served in the Armed Forces—not exclusive to Vietnam—between August 5, 1964, and May 7, 1975.

Hospitality managers must also meet the guidelines of the Selective Training and Service Act of 1940. The act requires employers to rehire veterans—within ninety days of reapplication and with no loss of seniority—who leave a job for military service and then apply for reemployment upon completion of service. This act also requires employers to give employees time off, without pay, to maintain active reserve status. This time off is in addition to normal vacation time. The act also protects veterans who saw either active or reserve duty during the Gulf War in the Middle East during 1990 and 1991.

In December 2004, President G. W. Bush signed into law the Veterans Benefits Improvement Act of 2005, which made two main revisions to the Uniformed Services Employment and Reemployment Rights Act of 1994. One of the changes requires all employers to notify employees of their rights and responsibilities under USERRA.11

Pregnancy Discrimination Act of 1978

Before the enactment of the Pregnancy Discrimination Act of 1978, an employer could require an employee to take pregnancy leave for a stipulated period or at a specific time in her pregnancy. This is no longer the case. Under this act, employers cannot stipulate the beginning and ending dates of a pregnant employee's maternity leave. In addition, this act prohibits employers from refusing to hire pregnant applicants as long as they can perform the major functions of the job. The act does not force employers to provide health and disability programs if none previously existed, nor does it require employers to provide health coverage for abortions except in cases where the life of the mother is endangered. It does, however, prohibit employers from providing health insurance that does not cover pregnancy or that imposes high costs for this type of coverage.

Other forms of discrimination are also prohibited, including limiting pregnancy benefits to married workers and discriminating between men and women regarding employee benefits. Employers who provide pregnancy benefits are required to provide the same benefits to spouses of employees. In 1993, Congress enacted the Family and Medical Leave Act, intended to establish a national leave policy.

Such programs are also mandated by state law in at least twenty-one states. In some cases, state laws are even more stringent than the federal law. Some states have passed laws that require employers to provide unpaid leaves of absence to women for pregnancy or childbirth. This has caused an equal treatment/special treatment debate, because some states do not require employers to provide the same leaves to men. In the 1987 case Geduldig v. Aiello, the Supreme Court upheld a California law requiring maternal leaves on the basis of "biologic reasoning"—meaning that pregnancy was a unique physical condition. The Supreme Court
upheld the California law again in the same year in *California Federal Savings and Loan Association v. Guerra*. In this case, the court found that Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act of 1978 did not preempt a state statute, and that the narrowly defined leave policy served the goal of sex equality. The California law in question requires that pregnancy leaves be granted for as long as four months.

This act substantially affects the hospitality industry, whose work force is predominantly female. In addition to increasing the cost of employer-controlled health benefits, the act specifically prohibits employers from discriminating against pregnant women on the basis that these women may not fit the image the company wants to project. As a result, a hospitality employer cannot require an employee to take a leave of absence simply because her appearance no longer reflects the company image. At the same time, employers cannot force a pregnant employee to perform duties other than those that she normally does. For instance, a hotel could not reassign a front desk clerk to a back-of-the-house position during her pregnancy.

One provision that the Pregnancy Discrimination Act of 1978 does not cover is the right of employers to bar pregnant or potentially pregnant applicants from jobs in which hazards could potentially harm a fetus. In March 1991, the U.S. Supreme Court ruled in *Auto Workers v. Johnson Controls* that an employer can lawfully keep a woman out of a job only when "her reproductive potential prevents her from performing the duties of the job," or when a woman becomes physically unable to do the job because of her pregnancy. This case came about because Johnson Controls had prevented women from working in their battery plants for fear that lead poisoning might pose a health threat to a fetus if an employee became pregnant. The court ruled, however, that parents alone are responsible for making decisions about the welfare of their future children. Employers, on the other hand, are responsible for making employees aware of the potential hazards.

Companies still seem neither to completely understand nor equally apply the provisions of this law. For instance, a lawsuit filed in Texas by hotel manager Laura Taylor, employed with Bigelow Management, Inc., alleged that she was twice demoted after becoming pregnant. The company originally sought to dismiss the case, but the U.S. District Court, Northern District of Texas, denied that motion, citing the inappropriate comments made by Taylor's supervisor when he learned about her pregnancy. In the ruling, the court wrote, "Stray remarks may be sufficient evidence of discrimination in the event comments are related to the protected class of persons [to which] the employee belongs, close in time to the adverse employment action, made by an individual with authority, and related to the employment decision." This case shows how stray comments can directly affect the outcome of a case against an organization. Advice for managers, then, would be to curb their tongues before speaking.12

**Retirement Equity Act of 1984**

The *Retirement Equity Act of 1984* requires companies to count all service since the age of eighteen in determining vesting in retirement benefits, plus all earnings since age twenty-one, even if there are breaks in service of up to five years. This act is considered a milestone for women, since they typically start work at younger
ages than men and often interrupt their careers to raise children. However, like other employment laws, this act applies to both sexes. As a result, both men and women will accrue larger benefits. This law also states that pension benefits may be considered a joint asset in divorce settlements and that employers must provide survivor benefits to spouses of fully vested employees who die before reaching the minimum retirement age.

**Immigration Reform and Control Act of 1986**

The Immigration Reform and Control Act of 1986 (IRCA) was designed to regulate the employment of aliens in the United States. Under this act, employers with four or more employees are prohibited from discriminating against applicants on the basis of citizenship or nationality. The act mandates that employers must verify citizenship status on all employees hired after November 6, 1986. Aliens who were hired before the enactment of the IRCA are not affected by the act. This places the burden on employers for ensuring that aliens work lawfully in the United States. All employers—no matter how small—must verify that applicants are authorized to work in the United States. This verification must take place within three days after hire by completing the Employment Eligibility Verification Form—commonly called the I-9 form. A sample I-9 form is shown in Exhibit 5.

Illegal workers tend to work in fields that require relatively few skills. In some cases, this includes hospitality positions. Approximately 31 percent of illegal immigrants in the United States work in the hospitality industry. Illegal workers most commonly hold positions as dishwashers, housekeepers, and cooks, in which 23 percent, 22 percent, and 20 percent, respectively, of all workers are illegal immigrants.

The impact of illegal immigrant employment on the hospitality industry overall has not been evaluated. However, a recent study of restaurants in Oklahoma, where a new law was passed making it extremely difficult to hire illegal immigrants, suggests that, while restaurants sometimes hire such workers, elimination of this labor pool would not result in many restaurant closings.

Under the IRCA and under regulation of the Department of Homeland Security, employers may rely on several documents to establish an employee's identity and authorization to work. An applicant can verify his or her citizenship status by showing such items as a U.S. passport, certificate of nationalization, birth certificate, or a Social Security card.

Applicants also may be eligible to work if they possess a valid foreign passport and a U.S. employment authorization or receipt from an alien registration form. This receipt is commonly referred to as a green card. Employers who fail to verify an alien's authorization to work in the United States are subject to both civil and criminal penalties.

While the IRCA does not permit employers to discriminate, it does permit employers to choose or show preference to U.S. citizens or nationals over aliens. However, discharges and layoffs cannot be based on these preferences.

In addition, this act requires that employers provide a working environment that prohibits ethnic slurs and verbal or physical abuse related to an individual's national origin. As is the case with sexual harassment, the employer is responsible for providing a workplace free of such acts by supervisors, other employees, and nonemployees.
Exhibit 5  Form I-9: Employment Eligibility Verification

<table>
<thead>
<tr>
<th>Section 1. Employee Information and Verification.</th>
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<tbody>
<tr>
<td>Print Name: Last First Middle Initial Maiden Name</td>
<td></td>
</tr>
<tr>
<td>Address (Street Name and Number) Apt. # Date of Birth (month/day/year)</td>
<td></td>
</tr>
<tr>
<td>City State Zip Code Social Security #</td>
<td></td>
</tr>
<tr>
<td>I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.</td>
<td></td>
</tr>
<tr>
<td>I attest, under penalty of perjury, that I am (check one of the following):</td>
<td></td>
</tr>
<tr>
<td>A citizen or national of the United States</td>
<td></td>
</tr>
<tr>
<td>A lawful permanent resident (Alien #) A</td>
<td></td>
</tr>
<tr>
<td>An alien authorized to work until</td>
<td></td>
</tr>
<tr>
<td>(Alien # or Admission #)</td>
<td></td>
</tr>
<tr>
<td>Employee's Signature Date (month/day/year)</td>
<td></td>
</tr>
<tr>
<td>Preparer and/or Translator Certification.</td>
<td></td>
</tr>
<tr>
<td>(To be completed and signed if Section 1 is prepared by a person other than the employee. I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.)</td>
<td></td>
</tr>
<tr>
<td>Preparer's/Translator's Signature Print Name</td>
<td></td>
</tr>
<tr>
<td>Address (Street Name and Number, City, State, Zip Code) Date (month/day/year)</td>
<td></td>
</tr>
</tbody>
</table>

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<tr>
<th>Section 2. Employer Review and Verification.</th>
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<tr>
<td>Document title:</td>
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</tr>
<tr>
<td>Issuing authority:</td>
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<tr>
<td>Expiration Date (if any):</td>
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<tr>
<td>Document #:</td>
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<tr>
<td>Expiration Date (if any):</td>
<td></td>
</tr>
<tr>
<td>List A</td>
<td>OR</td>
</tr>
</tbody>
</table>

| CERTIFICATION - latest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment.) |  |
| Signature of Employer or Authorized Representative | Print Name | Title |  |
| Business or Organization Name Address (Street Name and Number, City, State, Zip Code) Date (month/day/year) |  |

<table>
<thead>
<tr>
<th>Section 3. Updating and Reverification.</th>
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<tbody>
<tr>
<td>A. New Name (if applicable)</td>
<td></td>
</tr>
<tr>
<td>B. Date of Rehire (month/day/year) (if applicable)</td>
<td></td>
</tr>
<tr>
<td>C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility: Document Title: Document #: Expiration Date (if any):</td>
<td></td>
</tr>
<tr>
<td>I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.</td>
<td></td>
</tr>
<tr>
<td>Signature of Employer or Authorized Representative Date (month/day/year)</td>
<td></td>
</tr>
</tbody>
</table>

NOTE: This is the 1991 edition of the Form I-9 that has been rebranded with a current printing date to reflect the recent transition from the INS to DHS and its components.
Employee Polygraph Protection Act of 1988

In the past, it was fairly common for employers to require employees and all applicants to submit to polygraph tests in a number of situations. The Employee Polygraph Protection Act of 1988 prohibits the use of polygraphs in about 85 percent of the employment situations in which they were previously used. Under this law, employees are protected from dismissal, discipline, and discrimination solely on the basis of their refusal to submit to a polygraph exam. Employers can request polygraph tests under a very narrow exception. This exception permits employers to use polygraph tests to investigate economic loss or injury when they have reason to believe an employee was involved, and if they afford the employee other protection. Federal, state, and local governments and firms that perform sensitive work for the U.S. Department of Defense, FBI, or CIA are exempt from this law.

Drug-Free Workplace Act of 1988

According to the U.S. Chamber of Commerce, drug abuse cost the United States $200 billion in lost productivity in 2010. While it is extremely difficult to pin specific numbers to this problem and many may quarrel with this figure, it is undoubtedly true that substance abuse does cost money to businesses. This has led to a huge drug-testing industry. Federal agencies spend billions each year on drug testing, as do private businesses. The use of drug testing is fueled, in part, by a desire to assure customers that businesses do not hire or employ drug users. However, perhaps the biggest reason that the drug-testing industry has grown to such an extent is that employers are given discounts on workers’ compensation insurance rates if they conduct drug testing.

Whether all this drug testing is providing a benefit to society commensurate with its costs is debatable. Occupational Health and Human Services reported at the end of 2008 that just 3.6 percent of job applicants tested positive for drugs during pre-employment drug screenings. And drug testing is just one element of the U.S. “war on drugs.” This three-decade “war” now costs tens of billions per year, with costs climbing. Yet drugs remain cheap, easy to obtain, and with higher purity levels than before the war on drugs was initiated. Obviously, this makes it more difficult for employers to maintain a drug-free workplace.

The Drug-Free Workplace Act of 1988 does not mandate a drug-free work environment for all private employers. It does, however, require that federal contractors establish policies and procedures to prohibit drug abuse and make a good-faith effort to sustain drug-free working environments. Federal contractors must publish company rules about drug possession and use of controlled substances, establish drug awareness programs, and administer appropriate discipline to employees convicted under drug statutes.

The Civil Rights Act of 1991

The Civil Rights Act of 1991 brought sweeping changes to employment law, but not because it expanded the scope of protection. Instead, the act precipitated changes in the area of costs and litigation. Prior to this law, employees could receive only back pay and equitable relief. Employees are now able to sue for
damage awards. More specifically, the act permits individuals to request a trial by
jury if they believe they have been discriminated against. If intentional discrimina-
tion is found, punitive and other damages can be assessed.

Another aspect of the act addresses "business practices." Criteria used by a
business for hiring decisions must be "job related for the position in question and
consistent with business necessity." Employers with fewer than fifteen employ-
eses are exempt from payment of punitive damages, except in cases of intentional
discrimination.

Family and Medical Leave Act of 1993

After eight years of debate, Congress passed the Family and Medical Leave Act
(FMLA) in 1993. The act requires employers with fifty or more employees within
a 75-mile radius to offer up to twelve weeks of unpaid (but job-protected) leave
during a twelve-month period for birth; adoption; care for an ill parent, spouse, or
child; or medical treatment. To be eligible, a worker must have been employed for
at least twelve months and have worked 1,250 hours (or about twenty-five hours
per week). Employers are not required to provide these benefits to the highest paid
ten percent of executives.

The right to take leave applies to males and females equally. Employers who
employ both husband and wife can limit their total to twelve weeks annually.
Intermittent leave cannot be taken for birth or adoption, but is available for illness.
Employers must continue health care coverage while employees are on leave. Pen-
alties for violation are severe for employers: up to 100 percent of lost wages and
benefits, plus attorney fees and various court-related costs.16

Since the act's passage, twenty-four million Americans have taken advantage
of its provisions. Statistics from the FMLA provide interesting facts about where
the law is headed:17, 18

- 29 percent of all FMLA leaves are to care for family members, primarily aging
  parents.

- The median leave has been two months.

- Several states offer longer leave periods, specifically for "bonding" with new
  children. Twenty percent of the FMLA leaves to date are taken for this purpose.

Research on those who have taken FMLA leaves shows:

- Leave-takers are 18 percent less likely to be promoted than their peers.

- Leave-takers receive eight percent less in salary increases.

- There is a correlation between the length of leave and the decrease in raises
  and promotions awarded to leave-takers.

- Leave-takers have gotten lower performance evaluation scores.

A report from the Employment Policy Foundation (www.epf.org) notes that
lost productivity, continued benefits coverage, and replacement labor to cover
employees on FMLA leave cost employers an estimated $21 billion in 2004. The
report's conclusions came from a survey of 110 organizations employing about
500,000 workers. Other highlights of the report include the following:
The survey showed that 14.5 percent of employees at responding companies took FMLA leave during 2004. Among these, 35 percent took more than one period of leave, and 15 percent took six or more covered leaves.

Thirty percent of FMLA leaves lasted less than five days. Twenty percent of such leaves amounted to one day or less. The average leave was 10.1 days long.

Less than half of the individuals who used FMLA at the surveyed organizations provided notice before the day the leave started.¹⁹

At the time of this writing, the DOL was considering changes to the FMLA that would extend the number of days a person must be sick—from three to ten—in order to request this leave. Various groups are debating this change and the impact that it could have on employers and employees alike.

**Other Employment Laws and Court Interpretations**

Not all the legislation affecting employer-employee relations is directly addressed in the major federal employment acts. Executive orders, issued by the president of the United States, and rulings in court cases have also helped shape employer-employee relations over the past forty years. The following section outlines important executive orders and court rulings.

**Executive Orders and Affirmative Action**

Thousands of companies have contracts with the federal government. Companies doing business with the U.S. government must obey the mandates of various employer-employee laws and the requirements of numerous presidential executive orders. Several executive orders require employers to hire, recruit, and promote women and minorities on an affirmative action basis. Exhibit 6 outlines sample steps toward establishing an affirmative action plan.

Let's consider Executive Order 11246, issued by President Johnson in 1965. This order paralleled Title VII of the Civil Rights Law of 1964 by prohibiting discrimination on the basis of race, color, religion, or national origin. However, the executive order goes beyond Title VII and requires employers with U.S. government contracts of $10,000 or more annually to engage in affirmative action; it requires those with fifty or more employees and $50,000 in contracts to develop affirmative action plans. These plans must include a set of specific, results-oriented goals designed to correct past discrimination against women and minorities in the workplace. Executive Order 11375 issued in 1967 set the same guidelines—based on gender—for federal contractors.

In 1969, President Nixon extended the issue of civil rights in the workplace by issuing Executive Order 11478. This order mandated that all U.S. government agencies and contractors base employment policies on merit and fitness, rather than gender, race, color, or national origin. Other executive orders issued in the late 1970s apply to veterans, citizenship requirements, and federal employees with disabilities.
**Exhibit 6  Sample Steps in an Affirmative Action Plan**

- Establish a company affirmative action statement or policy.
- Determine the most effective methods of communicating the policy.
- Widely circulate the policy or statement.
- Designate or assign EEO/AA responsibilities to appropriate personnel.
- Train personnel.
- Conduct utilization analysis to establish program objectives based on the company policy.
- Establish goals and timetables.
- Establish implementation procedures.
- Establish system for monitoring, evaluating, and reviewing the system.
- Identify and correct problem areas.
- Prepare documentation and reports for submission to EEOC.

Executive orders are administered by the Department of Labor through its Office of Federal Contract Compliance Programs (OFCCP). This office is charged with monitoring the employer-employee workplace actions of federal contractors through annual reports filed by contractors. The OFCCP is also charged with gaining compliance through conciliation agreements or, if necessary, through action by the U.S. Department of Justice. Failure to adhere to affirmative action provisions outlined in executive orders can result in loss of government contracts, ineligibility for future contracts, and fines or penalties.

**Major Cases and Interpretations**

In *Griggs v. Duke Power Co.*, 1971, the U.S. Supreme Court found that, by requiring a high school education or successful completion of an intelligence test as a condition of employment, the employer had unlawfully discriminated against African Americans. Since that ruling, educational and testing practices have been increasingly scrutinized for discriminatory elements.

Subsequent court actions increased the employer’s responsibility. For instance, in *Steelworkers v. Weber*, 1979, the Supreme Court ruled that companies and unions could establish quotas to eliminate racial imbalance in the workplace. This was later modified by two more rulings. *Firefighters Union No. 1784 v. Stotts, et al.*, 1984, ruled that a company could not interfere with an established seniority system to protect the rights of newly hired employees. In 1989, the *Martin v. Wilks* finding enabled employees adversely affected by affirmative action to sue on the basis of alleged discrimination. The Civil Rights Act of 1991 substantially modified *Martin* by strictly limiting circumstances under which plaintiffs can challenge affirmative action programs long after they have been established. (The Civil Rights Act overturned several 1989 decisions by the U.S. Supreme Court that had made it difficult to prove discrimination. The 1991 version also increased protection for women and minorities, including individuals with disabilities, against job discrimination and sexual harassment.)
Other significant cases that have affected the balance of employer-employee relations in the workplace include the 1983 *Newport News Shipbuilding and Drydock Co. v. EEOC*. In this case, the court ruled that employers must treat male and female employees equally when providing health benefit coverage for spouses. Also in 1983, *Arizona v. Norris* found that employer-sponsored retirement plans must pay equal benefits to men and women—despite actuarial tables that showed that women were likely to live longer than men and, thus, cost more in benefits. In 1987, the courts ruled through *Johnson v. Transportation Agency* that employers can implement affirmative action policies to correct gender discrimination.

While none of the major cases was based in a hospitality industry setting, the rulings apply to hospitality companies.

**State Employment Laws**

Nearly all states and many localities have EEO laws. In many cases these laws provide much broader protection than federal EEO legislation, which often limits coverage to companies meeting certain size requirements. Companies of all sizes are generally required to follow state EEO regulations.

Many states and municipalities have enacted laws that protect groups not included in the federal protection plan. For instance, some states protect the rights of homosexuals. In fact, "sexual preference" is now protected in some states. Other states and municipalities prohibit discrimination based on physical appearance, political affiliation, contagious diseases, and so on. Because these provisions can change so radically from state to state, employers should not assume that compliance with federal law is enough. Instead, employers should conduct a careful review of state and local EEO laws before establishing a business in any locale.

**Major Areas of Abuse and Litigation in Hospitality Operations**

Some describe the hospitality industry as a hotbed for EEO abuse, although few major court cases have alleged discrimination on the part of hospitality companies. The potential for such problems exists in the hospitality industry for several reasons:

- The hospitality industry is the largest employer of minimum-wage employees in the United States.

- While the hospitality industry has long provided employment for a large number of women, many hospitality companies have relatively poor records of promoting women to top-level management positions. This raises a red flag for potential charges of sex discrimination.

- The large number of female employees working for male managers creates situations conducive to sexual harassment charges.

- In the past, some segments of the hospitality industry have emphasized appearance as a condition of employment. As a result, these companies could be subject to charges of preferential selection, which involves hiring candidates on the basis of personal characteristics such as appearance. Preferential selection constitutes illegal discrimination.
Exhibit 7 Major Areas of EEO Abuse and Litigation

| Recruitment | Reverse Discrimination |
| Selection   | Employee Benefits      |
| Business Necessity Issues | Sex Discrimination |
| Four-Fifths Rule | Religious Discrimination |
| Applicant Testing | Seniority |
| Age Discrimination | Recruitment Advertising |
| Wrongful Discharge |

- The hospitality industry has a high incidence of illegal discrimination in recruitment advertising.
- Historically, the hospitality industry has placed sex designations on some jobs. Some companies have specifically prohibited individuals from performing specific jobs based on their sex.

Exhibit 7 highlights some of the major areas of EEO abuse and litigation in the hospitality industry.

Recruitment and Selection

Managers in the hospitality industry may be tempted to recruit and hire underqualified candidates simply to fill vacancies. Most managers already realize that such decisions can yield unproductive employees. What many managers may not know is that such hiring practices can be construed as discriminatory. For instance, if a restaurant has posted a job description for a server that specifically calls for “experience,” it must not deviate from this condition for employment. If it does—even once—the employer can be viewed as practicing discrimination if an applicant is turned down later on for lacking experience.

As noted earlier, business necessity is a narrow defense against a charge of discrimination under Title VII. To date, most successful cases have involved safety issues, such as special training and experience for airline pilots, bus drivers, and so on. A hotel operator’s desire to project a certain image to hotel guests by employing only certain age groups or races would not be considered a business necessity. The government deems such hiring practices as inconvenience or annoyance issues. Failing to hire female employees due to a lack of locker rooms, restrooms, or other appropriate facilities would also be considered an inconvenience issue. Other policies that would not be considered business necessities include:

- Refusing to hire women as hotel stewards because they cannot lift heavy objects
- Hiring only pretty or young employees as greeters in a restaurant because the company likes the impression they make on its guests
- Hiring only male servers because management views the image as more “professional”
Sexual Harassment: Preventing and Resolving Workplace Complaints

Sexual harassment takes many forms, some easier to distinguish than others. More and more managers and supervisors are learning that a wide range of activities can be labeled as sexual harassment. With sexual harassment, the single biggest mistake a manager or supervisor can make is to fail to take every complaint seriously. All complaints must be carefully considered and investigated.

Basically, sexual harassment can occur when:

- Employment decisions are made based on an individual's acceptance or rejection of sexual conduct.
- A person's job performance is adversely affected by sexual conduct.
- Sexual conduct creates an intimidating, hostile, or offensive work environment for an individual.
- An employee is subject to unwanted sexual conduct from nonemployees and the employer fails to exercise control over the work environment to stop the improper behavior.

As this list reveals, sexual harassment does not necessarily involve sexual contact or overt sexual advances or suggestions. Harassment can occur when one employee stares provocatively at another, makes off-color remarks or jokes, or for many other reasons. In fact, sexual harassment can occur even when victims appear to be willing participants. For instance, an employee can participate in telling off-color jokes and later successfully claim that he or she was sexually harassed. The defense would be that the others involved expected the employee to participate in the joke-telling and that his or her failure to do so would result in workplace hostility. Courts have also considered pinups, calendars, graffiti, vulgar statements, abusive language, innuendoes, and references to sexual activity to be aspects of sexual harassment.

The basic point is that unwanted, abusive conduct toward one gender and not the other can constitute sexual harassment in the workplace. Sexual harassment that creates a hostile or offensive work environment for one gender is considered a barrier to sexual equality. Sexual harassment is essentially sex discrimination and is thereby prohibited by Title VII of the Civil Rights Act of 1964. As such, sexual harassment charges are filed by employees with the Equal Employment Opportunity Commission (EEOC), the government agency that enforces Title VII.

Companies wishing to establish strong policies against sexual harassment should follow these guidelines:

- Issue a strong policy statement against sexual harassment.
- Make it easy for employees to file harassment charges.
- Take every complaint seriously.
- Do not allow the person who makes a sexual harassment charge to walk away frustrated.
- Take remedial action to correct past sexual harassment.

(continued)
When conducting a sexual harassment investigation, a company should:

- Take every complaint seriously. Failure to do so can lead complainants to take action outside the company and can send a message to employees that the company does not care.
- Conduct the investigation promptly.
- Set a professional tone for each interview that is part of the investigation.
- Treat each allegation as a separate incident.
- Keep the facts and other information concerning the issue private.
- Obtain statements from the accuser and the accused regarding what took place.
- Clearly identify the relationship between the accuser and the accused, and determine whether or not this relationship had a bearing on the alleged harassment. For instance, determine if the harassment involved a supervisor and employee and if work responsibility issues could have been involved.
- Gather facts. Do not prejudge.
- Get detailed answers to the who, what, when, where, and how questions that are specific to the investigation. The company should follow up on these questions and answers until all the facts are clearly established.
- Interview witnesses and obtain statements from each regarding their knowledge of what took place.

The EEOC may become involved if the incident cannot be resolved by the company. When the EEOC intervenes in a sexual harassment charge, the following sequence of actions and events will likely take place:

- **Filing the Charge.** The individual will file charges with the EEOC by mail, by telephone, or by visiting an EEOC office. In most cases, the time limit on EEOC charges is 180 days from the date of harassment.
- **Serving the Charge.** Within 10 days after receiving the charge, the EEOC will contact the employer by serving a copy of the charge. At this time, the EEOC will request that the employer reply, in writing, about the alleged incident. Employers generally have from 10 to 30 days to respond.
- **Conducting a Fact-Finding Hearing.** The EEOC will plan an on-site visit or require the employer to attend a fact-finding hearing in which the employee charging harassment meets face-to-face with the employer. If an on-site visit occurs, an EEOC investigator will visit the workplace and collect information regarding the event.
- **Arranging a Negotiated Settlement.** In many cases, the EEOC assists the parties involved in negotiating a settlement. Employers typically agree to provide the employee with relief appropriate to the charge. This relief could include reprimanding or removing the harasser, reinforcing the company’s sexual harassment policy, or providing for back pay, front pay, and attorney’s fees.
Issuing a Letter of Determination. If a negotiated settlement is not reached, the EEOC will issue its findings through a letter of determination. This letter notifies the complainant of his or her right to sue. The same information is provided to the employer. The right to sue gives the complainant notice that he or she has 90 days in which to engage a lawsuit in federal district court.


Hospitality managers should also know about what the EEOC calls "the four-fifths rule." The four-fifths rule was established by the Uniform Guidelines on Employee Selection Procedures in 1978. Under this rule, also known as the 80 percent rule, the selection of any racial, ethnic, or gender group at a rate that is less than 80 percent of the group with the highest selection rate is regarded as strong evidence of adverse impact.

To illustrate this rule, suppose a new hotel opens and hires 60 of 120 white applicants and only 20 of 60 African American applicants. The white applicant hire rate is 60 out of 120, or 50 percent; the African American applicant hire rate is 20 out of 60, or 33 percent. The African American hire rate is only 66 percent of the white hire rate. These numbers fall short of the four-fifths rule and may indicate that the hotel's hiring practices have an adverse impact on African American applicants.

Applicant testing is a common area of selection discrimination. Griggs v. Duke Power Co. ruled that only those tests that test job-related ability are acceptable as bona fide occupational qualifications. This means that selection tests are considered illegal if they measure issues not related to job specifications. In Washington v. Davis, the Supreme Court ruled that job-related tests were acceptable as screening devices even if they result in adverse impact. In this case, the Washington, D.C., police department used a verbal skills test to evaluate applicants for police positions. The verbal skills were deemed necessary for the job and, therefore, allowable.

Discrimination in selection can also occur when recruitment is based on employee referrals. For instance, the case could be made that such referrals among an all-white staff could discriminate against other races.

Selection based on arrest records can also be problematic; being accused of a crime is much different from committing a crime. Employers can discriminate on the basis of an applicant's criminal conviction record, but not on the basis of accusations. However, even this is not an absolute. For instance, unless the conviction is directly related to the type of work, a manager might be guilty of discrimination if he or she refuses to hire someone based on a conviction record.

Age Discrimination
As the overall age of Baby Boomers increases, so will the overall age of the work force. It stands to reason, then, that the number of age discrimination cases will increase.
As we discussed earlier, the ADEA regards both applicants and current employees forty years of age or older as a protected group. The ADEA specifically prohibits discrimination against this group in all employment conditions: hiring, discharge, compensation, and so on. Some provisions are made for business necessities, particularly in lines of work where health and safety are paramount, such as police work and air travel. For the most part, image is not considered a business necessity.

While many hospitality companies have made great strides in overcoming the perception of hiring only young, attractive employees, others have not. As a result, these companies are more likely to find themselves involved in age discrimination cases as the working population gets older. Refusing to put older workers in training programs, not promoting older employees, and forcing older employees to retire or to move to less desirable positions all represent age discrimination according to the provisions of the ADEA.

Reverse Discrimination
Reverse discrimination generally occurs when an employer attempts to rectify past human resources practices by hiring or promoting applicants or employees from a protected group over those who do not fit this description. In the past, granting preferential treatment to such groups has been considered reverse discrimination. However, since Steelworkers v. Weber in 1979, preferential treatment can be given to members of protected groups to eliminate what the Supreme Court termed “manifest racial imbalance” in jobs historically dominated by whites. No quotas are allowed. Preference is allowed based on race, gender, or some other protected characteristic if the intent is to attain a certain percentage of employees with that characteristic—but only if that preference is one factor among many. On the other hand, employers can follow seniority on such issues as layoffs and promotions, even when there is an adverse impact on recently hired or promoted minorities or women.

Employee Benefits and Sex Discrimination
In the past, employers sometimes offered one plan to men (deemed heads of the household) and another to women. Such practice was ruled illegal by the Pregnancy Discrimination Act of 1978. As a result, employers cannot discriminate on medical benefits, hospitalization, accident and life insurance, retirement plans, and so on.

As a result of the Pregnancy Discrimination Act, employers cannot discriminate against women because of pregnancy. As mentioned earlier, this act protects pregnant women regarding such issues as eligibility for employment and promotion.

Religious Discrimination
Title VII of the Civil Rights Act makes it illegal to refuse to hire someone simply because of his or her religious beliefs. It is illegal to refuse to hire individuals whose religious beliefs might prevent them from working at certain times. However, a company can refuse to hire someone because of his or her religious beliefs if it can prove that the company will incur undue hardship when the employee takes
time off for religious reasons; the company must also show that the job cannot be performed by anyone else during such times. Hospitality companies may face other issues involving religious beliefs such as appearance, dress codes, and work schedules. In addition, employers must keep the workplace free from religious bias or intimidation by employees who attempt to impose their religious beliefs on others. The EEOC has issued religious discrimination guidelines to help employers comply with regulations regarding religious beliefs.

Seniority
Seniority has often been tested in court as it relates to Title VII and subsequent nondiscrimination acts. The seniority debate often revolves around promotions and other benefits based on seniority systems, which may be inherently biased due to exclusionary hiring practices before the passage of Title VII. The U.S. Supreme Court has ruled that seniority systems are legal as long as they do not discriminate on the basis of race, color, religion, national origin, or sex. However, if it can be demonstrated that a seniority system has an adverse impact on women or minorities, it will be subject to challenge under Title VII.

What this ruling means for hospitality is that employers or unions can legally discriminate on the basis of seniority. According to the ruling by the Supreme Court, it is discriminatory to lay off employees with seniority simply to protect the jobs of recent hires who belong to protected groups.

Recruitment Advertising
Unfortunately, hospitality companies are guilty of breaking discrimination laws in their employment advertising more often than employers in any other industry. Ads that specify sex or age are still the most common abuses. As in other discrimination cases, the burden of proof lies with the employer, not with the applicant.

Hospitality firms can be forced to prove that their advertising is not discriminatory. This process can be both costly and time-consuming. Sex discrimination occurs in advertising when sex-specific terms such as “girl,” “man,” “maid,” “waiter,” or “hostess” are used instead of generic terms such as “server,” “busperson,” or even “waiter/waitress.” Another form of discrimination is used in ads that specify or imply certain ages, such as “excellent opportunity for college student” or “part-time position for retiree.” These ads are discriminatory because they discourage applicants in other age groups. A sample comparison of discriminatory versus nondiscriminatory advertising is presented in Exhibit 8.

Wrongful Discharge
Most discrimination charges arise over the dismissal of employees. Employers are often uninformed about legal standards regarding wrongful discharge and how to protect themselves from such charges.

Wrongful discharge is not the same as dismissal resulting from discrimination. Whereas Title VII applies only to employers of fifteen or more employees, an employer of any size can be the target of a wrongful discharge suit. Also, discrimination suits must be based on race, sex, or some other protected characteristic, whereas wrongful discharge suits can be filed whenever an employee is dismissed for any reason.
There are two basic categories of wrongful discharge: contract theory and public policy theory. In contract theory, the employee might claim that a personnel manual, for instance, created a contract and that he or she was dismissed in violation of this "contract." In the public policy theory, the employee might claim that he or she was dismissed either for refusing to break the law or for insisting on obeying the law.

Fortunately, most employers can protect themselves from wrongful discharge complaints and lawsuits simply by establishing a discharge policy and sticking to its guidelines. Employers can follow one of two basic policies: employment at will or dismissal for just cause. Employment at will allows an employer to terminate employees with or without notice at any time for any reason. A just cause policy emphasizes fair and equal treatment and progressive discipline.

Employers can follow a set of relatively simple techniques to prevent charges of wrongful discharge. 20

1. **Specify the rules.**

   - Clearly identify whether your company follows an employment at will or just cause policy. Failure to stick to the policy can result in a wrongful discharge suit.
   - Do not promise more than you are willing to deliver. Some courts have even viewed lengthy duration of employment as an "implied contract" of permanent employment.
   - If you adopt an employment at will policy, state up front in clear and conspicuous language that employment is "at the will" of the employer.

2. **Be candid with employees.**

   - In periodic evaluations, tell the truth about performance. Too many employers fail to note poor performance over a long period of time because they do not want to confront an employee.
   - Be specific about areas in which the employee needs to improve.

3. **Put employees on notice.**

   - If you opt for dismissals based on a just cause-only policy, establish and follow a progressive discipline program.
- Be sure to document and ask employees to sign any warnings or other disciplinary actions. However, don’t force employees to sign anything. If an employee refuses to sign a document, simply indicate that fact in the file.

4. Consider the options.

- Discharge is rarely the only solution. Consider counseling, training, or returning employees to previous positions in which they performed well.
- Assist in outplacement whenever possible, or provide other benefits in exchange for a written release of claims against the company.

Title VII of the Civil Rights Act of 1964, the Immigration Reform and Control Act of 1986, the Age Discrimination Act of 1967, and the Employee Retirement Income Security Act (ERISA) all protect employees against wrongful discharge actions by employers, as do several state EEO regulations.

Issues in a Social Context

Even though Title VII and subsequent legislation made it illegal to discriminate in the workplace, it is wrong to assume that equality has been attained. This is especially true regarding two groups in the work force: women and senior citizens. Hospitality companies have made significant progress in their treatment of women and seniors. However, many feel there is still room for improvement.

Women in the Hospitality Work Force

Even though women fill a majority of the positions in many service industries, most hold what have commonly been referred to as “pink-collar jobs,” working as servers, typists, secretaries, and guestroom attendants.

On the average, jobs dominated by women pay less than those dominated by men. The hospitality industry has taken great strides toward correcting these abuses since the passage of Title VII, but there are still more steps to take. The hospitality industry continues to be one in which men typically supervise women.

Overtime Work Laws

In August 2004, the federal government issued new rules extending rights for overtime pay to more low-wage workers, but reducing or eliminating that protection for many white-collar and middle-income employees.

A draft of the rules in 2004 drew a strong reaction, with the DOL receiving more than 80,000 letters from workers fearing they would lose their overtime rights. The final rules are certain to further inflame opponents, including congressional Democrats and their organized-labor allies, who are seeking to overturn the restrictions. To temper the outcry, the administration boosted protections for low-wage workers in the final rules. They did this primarily by raising the salary floor below which workers are generally guaranteed the right to overtime. The previous floor, which hadn’t been modified since the early 1970s, was as low as $8,000. Under the new Fair Pay rules, workers earning less than $23,660 per year ($455 per week) are guaranteed overtime protection. However, a new salary deduction
exception in the Fair Pay regulation states that employees’ salaries can be docked when they receive an unpaid disciplinary suspension of one or more full days for violating workplace conduct rules.

An interesting provision in this ruling states that if a hotel, restaurant, or other business closes temporarily because of a hurricane, or for any other reason, the property still must pay employees who are exempt from overtime a weekly salary to maintain their exempt status.

Most overtime rules date back to the passage of the act itself, in 1938, and changes to it are rare.21

Some states are reacting adversely to this new ruling. For instance, Maine finalized new regulations on the executive, administrative, and professional exemptions from the state’s minimum wage and overtime law with the intention of preserving the status quo that prevailed before revised federal regulations went into effect August 23, 2004. (Similar moves are afoot in Michigan and Ohio, but so far neither of those efforts has gained much ground.) At the behest of Governor John E. Baldacci, the Maine Department of Labor proposed rules that “any employee in a position that had or should have had the right to overtime under the U.S. Department of Labor regulations at 29 C.F.R. Part 541 [the so-called white-collar exemptions] in effect on August 22, 2004, will maintain that right.”22

Impact of Unethical Business

Over the past few years, numerous companies have been charged with various forms of unethical business practices. Large organizations such as Adelphia, Enron, WorldCom, and others have seen their chief executive officers and others sentenced to long prison terms for their actions, including embezzlement of company funds and illegal reporting of assets on U.S. Securities and Exchange Commission (SEC) reports.

The hospitality industry has not been a focus of major SEC investigations to date. However, one ruling by the SEC is likely to affect many hospitality employers; it concerns the employment of spouses and other family members. The series of new required disclosures is at least partially a by-product of the SEC’s high-profile charges against Disney for failing to disclose family ties between its directors and company employees. Without admitting or denying that it broke the rules, Disney in December 2004 settled the SEC charges by agreeing to avoid future violations. Until the Disney case, some companies didn’t disclose such relationships on the grounds that they didn’t think the employment of an executive or director’s family member represented a financial transaction that was covered under SEC Regulation S-K. That clarification has been strengthened to read that family members paid more than $60,000 must now be specifically disclosed on SEC reports. While this affects public companies only, the ruling could pertain to hospitality firms in which executive compensation includes salaries for spouses, children, or other family members.23

The SEC assumed in this matter that such salaries are merely methods of concealing real executive compensation and, as such, must be reported to shareholders and the SEC. This ruling applies not only to those living with the executive but also to “adults not living with the director or executive.”
The Aging Work Force

In the hospitality industry, employees have typically been young. Hospitality has the reputation of being an industry that employees "just pass through" until they get their "real jobs." Some see this as evidence that the hospitality industry has failed to develop a career ladder for its employees, which, in turn, has created a negative image of the industry. However, in some cases, the industry has simply been responding to the demands of its guests.

In observance of discrimination laws, the hospitality industry is no longer able to use this rationalization for favoring younger workers. This presents real problems for hospitality managers torn between taking ethical and moral actions and responding to the demands of guests. For example, consider the dilemma of managers in an institutional food service environment where the clients ask the food service contractor to staff an executive dining room with youthful female employees. Even though the food service manager might like to respond to the request of the client, and feels a need to do so in order to retain the contract, he or she can't legally honor the request because of the ADEA.

The impact of EEO legislation on the hospitality industry will be magnified by the aging of the Baby Boom generation (born between 1946 and 1964). As Baby Boomers retire in large numbers, the hospitality industry will face a new problem: how to cope with fewer experienced managerial personnel. Hospitality will face an additional need: increased reliance on aging Baby Boomers to fill part-time positions. Not only will baby boomers retire in large numbers, but many will re-enter the work force as part-time employees to supplement their pensions.

Employment Practices Liability Insurance

The evolution of employment practices liability insurance (EPLI) offers another example of industry adaptation. In 1991, EPLI was offered by only five carriers in the United States and it focused only on large employers. By 2000, seventy companies offered such policies. What does an EPLI cover? The contract provides defense and indemnity protection against claims arising from the employer-employee relationship. It provides coverage for wrongful employment acts, wrongful termination, sexual harassment, or discrimination. Coverage is provided for the business entity itself as well as for senior officers and directors. Deductibles range from $2,500 to $25,000. When selecting an insurer for these policies, a business should ask the following questions:

- What is the carrier's EPLI experience?
- How will the insurer manage a claim?
- What is the scope of the coverage?
- What services does the insurer provide?
- What overseas coverage is provided?

Continuing Education

Many people choose at some point to continue their educations, and tax laws can have an impact on the decision. For example, the Master of Business
Administration (MBA) degree has been popular for decades, symbolizing advanced competencies in business management. Costs for completing an MBA can exceed $100,000. The incentive is an average starting salary of approximately $75,000. From a legal perspective, it's important to remember that the costs of acquiring the degree are often tax deductible. For qualifying individuals, the tax savings are substantial. For self-employed individuals, the deduction lowers income subject to self-employment taxes, resulting in even greater tax benefits.

The allowance of the deduction for education expenses is included in Internal Revenue Code section 162 under the wide-ranging concept of “a deduction of all the ordinary and necessary expenses ... in carrying on any trade or business.” Further analysis of this deduction reveals certain complexities in determining qualified education expenses.

Treasury Regulations section 1.162-5 (last revised in 1967) expands, explains, and provides examples related to the specifics of the deduction of education expenses. In general, the following must be met for the expense to be deductible:

- It is not required in order to meet the minimum educational requirements for qualification in employment, or other trade or business;
- It is not part of a program of study that will lead to qualification for a new trade or business; and
- It will maintain or improve skills required by the individual in employment or other trade or business; or
- It meets the express requirements of the individual's employer, or meets the legal requirements to maintain the individual’s employment, status, or rate of compensation.25

Avoiding Lawsuits (and Unionization)

It has become increasingly difficult to manage employees. Each year, new employment laws and regulations are issued that influence employers in hospitality. It is difficult, but of course necessary, to follow each of them to avoid costly litigation.

One legal expert who has worked with hospitality companies for more than twenty-five years recommends that the best way to avoid potential lawsuits (and the potential for formation of unions in your business) is simply to listen to employees, find out what they want, need, expect, and would like.26 The company does not need a legal expert for this, just good, sound, caring management, according to the author. Low morale is usually caused by management actions that are unpopular with employees. Finding out what these are and anticipating the employees’ reaction to new employer rules can avoid much of the tension that leads up to lawsuits. To do this, you must listen to employees, either formally or informally. Whether gathered through small group discussions or large employee opinion surveys, employee feedback can help operators prevent litigation by understanding the employees’ perspective better. One good first step is to ask an employee or employee group to participate regularly in employer decision-making. Providing this opportunity for employee input is often enough to ensure that employees will attempt to work problems out rather than take more drastic steps that affect businesses more adversely.
Using Credit Reports as Employment Checks

Since 2003, differing opinions have been voiced about how companies can use credit reports for employment checks. In response, the Federal Trade Commission issued a clarification as to how the Fair Credit Reporting Act (FCRA) can be used. According to these guidelines, employers must have written authorizations from employees or job applicants to obtain copies of their credit reports. If an employer takes an "adverse action" such as denying employment or promotion on the basis of information included in a consumer credit report, the employer must notify the applicant or employee and provide the name, address, and phone number of the agency that produced the report.

Employers conducting third-party investigations of suspected misconduct, such as sexual harassment, no longer need to comply with the notification requirements. Nonetheless, if an employer takes any adverse employment action during the investigation, it must provide the subject of the investigation with the materials collected.27

Americans with Disabilities Act

On July 26, 1992, the Americans with Disabilities Act went into effect for many employers. This wide-ranging law dramatically affects the way hospitality companies relate to guests and employees. It also has a great impact on human resources management within the industry.

Background

President George H. W. Bush signed the Americans with Disabilities Act (ADA) in July 1990. This law forbids discrimination against people with disabilities. Many legal authorities see the ADA as the most sweeping piece of civil rights legislation since Title VII of the Civil Rights Act of 1964.

The ADA has five titles (or parts), as follows:

Title I Employment
Title II Public Services
Title III Public Accommodations and Services Operated by Private Entities
Title IV Telecommunications
Title V Miscellaneous

Our discussion will focus primarily on Title I. Under the provisions of this title, it is unlawful to discriminate against people with disabilities in all employment and employment-related practices, such as:

- Recruitment
- Hiring
- Promotion
- Training
- Layoff
Chapter 1

- Pay
- Termination
- Job assignments
- Leave
- Benefits

As a result of the ADA, protected group status is legally designated for citizens with disabilities in the United States. According to the American Association of People with Disabilities (AAPD), a group dedicated to promoting economic self-sufficiency among its membership, there are more than 56 million people with disabilities in the United States—or about one out of every five people.

Still, according to the AAPD, of the twenty-eight million people with disabilities of employable age, only about one-third has found work, suggesting that there remains a pool of people who are willing to work and capable of pitching in if given the opportunity. Since 1995, the unemployment rate for women who are not disabled has been 19.94 percent, while for women with disabilities, the unemployment rate has been 66.94 percent. Since 1995, the unemployment rate for nondisabled men has been 5.04 percent, while for men with non-severe disabilities it has been just over 23 percent, and for men with severe disabilities, 76.8 percent. Additionally, for graduates of four-year colleges, the unemployment rate for both men and women who are not disabled has been 10.1 percent, while for graduates with disabilities, the unemployment rate grows to 49.4 percent. Not surprisingly, given these figures, the median household income for women with disabilities during this time was only $13,974, as compared to $28,518 for nondisabled women. Disabled men had a median household income of $15,275, compared to $31,068 for nondisabled men.

Other civil rights regulations have provided certain protection for people with disabilities. The Vocational Rehabilitation Act of 1973 requires employers receiving more than $25,000 in federal contracts to actively recruit and accommodate people with disabilities. However, until the ADA, people with disabilities were not recognized as a protected class. Under the ADA, all employers, public or private, that employ fifteen or more employees for each workday in each of twenty or more calendar weeks in the current or preceding year must adhere to the law. Exhibit 9 compares the Vocational Rehabilitation Act and the ADA.

The EEOC is the designated enforcement agency for the ADA. Charges of discrimination must be filed with the EEOC within 180 days of occurrence (except in states with approved enforcement agencies where charges may be filed up to 300 days later). After a complaint is filed, the EEOC has up to 180 more days to investigate the charge and either sue the employer or issue a right-to-sue letter to the complainant. Finally, after receiving such a letter, the complainant has up to ninety days to file a lawsuit. Depending on the circumstances and the state, an employee can file suit against a current or former employer for an event that happened up to 570 days (or more than eighteen months) earlier. The same guidelines apply when a person is discriminated against by potential employers.

Companies that fail to comply with the ADA are subject to stringent penalties. For instance, the court can assess civil penalties against any employer to a maximum
Exhibit 9  Comparison of the Vocational Rehabilitation Act and the Americans with Disabilities Act

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<th>Who is affected?</th>
<th>Vocational Rehabilitation (1973)</th>
<th>ADA (1990)</th>
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<tr>
<td></td>
<td>federal contractors and subcontractors</td>
<td>most employers</td>
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<tr>
<td>Terminology</td>
<td>handicapped</td>
<td>disabled</td>
</tr>
<tr>
<td>To prove discrimination</td>
<td>must show that decision was based &quot;solely&quot; on handicap</td>
<td>must show that decision was because of &quot;disability&quot;</td>
</tr>
<tr>
<td>Harm/risk to others</td>
<td>can discriminate if &quot;substantial&quot; risk is involved</td>
<td>can discriminate if &quot;significant&quot; risk is involved</td>
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<tr>
<td>Lawsuits</td>
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<td>can bring lawsuit</td>
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<td>Punitive damages</td>
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<td>Affirmative action required</td>
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<td>Number of people protected</td>
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</tbody>
</table>

of $50,000 for a first violation and up to $100,000 for subsequent violations of the rights of individuals with disabilities. The ADA also provides for equitable remedies in job discrimination lawsuits; this includes job reinstatement, back pay, and even front pay for employees with disabilities who experience discrimination by an employer or potential employer. The Civil Rights Act of 1991 allows for recovery of compensatory and punitive damages up to $300,000 (depending on the number of workers employed) for intentional discrimination.

Much like with Title VII, an employer is considered in violation of the ADA if employment practices are used that discriminate against people with disabilities regardless of whether the discrimination is intended. This resembles the adverse impact aspect of Title VII, which has provided the grounds for many of the discrimination suits filed since 1964. According to this provision, even employment practices that appear neutral can be considered discriminatory if they adversely affect people with disabilities. For example, adverse impact occurs under Title VII if the selection rate for a specific protected group is lower than 80 percent of the selection rate for the group with the highest selection rate, even if the employer does not intentionally discriminate. Exhibit 10 highlights some of the major points of the ADA.
## Exhibit 10  Highlights of the ADA

<table>
<thead>
<tr>
<th>Effective July 26, 1992, for businesses with 25 or more employees. Effective July 26, 1994, for businesses with 15 or more employees.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defining disability: Any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment is legally considered to have a disability.</td>
</tr>
<tr>
<td>Penalties of up to $50,000 for first violation; $100,000 for subsequent violations. Provides for equitable remedies in job discrimination lawsuits, including back pay, reinstatement, and even front pay.</td>
</tr>
<tr>
<td>Will affect workplace rights of approximately 43 million Americans.</td>
</tr>
<tr>
<td>Protected groups: orthopedically impaired (users of wheelchairs, walkers, and so on); speech, vision, and hearing impaired; people with mental retardation or emotional illnesses; individuals with disease such as cancer, heart disease, palsy, epilepsy, multiple sclerosis, arthritis, asthma, diabetes, and AIDS. Other groups include people with drug and alcohol problems who are in supervised rehabilitation programs.</td>
</tr>
<tr>
<td>The EEOC is the designated enforcement agency.</td>
</tr>
</tbody>
</table>

### Defining Disability

Under the ADA, an individual is considered to have a disability when he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. Major life activities include seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working.

The ADA protects people with disabilities that involve speech, vision, and hearing, as well as disabilities caused by mental retardation, a specific learning impediment, and mental illness. In addition, people with diseases such as cancer, heart disease, cerebral palsy, epilepsy, multiple sclerosis, arthritis, asthma, and
diabetes are protected, as are people with HIV and AIDS. Drug and alcohol addiction is considered a disability if a person participates in a supervised rehabilitation program or has undergone rehabilitation and is not currently using drugs or alcohol. The ADA also protects people who are regarded as having a substantially limiting disability. For instance, the ADA would protect a severely disfigured person from being denied employment because the employer feared the negative reaction of others. Other conditions covered under the ADA include autism, Alzheimer's disease, head injury, and brain injury. The act also encompasses general categories of impairment such as orthopedic, neurological, psychological, and respiratory disorders.\(^{30}\)

On January 1, 2009, the **ADA Amendments Act (ADAAA)** of 2008 went into effect. This new act made some major changes to the way the definition of disability has been interpreted under ADA legislation in the past. Some of the “major life activities” covered by ADAAA include, but are not limited to, caring for yourself, doing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The 2008 amendment also covers major body functions, including but not limited to functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. This change can help people with cancer, since they often had a hard time meeting the definition of disability before the 2008 amendment.\(^{31}\)

**Qualifying for Work**

Under the ADA, people with disabilities are considered qualified if they can perform the **essential functions of the job** with or without **reasonable accommodation**. These two issues are critical for employers to understand. “Essential functions” are job tasks that are fundamental. For instance, cooking skills would be considered fundamental for a cook. However, the ability to hear orders called by servers to a cook might not be considered fundamental, since other means exist for communicating orders. As a result, an operation might be required to make reasonable accommodation so that cooking positions are open to people with auditory disabilities.

“Reasonable accommodation” refers to what employers must do to make the workplace accessible to people with disabilities. As a general rule, employers are required to accommodate people with disabilities unless doing so imposes an **undue hardship** on the employer. The EEOC believed that approximately 50 percent of people with disabilities would not require reasonable accommodation to be made by employers. Even when reasonable accommodations are required, the cost to make them is often just a few hundred dollars, far less than the cost of replacing an employee.

The following efforts are considered reasonable accommodations by the EEOC unless particular issues in a specific case deem them otherwise:

1. Making facilities accessible—constructing wheelchair ramps, widening aisles, raising a cashier station on blocks for a person in a wheelchair, etc.
2. Restructuring jobs to eliminate nonessential functions.
3. Reassigning a person to a vacant job—moving someone to another job if he or she becomes unable to perform in an existing job.
4. Modifying work schedules to allow for medical and other related appointments.
5. Modifying or acquiring equipment—this may include special equipment that a person with a disability needs to perform essential job functions.
6. Providing readers or interpreters for people who cannot read or have visual impairments.

The provisions for reasonable accommodations basically stipulate that employers must make the workplace accessible and barrier-free so that employees with disabilities can be hired and can access their workstations. Physical barriers such as stairs, curbs, escalators, and narrow doorways have to be modified to accommodate employees with disabilities. Elevators must have audio cues and Braille buttons for people with visual impairments.

Under the ADA, employers are prohibited from discriminating against employees and job applicants because of disability only if employers are aware that the disability exists. This means that employers are not liable for conditions they are unaware of. However, employers must anticipate issues of reasonable accommodation because cases will arise in which employees contend that their employer should have known that they needed such accommodations.

**The ADA’s Impact on the Hospitality Industry**

The ADA has led to changes in many areas of hospitality management. For instance, the U.S. Department of Justice is currently inspecting hotel construction projects for compliance with the ADA. Why? Because hotels commit the same errors again and again. The first example of failure to comply is in hotel entrance doors. To comply, doors must have a 32-inch-wide clearance. The same is true for most other doorways, including guestrooms, bathrooms, kitchens, connecting rooms, and so on. With the door opened at a 90-degree angle, there must be 32 inches of clearance from the face of the door to the door jamb. The second common error is that accessible rooms are not dispersed among the different types of hotel rooms. Hotels and motels must offer accessible rooms among various types—standard rooms, suites, ocean-front, and so on. In addition, there must be connecting rooms as well as smoking and no-smoking rooms. Hotels with fifty or more rooms often lack accessible rooms with roll-in showers. The number required increases with the number of overall rooms.

Also, many hotels are not building rooms with accessible alarms. People with hearing disabilities cannot hear fire alarms, ringing phones, knocking at doors, and so on. Hotels must provide accessible rooms with visual strobe alarms connected to the hotel’s fire alarm system as well as visual alarms to let guests know when the phone is ringing.

Many faucets, lamps, drapery controls, air conditioning controls, heating controls, and similar devices fail to meet ADA standards. These are inaccessible
primarily because they require tight grasping or pinching. To test the accessibility, use the closed-fist test. If you can operate the mechanism with a closed fist, it's accessible. Some signage is also in violation. To be accessible, signs must be clear and contrasting (black on white, or white on black), and braille signs must also be provided.32

In some cases, the hospitality industry is affected by the ADA in unique ways. For instance, hospitality has long relied on employing people with pleasant appearances. In the past, some states enacted legislation that allowed hospitality companies to hire “pleasant-looking people.” Prior to passage of the ADA, for example, employers in Tennessee could seek people with pleasant or pleasing appearances if the employees were to engage in meeting the public. Under the conditions of the ADA, such “cosmetic” hiring practices are considered discriminatory.

Another example of the direct impact of the ADA on hospitality involves the treatment of employees who are infected with HIV or who have AIDS. Hospitality leaders lobbied for an amendment to the ADA to permit operators to assign employees with contagious diseases to nonfood-handling jobs. This amendment was defeated, primarily because there is no evidence that AIDS can be transmitted via food handling or casual contact.

Communicable Diseases

Late in 2004, the EEOC issued explanatory guidelines that pertain specifically to restaurants. In these guidelines, the EEOC confirmed that in some cases employees with communicable diseases must be afforded disabled status when it affects their ability to work. Specifically mentioned in the new guidelines were four communicable bacterial agents: Salmonella typhi, Shigella, E. coli, and the hepatitis A virus. When an employee is diagnosed with one of these four infections, he or she must not work in the restaurant. In this ruling, the EEOC informs restaurants that they must not categorically eliminate the employee from employment. In some cases, reasonable accommodations must be made instead, because the infected employee should be viewed as having a disability. This generally applies to cases in which employees contract these illnesses on a long-term basis.33

Endnotes

2. www.eeoc.gov.
20. These techniques are adapted from Andrew B. Kaplan, “How to Fire Without Fear,” *Personnel Administrator* (September 1989): 74–76.


33. Carroll and Miller.

Key Terms

ADA Amendments Act of 2008 (ADAAA)—An act of Congress that amended the Americans with Disabilities Act of 1990 and other disability nondiscrimination laws at the federal level. The ADAAA made changes to the definition of the term “disability,” clarifying and broadening that definition and therefore the number and types of persons who are protected under the ADA and other federal disability nondiscrimination laws.

adverse impact—A possible result of selection or employment practices in which members of one group or class are much more negatively affected by the practices than members of another group or class.

affirmative action—A policy that establishes an obligation for federal employers or federal contractors to take positive steps to ensure that members of a protected group or class receive treatment that will help overcome past discriminatory practices.

Age Discrimination in Employment Act of 1967 (ADEA)—Legislation that made it illegal to discriminate on the basis of age. U.S. citizens age forty and over are protected by this act.

Americans with Disabilities Act (ADA)—Legislation that requires commercial operations both to remove barriers to persons with disabilities in the workplace and to provide facilities for customers with disabilities. Called the “Bill of Rights” for persons with disabilities because it prohibits job discrimination against people with disabilities.

bona fide occupational qualifications (BFOQs)—Qualifications on which employers are allowed to legally discriminate during selection and promotion.

business necessity—Discrimination allowed by Title VII of the Civil Rights Act of 1964 as a legal reason for choosing one employee over another. To date, most of the acceptable cases have involved job-related safety issues such as special training or experience.

Civil Rights Act of 1964—Legislation that established the Equal Employment Opportunity Commission and provides regulations against discrimination in the workplace.

Civil Rights Act of 1991—Legislation that provides for both compensatory and punitive damages to those discriminated against.
disparate impact—Occurs when an employer does not intentionally discriminate yet does something that gives one group an advantage over another.

disparate treatment—Occurs when an employer treats one individual differently from others because of that person’s race, sex, color, religion, national origin, or other protected characteristic.

Drug-Free Workplace Act of 1988—Legislation that requires federal contractors to establish policies and procedures that prohibit drug abuse and to make a good-faith effort to sustain a drug-free working environment.

Employee Polygraph Protection Act of 1988—Legislation that protects employees from dismissal, discipline, or discrimination solely on the basis of their refusal to submit to a polygraph (or “lie detector”) test.

Employee Retirement Income Security Act (ERISA) of 1974—Legislation that establishes reporting requirements, fiduciary responsibilities, and guidelines for participation, vesting, and funding for retirement and pension plans.

employment at will—An employment policy under which an employer may terminate an employee with or without notice, at any time, for any reason.

Equal Employment Opportunity Commission (EEOC)—Created by the Civil Rights Act of 1964, this federal commission is responsible for enforcing nondiscrimination laws in the United States.

Equal Pay Act of 1963—Legislation that establishes federal policy of equal pay for both men and women who do the same job with the same employer.

essential functions of a job—Language in the Americans with Disabilities Act that specifies that people with disabilities must not be barred from work if they can perform the “essential functions of the job.” In the case of a cook, essential functions would include cooking skills.

executive order—Method by which equal employment opportunity provisions have been added to existing laws. Executive orders are made by the president of the United States.

Family and Medical Leave Act of 1993—Legislation that requires employers with fifty or more employees to provide twelve weeks of unpaid leave for employees after the birth or adoption of a child; to care for a seriously ill child, spouse, or parent; or in the case of the employee’s own serious illness.

four-fifths rule—Rule established by the Uniform Guidelines on Employee Selection Procedures in 1978 that states selection or promotion of any racial, ethnic, or sex group must occur at a rate of at least 80 percent (four-fifths) of the rate of the group with the highest selection rate.

Immigration Reform and Control Act of 1986—Legislation designed to regulate the employment of aliens in the United States, and to protect employees from discrimination on the basis of citizenship or nationality.

I-9 forms—Forms used to verify citizenship of applicants and employees as required by the Immigration Reform and Control Act of 1986.
just cause—A policy that focuses on fair and equal treatment, and progressive discipline.

Pregnancy Discrimination Act of 1978—Civil rights legislation that prohibits discrimination by the employer on the basis of pregnancy.

reasonable accommodation—Language in the Americans with Disabilities Act that defines the workplace changes that must be made to satisfy the requirements of the act. Reasonable accommodations include such items as widening work aisles, lowering countertops, and installing ramps.

Retirement Equity Act of 1984—Legislation that requires companies to count all of an employee’s service since the age of eighteen in determining vesting in retirement benefits, and all earnings since age twenty-one—even if the employee has breaks in service of up to five years. Other provisions of the act are that pension benefits are considered a joint asset in divorce settlements, and employers must provide survivor benefits to spouses of fully vested employees who die before reaching the minimum retirement age.

reverse discrimination—Discrimination against a member of a majority group in favor of a minority solely on the basis of race, color, religion, sex, age, disability status, or national origin.

Selective Training and Service Act of 1940—Legislation that requires employers to rehire veterans who left for military service within ninety days with no loss of seniority, if the veteran re-applies. The act also requires employers to give employees time off, without pay, to meet active reserve status.

Title VII (of the Civil Rights Act of 1964)—Legislation that prohibits discrimination on the basis of race, color, religion, sex, or national origin.

Vietnam Era Veterans’ Readjustment Assistance Act of 1974—Legislation that made Vietnam veterans a protected group for a period of four years upon their return to the private sector. This legislation also provided guidelines for employers regarding treatment of veterans from all wars.

Vocational Rehabilitation Act of 1973—Legislation that made it illegal for public sector employers to discriminate against individuals with disabilities. This legislation also applies to companies that hold federal contracts.

wrongful discharge—Charge brought against an employer for terminating an employee without due process or without substantial efforts to first call the employee’s attention to improper work habits and to help the employee change; terminating an employee’s employment without sufficient reason.

Review Questions

1. The equal employment opportunity laws enacted by the U.S. Congress since 1964 have focused on what four areas?

2. How do affirmative action and equal employment opportunity laws differ?

3. What are bona fide occupational qualifications?
4. What is the four-fifths rule? How might it apply to hospitality companies?

5. What does adverse impact mean? How might this apply to hospitality companies?

6. Why is wrongful discharge such a sensitive employment issue?


8. Companies can be exempted from some employment laws by using a defense known as *business necessity*. Describe what this means, using a hospitality company as an example.

9. Many people say that EEO laws have affected the hospitality industry more than many others. Would you agree with this statement? Why or why not?

10. What are the central features of the ADA? How might the act influence the way hospitality companies select employees?

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**Internet Sites**

For more information, visit the following Internet sites. Remember that Internet addresses can change without notice. If the site is no longer there, you can use a search engine to look for additional sites.

- Americans with Disabilities Act  
  www.ada.gov

- Pregnancy Discrimination Act of 1978  
  www.eeoc.gov/facts/fs-preg.html

- Equal Employment Opportunity Commission (EEOC)  
  www.eeoc.gov/

- Sexual Harassment Hotline Resource List  
  www.feminist.org/911/harass.html

- Immigration Reform and Control Act of 1986  
  www.eeoc.gov/

- Society for Human Resource Management  
  www.shrm.org

- Occupational Safety and Health Administration (OSHA)  
  www.osha.gov/

- Title VII of the Civil Rights Act of 1964  
  www.eeoc.gov/policy/vii.html

- U.S. Department of Labor  
  www.dol.gov/

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**Mini Case Studies**

**The ADA in Action**

The following mini cases ask you to apply your knowledge of the ADA to potential situations in hospitality settings.

**Mini-Case One:** Megahotels has been conducting drug tests as part of its pre-employment screening process. An applicant has charged that this is illegal under the provisions of the ADA. Is it?
Mini-Case Two: An applicant charges that your company has failed to comply with the provisions of the ADA because you discriminated against him for a room attendant position. Selection criteria for this position stipulated that an applicant must be able to successfully make beds, wash out sinks and bathtubs, and vacuum floors. The applicant believes that the employer is required to rewrite the job description so that some parts of this job, which are not actually essential functions, can be performed by others. Is he correct? Why or why not?

Mini-Case Three: A visually impaired guest in your restaurant has asked for a braille menu. Do you have any options aside from providing a menu in braille? If so, what are they?

Mini-Case Four: Megahotels has established a policy of hiring disabled people over nondisabled people in order to correct past practices that discriminated against the disabled. Is this legal? Why or why not?

Mini-Case Five: You contend that the ADA applies to selection procedures. An employee who has recently become disabled contends that the law also covers all employees with at least five years' tenure. Which contention is correct?

Mini-Case Six: Your company has established a policy of nondiscrimination on the basis of disability for individuals applying for jobs and for employees being considered for promotion. However, the company still ties its compensation policy to the ability of each employee to perform every function of a job. Is this illegal? Why or why not?

Mini-Case Seven: Part of your application process is a test used to determine the speed that an applicant for a cook's position can plate orders. The test favors applicants who can more quickly plate the orders once the orders are cooked. Is this test unlawfully discriminatory? Why or why not?

Mini-Case Eight: Jennifer is thirty-five and has multiple sclerosis. She has applied for the position of cashier in your food service establishment. Your advertisement for the job reads: "Able-bodied female to perform cashier responsibilities." You explained to Jennifer that the job requires a great deal of stamina, but she insisted on filing an application. Even though Jennifer was among the first applicants, she was not hired. Are you liable under the ADA? Why or why not?

Mini-Case Nine: John is a recovering alcoholic who is currently enrolled in a rehabilitation program. John applied for a sales position with Megahotels and received a favorable review by the human resources manager during his interview. In fact, when he left the interview, John had the distinct impression that the job was his. However, a week passed and he heard nothing from the company. John called the hotel and was finally referred to the director of sales. The conversation went like this: "John, we are not going to hire you. Quite frankly, even though your sales experience fits our needs, we are afraid that the pressure you would feel on this job might knock you off the wagon. We do not want to be responsible for that." Does John have a case under the ADA? Why or why not?

Mini-Case Ten: Mary applied for the position of room attendant at Megahotels. She has experience as a room attendant and has good references. Mary was not hired for the position. When she asked why she was not hired, Mary heard this from the housekeeping manager: "You indicated on your application that you had a bad back. We are afraid that you might hurt your back while on the job and then
take disability leave. We just can’t take the chance.” Has Mary been discriminated against under the ADA? Why or why not?

**Test Your Employment Law Knowledge:** Try to determine whether or not the employer is liable in the following cases:

- A woman accepts a position with a company engaged in international business. She is slated to go to China. However, she becomes pregnant. While the woman believes she can still go, her boss, who has been to China, believes it is too dangerous. Because there are no other jobs available in the company, the woman is terminated.

(Answer: The woman sued under the Pregnancy Discrimination Act and was awarded $66,000.)

- Several female lifeguards file suit against their employer, claiming that the male lifeguards have been harassing them. The employer says the female lifeguards never complained and that all employees go through sexual harassment training.

(Answer: The court ruled that the female lifeguards should have objected to the treatment prior to filing suit.)

- A football assistant coach is charged with drunken driving and reckless driving for driving backward on a one-way road. The university fired him because of the negative media coverage that ensued. The coach sued under the ADA, saying that he was protected by a disability—alcoholism. Who won?

(Answer: The court ruled for the employer, saying that employers must be allowed to discipline employees. Since the coach was not in an alcohol treatment program, he was not covered by the ADA.)

- A woman works for a company where her “essential responsibility” as described in her job description is answering phone calls, which she must do about 100 times a day. After a car accident, the woman develops panic attack syndrome and panics each time the phone rings, and cannot answer it. The company dismisses her. Can the woman win a lawsuit?

(Answer: No. The court ruled that because the “essential functions” of the job specifically included answering the phone, the company cannot be sued under the ADA.)

- A female worker in a business started wearing a large (two-inch wide) button with the words “Stop Abortion” and “They Are Forgetting Someone” and a picture of an unborn fetus on it. She vowed to wear it until abortion laws were changed. Co-workers complained that she was hard to work with, was always politically motivated and espousing her beliefs, and that her performance had suffered since she started wearing the button. The boss gave the employee three choices: (1) don’t wear the button at work, (2) cover it while with others, or (3) wear a different button with the same message but no picture of a fetus. She refused to comply and was terminated. She sued and claimed the manager infringed on her religious beliefs.
(Answer: The court ruled that the three options provided by her boss were reasonable and that discrimination laws do not allow employees to submit co-workers to what she had referred to as religious beliefs.)*

Case Study

Old-Timer Makes Waves

Caleb, the human resources manager at the Edgeway Hotel, scowled as his phone rang for the third time in ten minutes. "Human resources," he answered, setting aside the stack of performance evaluations.

"Caleb, good morning. This is Jenna. I have a letter for you to look at."

Caleb immediately focused his attention on the call from corporate headquarters—if the senior vice president of operations had a letter for him to look at, these evaluations would have to wait. "Oh? What's it about?"

"It appears one of your front desk supervisors—who just happens to have worked with our president in the good old days when he was a front desk clerk—has a complaint," Jenna explained. "She feels she's being forced out because of her age. I'm faxing you the letter. She sent it directly to her 'old buddy' Mr. Alvarez. He's asked me to pass it on to you to take care of. Let me know what happens."

"All right. Who is it? I'll pull her file before the fax gets here."

"Sally Fenders. Call me when you resolve this. Good-bye," Jenna said, hanging up the phone.

Sally, Caleb mused, I know her; she's been here forever and a day. In fact, next month will be her twentieth anniversary with the hotel. Caleb opened up the file cabinet and pulled Sally's thick folder. He opened her file and reviewed the past several years. After a quick reading, his notes highlighted key items in Sally's file:

<table>
<thead>
<tr>
<th>Year</th>
<th>Month</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td></td>
<td>Performance review, 5.0 average</td>
</tr>
<tr>
<td></td>
<td></td>
<td><em>(Performance scale: 1 Probationary; 2 Below Standards; 3 Meets Standards; 4 Exceeds Standards; 5 Outstanding)</em></td>
</tr>
<tr>
<td></td>
<td></td>
<td>December Named Employee of the Year</td>
</tr>
<tr>
<td>2005</td>
<td>May</td>
<td>Medical leave for hip surgery, out three months</td>
</tr>
<tr>
<td></td>
<td></td>
<td>September Performance review, 4.0 average</td>
</tr>
<tr>
<td>2006</td>
<td>February</td>
<td>Complimentary letter from a guest</td>
</tr>
<tr>
<td></td>
<td>September</td>
<td>Performance review, 3.85 average</td>
</tr>
<tr>
<td>2007</td>
<td>March</td>
<td>Medical leave, out seven weeks</td>
</tr>
<tr>
<td></td>
<td>August</td>
<td>New supervisor</td>
</tr>
<tr>
<td></td>
<td>September</td>
<td>Performance review, 3.33 average</td>
</tr>
<tr>
<td></td>
<td>December</td>
<td>Sally reprimanded for sleeping on the job</td>
</tr>
</tbody>
</table>

2008
September  Performance review, 3 average
October    New supervisor

2009
January    Customer complaint about gruffness
March      Three customer complaints about service
September  Performance review, 2.8 average
November   Transferred to night shift

2010
January    New supervisor

Caleb’s secretary brought in the fax from Jenna. He sighed as he read the letter
and then put in a call to Francine, the new rooms division manager, and asked her
to meet him as soon as possible. Within a half hour, Francine arrived. “Hi, Caleb. I
have about ten minutes free. Will this take long?”

“I’ll take the ten minutes, Francine. It may take longer, but we can get back
together later in the day. It’s about Sally Fenders.”

“Her!” Francine harrumphed. “I’ve been pressuring the front desk manager,
Sydney, to start the counseling process with her. We can’t carry folks like her—not
and stay competitive. She refuses to change. She thinks we can treat a meeting
planner who’s bringing in $400,000 worth of business the same way you treat the
little old lady who stays here once a year with a Discovery coupon!”

“Well, she’s feeling the pressure,” Caleb said. “Take a look at this.” He handed
Francine the letter:

Dear Mr. Alvarez:

Last year, the company threw a big party celebrating my 50th birthday
and now it’s trying to force me out. I’ve been transferred to night hours
and I have a manager that complains about everything I do. He’s con-
tantly watching me and writing up everything I do. I think he wants
to hire someone younger that he could pay less. Normally I’d wait him
out—these front desk managers change every few years anyway—but I
think he’s trying to get rid of me.

I’m not the only one who feels this way. While I don’t speak for
everyone, there are quite a few of us old-timers who just don’t know
what’s going on in this hotel. We used to know everything—customers,
prices, and service levels. I don’t know any of that anymore. I want to do
the right thing, but I can’t figure out what it is.

I’m not doing anything differently than I have for the past 20 years,
but all of a sudden I’m not any good. How is it that I’m Employee of
the Year in 2004, but now I’m worthless? I went to the awards dinner
you held last year and was recognized as the employee with the longest
service record. You said that I was a positive example and that the hotel
celebrated the type of commitment and dedication that I had.

I remember when you were just a front desk clerk and I taught you
how to use a room rack. I’ve never asked you for anything before, but I
will now. Please stop this harassment. I have two kids in college and a
sick husband. I still have a lot of good years in me. I’ve given my life to
this hotel, and I shouldn’t be pushed out because some hotshot manager
wants to get cheap labor in.
I know I can count on you. I'd hate to hire a lawyer when I've been
loyal to the company for 20 years.

Sincerely,
Sally Fenders

Francine put the letter down in disgust, "Isn't that convenient? Buddy-buddy
with our president, is she? Notice how she neglects to mention that she's gruff
with the customers, or that we've caught her dozing off on the night shift several
times. I can't believe that she'd just go over my head like this. Sydney and I have
put in a lot of time and effort with this lady. We've coached her, worked with her,
given her extra training and support. It angers me that she'd send a letter like this.
If I could get away with it, I'd fire her for that."

"Has the quality of her work changed?" Caleb asked.

"No, but that's the problem. We're in a newly competitive environment. She's
been told, along with everyone else, that we have a new market segment and are
taking on guests who demand a higher level of service. She hasn't been willing to
make that change with us. The 'same old' doesn't cut it anymore. We've tried to
get her to change. I even had Sydney send her to training. Nothing has worked."

"What sort of training did you send her to? Did she receive training on some-
thing she didn't know how to do? Did Sydney follow up with her so that she knew
what she was supposed to learn?"

"I don't know, but I'll find out. But, training aside, you're the one who is
always telling us that we can't carry employees indefinitely and she's become a
high-maintenance employee. This isn't age discrimination—it's attitude discrimi-
nation. She doesn't have the right attitude for today's business."

**Discussion Questions**

1. What recent changes at the Edgeway Hotel precipitated the problem with
   Sally?
2. Is it an issue that Sally didn't follow the chain of command?
3. What are the roles and responsibilities of the management team in dealing
   with this situation?
4. Does Sally's length of service and past performance warrant special treatment
   by management in handling her current situation?

The following industry experts helped generate and develop this case: Philip J.
Bresson, Director of Human Resources, Renaissance New York Hotel, New York,
New York; and Jerry Fay, Human Resources Director, ARAMARK Corporation,
Atlanta, Georgia.