EMPLOYMENT LAW FOR THE BUSINESS MANAGER

Employment Law Lecture Summaries

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Employment At Will: Foundations and Limitations

In Oklahoma, **employment at will serves as the foundational common law doctrine for employment relationships**, granting both employers and employees broad freedom in terminating the employment relationship. However, this doctrine is **not absolute and is subject to significant statutory and judicial limitations** that restrict an employer's ability to terminate an at-will employee.

Foundational Aspect of Employment at Will in Oklahoma

The common law of Oklahoma, like most states, is built upon the employment-at-will doctrine. This doctrine states that an **employee with an employment contract of indefinite duration is free to quit for any reason, or no reason at all, without incurring liability to the employer**. Similarly, the **employer has the corresponding freedom to terminate an at-will employee for any reason, or no reason at all, without incurring liability to the employee**. Such indefinite employment contracts are considered terminable-at-will agreements, meaning they can be terminated without cause at any time without incurring liability for breach of contract. The doctrine is rooted in principles of freedom of contract and the importance of economic growth, forming the foundation of employment in much of the United States.

Limitations to Employment at Will in Oklahoma

Despite its foundational nature, the employment-at-will doctrine has limits, as both courts and state legislatures have shown ambivalence due to its sometimes-harsh consequences. A wide range of exceptions have been crafted to avoid the doctrine's application when circumstances suggest otherwise.

Key limitations include

Employment Contracts

- The presence of an **express employment contract between the parties can alter at-will employment** by specifying the duration of employment. If employment ends without mutual agreement before the term's end, either party may be liable for damages. Specific contract provisions can also define grounds for termination, such as employee violations or "just-cause" discharge reasons like dishonesty, drug/alcohol use, competition, rule violations, fighting, incompetence, or failure to follow orders.
- **Employee handbooks can sometimes create an implied contract**. While many courts generally reject this, Oklahoma has signaled that a handbook may form the basis of a contract under "limited circumstances" if four traditional contract requirements are met: (1) competent parties, (2) consent, (3) a legal object (or "mutual meeting of the minds"), and (4) consideration. However, implied contracts from handbooks only alter the at-will relationship with respect to accrued benefits, and the promises must be definite, not vague assurances.
- **Disclaimers in handbooks**, which state that no provision creates a contractual obligation, must be clear and prominently displayed. Crucially, the **employer's conduct must consistently reinforce the disclaimer's message**; inconsistent actions or representations can negate its effect. The *Russell v. Board of County Com'rs, Carter County* case highlighted this by noting that a bold, all-caps disclaimer could still be nullified by inconsistent employer conduct.

Statutory Exceptions

- **Illegal Discrimination**: Federal and state anti-discrimination laws restrict the at-will doctrine by prohibiting employment decisions based on protected characteristics like race, color, religion, sex, national origin, age, disability, or veteran status. Oklahoma's Anti-Discrimination Act (OADA) similarly prohibits discrimination based on these factors and genetic information, providing the **exclusive state remedies for employment-based discrimination** and expressly abolishing common law remedies for such claims.
- **Retaliation**: It is illegal to retaliate against an employee for filing a claim, suing under certain statutes, or engaging in protected activities. Oklahoma specifically created a **statutory exception to at-will employment for**

cases alleging retaliation for filing a workers' compensation claim. This includes filing a claim, retaining a lawyer, instituting a proceeding, or testifying in a workers' compensation proceeding. The OADA also prohibits retaliation for opposing discriminatory practices or participating in discrimination investigations/proceedings.

- **Other Statutory Protections**: Various other Oklahoma statutes contain anti-retaliation provisions protecting employees who engage in protected activities, such as reporting child abuse or neglect, discrimination in wages, or violations of specific labor laws.

Judicial Public Policy Exception (Burk Tort)

- In 1989, the Oklahoma Supreme Court established a significant judicial exception in *Burk v. Kmart Corp.*, adopting a **public policy exception to the terminable-at-will rule**. This created a new tort claim (known as a "Burk tort") for termination in violation of public policy.
- This exception applies in a "narrow class of cases in which the discharge is contrary to a **clear mandate of public policy as articulated by constitutional, statutory or decisional law**". The public policy of Oklahoma limits an employer's ability to discharge an employee.
- To qualify for a public policy exception, a plaintiff employee must establish five elements: (1) an actual or constructive discharge, (2) of an at-will employee, (3) in significant part for a reason that violates an Oklahoma public policy goal, (4) found in Oklahoma's constitutional, statutory, or decisional law or in a federal constitutional provision that prescribes a norm of conduct for Oklahoma, and (5) **with no statutory remedy existing that is adequate to protect Oklahoma policy goal**. This "adequacy of statutory remedy" test is crucial, meaning a Burk tort only exists if no adequate statutory remedy protects the policy goal.
- The *Darrow v. Integris Health, Inc.* case limited the Burk exception to matters affecting the **welfare of the State as a whole** that fit within traditional government action limitations.
- Examples of public policy violations include **sexual harassment** (*Collier v. Insignia Fin. Grp.*) and violations of **public health and safety** laws, such as those prohibiting unsafe food handling (*Silver v. CPC-Sherwood Manor, Inc.*).
- More recently, in *Ho v. Tulsa Spine & Specialty Hospital*, the Oklahoma Supreme Court found that executive orders issued by the Governor during the COVID-19 pandemic, which expressed a public policy of curtailing infectious disease, could serve as a basis for a Burk tort claim when an employee was allegedly fired for refusing to work due to health and safety concerns. However, the court has also rejected attempts to expand public policy to include harms to individuals rather than the general public, especially when legislative remedies exist.

In conclusion, while employment at will forms the bedrock of Oklahoma's

employment law, it is extensively limited by a combination of express and implied contracts, specific anti-discrimination and anti-retaliation statutes, and a judicially created public policy exception that safeguards broader societal interests in the workplace. Employers in Oklahoma must navigate these complex exceptions to avoid legal liability.

The Evolving Landscape of Worker Classification

Introduction: The Shifting Sands of Work and the Enduring Classification Dilemma

The Modern Workplace Transformation

- The institution of employment has undergone massive changes due to the growth of the service sector, technological advancements, and developments in the finance market.
- Traditional norms of full-time, long-term employment with set wages and predefined duties are rapidly losing status.
- Workers are increasingly engaged in non-standard forms of work, including multiple part-time jobs, work for staffing agencies, or other contingent employment, often in multiple locations and with worker-set schedules.
- The rise of the "platform economy" or "gig economy" (e.g., app-based work like Uber and Lyft) has introduced new business models that leverage digital platforms for flexible, episodic jobs. This model allows companies to scale production and handle uncertain demand, while workers may enjoy flexibility in setting hours and choosing projects.

The Critical Importance of Worker Classification

- The distinction between an "employee" and an "independent contractor" is fundamental to employment law.
- This classification determines whether a worker is entitled to numerous crucial protections and benefits, including minimum wage, overtime pay, workers' compensation, unemployment compensation, anti-discrimination protection, and the right to organize and bargain collectively (under the NLRA in the U.S.).
- Misclassification can lead to significant lost tax revenue for governments and reduced social safety net contributions.
- For app-based workers, misclassification can result in economic and existential instability, and increased health risks due to stress and lack of protections like health insurance.

The Inherent Challenges of Classification

- Accurately classifying workers is exceedingly difficult due to the complexity and subjectivity of tests, and the sheer variety of work arrangements.

- Existing classification tests, many rooted in older legal concepts, are often poorly suited to the nuances of app-based or "gig" work, leading to descriptions of "fitting a square peg into a round hole".
- The uncertainty and volume of lawsuits arising from worker classification issues are unsustainable, burdening workers and companies with lengthy legal processes.

Historical Foundations and Evolving Tests of Worker Classification

Origins in Tort Law and Vicarious Liability

- The common law distinction between employees and independent contractors originated in England in the 1800s, primarily as an agency law question concerning vicarious liability.
- The core doctrine, *respondeat superior*, held a "master" (employer) responsible for the "misconduct" or torts of their "servant" (employee) committed within the scope of employment.
- The "control test" was the original criterion to determine this relationship: the employer's right to give orders and instructions regarding the manner in which work is carried out. If the employer controlled the worker's activities, they could be held vicariously liable.

The Shift to Statutory Protections

- In the 20th century, particularly with New Deal legislation in the U.S., worker classification became crucial for defining the scope of statutory protections (e.g., minimum wage, overtime, workers' compensation) that applied *only* to employees.
- This introduced a new purpose for classification beyond tort liability.

Evolution of Tests Beyond Sole Control

- The initial control test faced criticism for its "deceptive simplicity" and limitations, particularly in modern workplaces where direct oversight might be minimal, or where skilled workers retain autonomy over methods.
- This led to the development of more comprehensive approaches, such as the "total relationship" test in Canada, and the "economic realities" and "entrepreneurial opportunity" tests in the U.S., all seeking to capture the true nature of the working relationship.

Worker Classification in the United States: A Fragmented Landscape

The Problem of Multiplicity and Inconsistency

- The U.S. system is characterized by a "confusing array of classification tests" used at federal and state levels, which are often "complex, subjective, and differ from law to law".
- This leads to significant confusion, unpredictability, and a high volume of lawsuits.
- Contractual designations of "independent contractor" are often disregarded, as courts and agencies look to the "economic reality" of the relationship.

Federal-Level Classification Tests

1. The Common Law Control Test:
    - While originating in tort law, versions of this test are still used by many federal statutes and agencies (e.g., ADEA, ADA, ERISA, FUTA, FICA, IRC, OSHA, Title VII, WARN) for worker classification purposes.
    - It determines if the hiring entity "controlled or had the right to control the manner and means" of the worker's work.
    - Factors considered include the extent of control by agreement, whether the worker is in a distinct occupation, the kind of occupation (supervised vs. specialist), and the skill required.
    - Despite its widespread use, it is criticized for being vague, indeterminate, and failing to provide clear guidance, often requiring fact-dependent, individual analyses.
2. The Economic Realities Test (FLSA):
    - Primarily used for the Fair Labor Standards Act (FLSA), which governs minimum wage and overtime.
    - Conceptually, a worker is an employee if, "as a matter of economic reality, the worker follows the usual path of an employee and is dependent on the business which he or she serves".
    - This test focuses on economic dependence and vulnerability, recognizing that workers lacking bargaining power require statutory protections.
    - Factors include: permanence of relationship, degree of skill, worker's investment in equipment/materials, opportunity for profit or loss depending on managerial skill, employer's control, and whether the service is an integral part of the alleged employer's business.
    - Despite its protective intent, it has been criticized as a "disembodied laundry list of factors" applied without embedding in the act's purpose, leading to unpredictable results.
3. The Entrepreneurial Opportunity Test (NLRA):
    - Used under the National Labor Relations Act (NLRA) to determine who has the right to organize.

- While rooted in common law agency principles, the NLRB and D.C. Circuit have emphasized "entrepreneurial opportunity" as a key consideration.
- This approach views control and entrepreneurial opportunity as "opposite sides of the same coin".
- It examines the "opportunities and risks inherent in entrepreneurialism," such as the ability to hire assistants, profit from their assistance, and control allocated time.
- Critiques include a lack of clear theoretical understanding of entrepreneurship by courts, leading to reliance on "common sense notions" rather than actual entrepreneurship. Some argue it leads to "entrepreneurial potential" being emphasized over the "realities of the actual relationship".

State-Level Classification Approaches

1. The ABC Test:
   - Gained significant traction in some states, like California (AB5), often for broad coverage (unemployment, workers' compensation, minimum wage, overtime).
   - It establishes a rebuttable presumption of employment unless all three conditions are met:
     - (A) The individual is free from control and direction over the performance of the service, both by contract and in fact.
     - (B) The service is performed outside the usual course of the hiring entity's business.
     - (C) The individual is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.
   - Challenges and Criticisms:
     - Rigidity: The "outside the usual course of business" (Part B) prong is particularly problematic for app-based companies whose core business *is* the service provided by their workers (e.g., driving for a rideshare company).
     - Overly Broad Reclassification: It can force reclassification of many workers into employee status, changing business models and potentially raising consumer prices.
     - Numerous Exemptions: California's AB5, initially intended to simplify, led to 109 complex exemptions in subsequent legislation (AB2257), creating new confusion and being subject to lobbying influence rather than principled distinctions.
2. The IRS Twenty-Factor Test:
   - Adopted by some states (e.g., Arkansas, Oklahoma, Tennessee, Alabama, Virginia, Texas, Michigan, Missouri, New Jersey).
   - Developed in 1987 (Revenue Ruling 87-41), stemming from the common law right-to-control test.

- The 20 factors are grouped into three categories: behavioral control, financial control, and type of relationship.
- No single factor is determinative, and the "entire relationship" is considered, with emphasis on whether "evidence of control or autonomy predominates".
- Some find it provides more consistent results than the ABC test, allowing for factual nuances to lead to different classifications (e.g., cosmetologists in different salon models).

3. Marketplace Contractor Laws:
   - A "handful of states" (e.g., Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee, Utah, Texas) have adopted specific laws or rules for app-based workers.
   - These laws typically define "marketplace contractors" who, if they meet certain criteria, are clarified as independent contractors, rather than creating a new worker category.
   - Criticisms: These laws are criticized for precluding app-based workers from employment-related protections (like workers' compensation) and for being self-serving to companies seeking to avoid costs and risks associated with employees.

The "Gig Economy" and the Push for a Third Category

- App-based companies have actively lobbied for laws that accommodate their business model and preserve independent contractor status for workers, leading to legal challenges and the creation of ballot initiatives.
- Proposition 22 (California): This initiative, passed by voters, created a *de facto* "third category" of worker for app-based drivers.
  - It provides *some* benefits (e.g., minimum hourly wage calculated differently from employees, health care stipends) but "lowers the baseline employment standards" compared to full employee status.
  - It has been criticized for potentially exacerbating racial inequalities, as a high percentage of gig workers are immigrants and subordinated minorities.
- The creation of a "third category" of worker that lies between independent contractors and employees has been proposed by many.

Contingent employment

"Contingent employment" refers to work arrangements that are temporary, project-based, or otherwise non-permanent, and typically do not involve a traditional, full-time employee relationship. This broad category encompasses various types of workers, including:

- **Independent Contractors/Freelancers:** Self-employed individuals who offer their services to multiple clients, often on a project-by-project basis.

- **Temporary Workers:** Individuals hired for a limited period, often through staffing agencies, to cover leave, handle peak workloads, or work on specific projects.
- **Gig Workers:** Individuals who perform tasks for pay through online platforms (e.g., rideshare drivers, delivery service providers).
- **Consultants:** Professionals offering specialized expertise for a defined period or project.

The defining characteristic of contingent employment is its **non-permanent nature** and the **lack of an implicit or explicit contract for ongoing employment**. Contingent workers generally do not receive the same benefits as permanent employees, such as health insurance, retirement plans, paid time off, or other perks. They are often paid on an hourly, project, or commission basis, and they typically have more flexibility and autonomy over their work schedules and methods.

Relevance to Employment Law:

Contingent employment is related to the critical issue of **worker classification**. The distinction between an "employee" and an "independent contractor" carries significant legal weight, and misclassification can lead to severe consequences for employers.

Here's how contingent employment interacts with employment law:

1. **Anti-Discrimination and Harassment Laws:** While independent contractors may not have all the same protections as employees, federal laws like Title VII of the Civil Rights Act (prohibiting discrimination based on race, color, religion, sex, national origin), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA) *can* apply to contingent workers, especially if the hiring entity exercises significant control over their work or if the worker can be considered an "employee" for purposes of these statutes.
2. **Workplace Safety (OSHA):** Employers generally have a duty to provide a safe workplace for *all* workers, including contingent workers, under the Occupational Safety and Health Act (OSHA).
3. **Co-Employment Liability:** When a company uses staffing agencies or other third parties to supply contingent workers, there's a risk of "joint employment." This means that both the staffing agency and the client company could be considered joint employers and potentially liable for employment law violations related to the contingent workers. Clear contracts outlining responsibilities between the parties are crucial to mitigate this risk.
4. **State-Specific Laws:** Many states have their own, often stricter, laws regarding worker classification and the rights of contingent workers.

In summary, while contingent employment offers flexibility and cost savings for businesses, it introduces complex legal considerations, primarily concerning worker classification. Employers must carefully assess their relationships with

contingent workers to ensure compliance with all applicable federal, state, and local employment laws and avoid costly legal disputes.

Public resolution of employment disputes

Employment conflicts can be resolved publicly, primarily through litigation in courts and administrative procedures involving government agencies. This public avenue is particularly significant for claims involving statutory rights, such as those under Title VII.

Public Resolution Through the Court System

Employment claims, which often involve allegations of discrimination, harassment, retaliation, or wage violations, can be resolved through judicial resolution in either federal or state court. The path an employment case takes depends on the specific laws violated and the parties involved

Judicial Resolution: Federal vs. State Court

Once administrative requirements are met, a plaintiff can proceed to file a lawsuit.

- Federal Court: Employment claims often end up in federal court if they involve federal laws (e.g., Title VII of the Civil Rights Act, Americans with Disabilities Act, Age Discrimination in Employment Act, Family and Medical Leave Act, Fair Labor Standards Act). Federal courts also have jurisdiction if the parties are from different states and the amount in controversy exceeds a certain threshold (diversity jurisdiction).
- State Court: State courts handle claims based on state anti-discrimination laws (e.g., Texas Labor Code Chapter 21), state wage and hour laws, breach of contract, wrongful termination under common law, or tort claims (like intentional infliction of emotional distress). Many employment claims can be brought in either federal or state court, giving the plaintiff strategic choices.

The Litigation Process: Complaint to Trial

The general stages of an employment lawsuit are similar in federal and state courts, though specific rules and timelines may vary.

1. Filing the Complaint (Pleading Stage)

- Plaintiff's Complaint/Petition: The lawsuit begins when the plaintiff (the employee) files a formal document called a "Complaint" (in federal court) or "Original Petition" (in state court) with the court clerk. This document outlines:

  - The parties involved (plaintiff and defendant, i.e., the employer).
  - The factual basis for the claim (what happened, when, where, by whom).
  - The legal claims being asserted (e.g., racial discrimination, sexual harassment, unpaid overtime).
  - The relief sought (e.g., monetary damages, reinstatement, injunctive relief).

- Service of Process: After filing, the plaintiff must formally "serve" the defendant with a copy of the complaint and a summons (a court order to appear). This ensures the defendant has proper notice of the lawsuit.

- Defendant's Response: The defendant (employer) then has a set period (e.g., 21 days in federal court) to respond to the complaint, typically by filing an "Answer," admitting or denying the allegations and asserting any defenses. The defendant might also file a "Motion to Dismiss" if they believe the complaint fails to state a valid legal claim.

2. Pre-Trial Procedures and Motions

This is often the longest and most complex phase of litigation.

- Discovery: This is the information-gathering phase. Both sides exchange information relevant to the case. Common discovery tools include:
  - Interrogatories: Written questions that must be answered under oath.
  - Requests for Production of Documents: Demands for relevant documents (emails, personnel files, policies, performance reviews, financial records).
  - Depositions: Out-of-court, under-oath testimony of parties and witnesses, recorded by a court reporter.
  - Requests for Admission: Written requests to admit or deny certain facts or the authenticity of documents.

- Pre-Trial Motions: Parties frequently file motions with the court to resolve specific issues before trial. Key motions in employment cases include:
  - Motion to Dismiss: Filed by the defendant, arguing that even if all factual allegations in the complaint are true, they do not constitute a legally recognized claim.
  - Motion for Summary Judgment: A critical motion, typically filed after discovery is substantially complete.8 A party (often the defendant) argues that there is no genuine dispute as to any material fact and that they are entitled to judgment as a matter of law. If granted, the case is dismissed without a trial. Plaintiffs also sometimes file these motions on specific issues.
  - Motions in Limine: Motions filed to prevent certain evidence or arguments from being presented to the jury at trial.

  - Motions to Compel Discovery: Filed when one party believes the other is not adequately responding to discovery requests.

- Settlement Discussions/Mediation: Throughout the pre-trial phase, parties often engage in settlement discussions. Many courts require or strongly encourage mediation, where a neutral third party helps the parties explore potential settlements. A significant percentage of employment cases resolve through settlement before trial.

3. Trial Procedure

If the case doesn't settle or get dismissed, it proceeds to trial.

- Jury Selection (Voir Dire): Prospective jurors are questioned by the judge and/or attorneys to determine their suitability and impartiality.12
- Opening Statements: Each side presents an overview of their case, outlining the facts they intend to prove and the legal theories supporting their claims or defenses.
- Presentation of Evidence:
  - Plaintiff's Case-in-Chief: The plaintiff presents their witnesses (including the plaintiff, co-workers, HR personnel) and introduces documents and other evidence to prove their claims.
  - Defendant's Case-in-Chief: The defendant then presents their witnesses (management, HR, other employees) and evidence to rebut the plaintiff's claims and support their defenses.
  - Rebuttal/Rejoinder: Both sides may have opportunities to present limited additional evidence to counter the other side's case.
- Closing Arguments: Each attorney summarizes the evidence and arguments, trying to persuade the jury (or judge in a "bench trial") to rule in their favor.13
- Jury Instructions (Jury Trials): The judge instructs the jury on the relevant laws they must apply to the facts they find.14
- Jury Deliberation and Verdict: The jury retires to deliberate and reach a verdict. In federal court, jury verdicts generally must be unanimous (Rule 48, Federal Rules of Civil Procedure).15 In Texas state court, a 10-2 majority is often sufficient for a civil verdict.
- Judgment: The court enters a judgment based on the jury's verdict or the judge's findings in a bench trial.

The Appeals System

If a party is dissatisfied with the trial court's judgment, they generally have the right to appeal.

- Notice of Appeal: The losing party files a "Notice of Appeal" with the trial court within a strict deadline (e.g., 30 days from judgment in federal court, often similar in state court).
- Appellate Court Review:
  - Intermediate Appellate Courts: Most appeals first go to an intermediate appellate court. In the federal system, these are the U.S. Courts of Appeals (e.g., the Tenth Circuit Court of Appeals for cases from Oklahoma).
  - Briefing: Both sides submit written arguments called "briefs," explaining why the trial court's decision should be affirmed or reversed, focusing on errors of law or abuse of discretion by the trial court, not generally on re-litigating factual disputes.
  - Oral Argument: Sometimes, the appellate court will schedule oral arguments where attorneys present their arguments directly to a panel of judges and answer their questions.
  - Decision: The appellate court issues a written decision, which can:
    - Affirm: Uphold the trial court's decision.
    - Reverse: Overturn the trial court's decision (e.g., finding that the law was applied incorrectly).
    - Remand: Send the case back to the trial court for further proceedings consistent with the appellate court's instructions (e.g., for a new trial, or to reconsider an issue).
- Highest Appellate Courts: If a party is still dissatisfied with the intermediate appellate court's decision, they may seek further review from the highest court in the system.
  - U.S. Supreme Court (Federal System): Review by the U.S. Supreme Court is discretionary and granted in only a small percentage of cases, typically those involving significant constitutional questions or conflicts among lower courts.
  - State Supreme Court (State System): Similarly, the state Supreme Court is the highest court in the state system, and review is largely discretionary. The appellate process can be lengthy, often taking a year or more, and focuses on legal questions rather than re-evaluating the facts presented at trial.

Public Resolution Through Administrative Agencies and Courts

Federal and state government agencies play a crucial role in providing information, assistance, and enforcement of employment laws. For a terminated employee, there are a multitude of potential causes of action that could lead to public resolution, including federal and state discrimination claims, retaliation claims, common law public policy claims, and more. Employers, facing a dramatic increase in employment litigation, have increasingly sought to steer claims out of the courtroom, highlighting the importance of understanding public resolution mechanisms.

Unique Administrative Procedure Under Title VII

For claims of illegal discrimination under Title VII of the Civil Rights Act of 1964 (and state and federal laws patterned after it), a unique administrative procedure is a mandatory prerequisite before a lawsuit can be filed. Title VII protects not only employees but also applicants from discrimination based on race, color, sex, national origin, and religion. Later federal statutes extended protections to age, pregnancy, and disabilities, and state laws further expanded protected categories.

Here's a breakdown of the process:

- Filing a Charge: A plaintiff must first file a "charge" with the Equal Employment Opportunity Commission (EEOC).
- Agencies in Oklahoma: In Oklahoma, an employee can file a discrimination claim with either the federal administrative agency, the EEOC, or the state administrative agency, the Oklahoma Human Rights Commission (OHRC).
  - These two agencies have a "work-sharing agreement," meaning they cooperate in processing claims, and it's unnecessary to file with both if the employee indicates a desire to "cross-file" the claim.
- Statute of Limitations: The employee must file the claim within 180 days of the alleged violation.
- EEOC's Role: The EEOC has multiple roles, including investigating charges of alleged discrimination, filing lawsuits, initiating settlements, developing interpretive guidelines, issuing regulations, and engaging in preventive efforts like education and assistance programs. The EEOC enforces laws such as Title VII, the Pregnancy Discrimination Act, Equal Pay Act, Age Discrimination in Employment Act, and Americans with Disabilities Act, and handles workplace retaliation and sexual harassment claims.
- Investigation and Conciliation: After a charge is filed, the EEOC conducts an investigation. If the EEOC believes the charge has merit, it will attempt an amicable resolution between the parties, known as "conciliation".
- Right to Sue Letter: If conciliation is unsuccessful, the EEOC issues a "right to sue letter" to the charging party, allowing them to proceed with a lawsuit.
- Settlements: Discrimination suits often end in settlements, or "consent decrees," between the EEOC and employers, which can save time and money.
- EEOC's Independence from Arbitration: Notably, even if an employee is bound by an arbitration agreement, the EEOC itself is not bound by that agreement and can still pursue enforcement actions or claims on behalf of the employee in federal court, even seeking remedies specific to the employee.

Other Public Avenues for Dispute Resolution

Beyond Title VII discrimination, other public bodies are involved in resolving employment disputes:

- Department of Labor (DOL): The Wage and Hour Division of the U.S. DOL is authorized to conduct investigations to ensure employer compliance with the Fair Labor Standards Act (FLSA), including minimum wage and overtime laws. This includes the power to enter businesses, examine records, and question employees.
- National Labor Relations Board (NLRB): The NLRB is an agency that enforces and interprets the National Labor Relations Act (NLRA), which aims to stop labor conflict and establish a system for collective bargaining. It oversees union elections, determines bargaining units, and hears cases and complaints regarding unfair labor practices by both employers and unions. The NLRB will also defer to arbitrators' decisions in grievances concerning employee discipline or discharge when certain conditions are met, reflecting a policy of promoting arbitration as an agreed-upon dispute resolution mechanism.
- Occupational Safety and Health Administration (OSHA): OSHA is responsible for enforcing health and safety standards in the private sector workplace. It conducts inspections (sometimes requiring a warrant), sets standards for known hazards, and investigates whistleblower complaints from employees regarding health and safety violations. OSHA does not allow an employee to sue an employer directly for violations of whistleblower protection; instead, the aggrieved employee must file a complaint with OSHA.
- Office of Federal Contract Compliance Programs (OFCCP): For federal government contractors, the OFCCP enforces affirmative action plans and nondiscrimination requirements. Unlike the EEOC, which investigates individual claims, the OFCCP primarily audits federal contractors to ensure compliance and has the power to inflict penalties outside the court system.
- Oklahoma Department of Labor (ODOL): The ODOL enforces the Oklahoma Occupational Health and Safety Standards Act (OOHSA), which applies to public workers and has adopted federal safety standards. It also handles complaints related to Oklahoma labor statutes, such as child labor laws and minimum wages.
- Oklahoma Employment Security Commission (OESC): This state administrative agency oversees unemployment compensation claims. It establishes appeal tribunals to hear appeals from its determinations, and parties can appeal to the Board of Review and subsequently to the Oklahoma Supreme Court.

Private resolution of employment disputes

Private resolution of employment disputes, primarily through **Alternative Dispute Resolution (ADR)** methods such as **mediation** and **arbitration**, is increasingly prevalent in the employment landscape. These methods aim to offer employers and employees a quicker and more efficient means of resolving workplace conflicts, serving as alternatives to traditional court litigation.

Mediation in Employment

Mediation is a process where a **neutral third party** helps disputing parties reach their own solution, rather than making a decision for them. It is often successful and can be utilized at any stage of a dispute, generally being less expensive than arbitration or litigation. Many employment agreements now mandate participation in mediation before a lawsuit or arbitration can begin. The Equal Employment Opportunity Commission (EEOC) also refers employment discrimination disputes to mediation after a charge is filed.

Advantages of mediation include:

- **Opportunity for self-determination** by the parties.
- **Reduced costs** compared to litigation.
- **Relationship repair** and improved communication.
- Resolutions tailored to the specific issue, leading to **closure**.
- **Quicker resolution**, often schedulable within weeks, unlike litigation that can take years.
- Allows employees to **tell their side of the story** to a neutral party, an opportunity often lost in litigation.
- Offers **confidentiality**, permitting free communication with little risk of later use against them.
- It is an **informal process** with no procedural formalities, allowing parties to structure it as they see fit.
- Mediators are generally **knowledgeable** about applicable statutes, regulations, and case law, with skills in conducting hearings and familiarity with the workplace environment.

Disadvantages of mediation include:

- Arguments that it **deprives parties of due process**.
- Concerns about **unequal bargaining powers** between employers and employees, potentially leading to "take it or leave it" settlements.
- Perceived problems such as **mediator biases**.
- Danger of **physical and psychological harm** due to the volatile nature of disputes.
- Possible **undermining of the guarantee to one's day in court** and the discovery process.
- Potential for **prevention of public stigmatization** of discriminating employers.

Arbitration in Employment

Arbitration involves parties resolving a dispute outside the court system by submitting the controversy to a **neutral third party (arbitrator) or panel**. An arbitration proceeding resembles a trial where each side presents evidence, and the arbitrator renders a decision. Arbitrators are often retired judges or certified attorneys. Arbitration can be considerably **less costly and faster than litigating** an issue in court, which continues to be appealing to employers.

Federal Arbitration Act (FAA)

Thousands of employment arbitrations occur annually under federal and state statutes. The **Federal Arbitration Act (FAA)** is central to this, generally **requiring courts to enforce arbitration agreements** and arbitral awards. It establishes a "liberal federal policy favoring arbitration". Courts are mandated to "give effect to the contractual rights and expectations of the parties" and enforce agreements according to their terms. When questions arise regarding arbitrability, the FAA dictates that these issues should be **resolved in favor of arbitration**. A court must compel arbitration if a **valid agreement to arbitrate exists, the dispute falls within its scope, and the plaintiff has refused to proceed to arbitration**.

Interaction with Statutory Rights

Despite the broad favor shown to arbitration, the Supreme Court has clarified that **mandatory arbitration agreements cannot prevent a plaintiff from asserting their statutory rights**. For example, employees who sign arbitration agreements can still bring claims under laws like Title VII (prohibiting discrimination) or the Age Discrimination in Employment Act (ADEA). By agreeing to arbitrate a statutory claim, an employee "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum".

Furthermore, even if an employee is bound by an arbitration agreement, the **Equal Employment Opportunity Commission (EEOC) itself is not bound by that agreement**. The EEOC can still pursue enforcement actions or claims on behalf of the employee in federal court, even seeking remedies specific to the employee.

Challenges to Arbitration Agreements

The FAA allows for written arbitration agreements to be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract". This means an arbitration agreement may be invalidated by **"generally applicable contract defenses, such as fraud, duress, or unconscionability"**. Challenges to pre-dispute arbitration agreements imposed as conditions of employment often focus on elements like **adhesiveness, one-sidedness, limitations on**

substantive statutory rights (including damages), unfair prescribed procedures, and burdensome arbitration fees.

In *Rent-A-Center West, Inc. v. Jackson*, the Supreme Court held that an arbitrator may consider a claim that an arbitration agreement is unconscionable if the employee did not specifically challenge the "delegation provision" (the part of the contract delegating the power to the arbitrator to decide unconscionability questions). A general challenge to the entire agreement's validity will typically result in the arbitrator, not the court, deciding the unconscionability issues.

Class Action Arbitration

The Supreme Court has addressed whether arbitration agreements can require individual arbitration and waive the right to class or collective actions. In *Epic Systems Corporation v. Lewis*, the Court concluded that the FAA "instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings". This built upon *AT&T Mobility, LLC v. Concepcion*, which recognized that requiring parties to engage in class action suits would undermine arbitration's efficiency. The Court reasoned that class arbitration was not envisioned when the FAA was enacted, and requiring it interferes with the fundamental characteristics of arbitration. Such requirements introduce numerous procedural issues (e.g., class certification, notice, discovery), are inconsistent with conventional arbitration's procedural formality, and are poorly suited to the higher stakes and limited appeal rights of class litigation. The Court found that if parties did not contract for class-wide arbitration, state law may not insist on it.

National Labor Relations Board (NLRB) and Arbitration

Following *Epic Systems*, the National Labor Relations Board (NLRB) has held that **class and collective-action waivers in mandatory arbitration agreements do not violate the National Labor Relations Act (NLRA)**. Employers are permitted to inform employees that refusal to sign a mandatory arbitration agreement may result in discharge, and they are not prohibited from promulgating such agreements in response to employees opting into collective actions under the Fair Labor Standards Act (FLSA) or state wage-and-hour laws. However, employers are still prohibited from taking adverse action against employees for engaging in concerted activity by filing a class or collective action.

The NLRB also defers to arbitrators' decisions in grievances concerning employee discipline or discharge (alleged NLRA violations) when certain conditions are met: the proceedings were fair, parties agreed to be bound, the arbitrator considered the unfair labor practice issue, and the decision is not clearly repugnant to the Act. This reflects a policy of promoting arbitration as an agreed-upon mechanism for dispute resolution.

Transportation Worker Exception

Section 1 of the FAA includes an **exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"**. The Supreme Court, in *Bissonnette v. LePage Bakeries Park St., LLC* (2024), clarified that a transportation worker does **not need to work in the transportation industry to be exempt from the FAA's arbitration requirement**. The focus is on whether the worker is actively engaged in interstate transportation, regardless of the employer's primary industry.

Building on this, the Oklahoma Supreme Court, in *Mathis v. Kerr* (2024), applied *Bissonnette* to conclude that **Amazon delivery drivers are exempt from federal arbitration requirements** because they deliver goods shipped from other states, engaging in interstate commerce. Crucially for Oklahoma employment law, *Mathis v. Kerr* also determined that, under Oklahoma state law, **workers' compensation retaliation claims are exempt from arbitration agreements**.

Exception for Cases of Sexual Harassment

The **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA)**, signed into law by President Biden on **March 3, 2022**, represented a significant shift in U.S. employment law. It sought to empower survivors of sexual assault and sexual harassment by giving them the choice to pursue their claims in court, even if they had previously signed a mandatory arbitration agreement.

Here's a brief overview:

Key Provisions and Purpose

- **Invalidates Predispute Arbitration Agreements:** The core of the EFAA is its invalidation of any "predispute arbitration agreement" or "predispute joint-action waiver" that would force a person alleging a sexual assault or sexual harassment dispute into arbitration.
- **Choice for Survivors:** This means that an individual who experiences sexual assault or harassment in a workplace (or other covered context) can now *elect* to bring their case in a public court, regardless of any arbitration clause they may have signed as part of their employment contract or other agreement *before* the dispute arose.
- **Applies to Federal, State, and Tribal Law:** The law covers claims filed under federal, state, or tribal law relating to sexual assault or sexual harassment disputes.
- **Covers Class and Collective Actions:** It also prevents the enforcement of predispute waivers that would prohibit a person from participating in a joint, class, or collective action related to these disputes.

- **Court Determines Applicability:** Importantly, the EFAA specifies that a court, not an arbitrator, will determine whether the Act applies to a particular agreement and whether that agreement is valid and enforceable.
- **Retroactive Application:** The law is considered retroactive in that it applies to agreements signed *before* its enactment date, as long as the dispute or claim *arises or accrues on or after March 3, 2022*.

Context and Impact

- **Response to #MeToo Movement:** The EFAA was a direct result of the #MeToo movement, which brought widespread attention to how mandatory arbitration clauses often silenced victims of sexual misconduct. These clauses often resulted in confidential arbitration proceedings, preventing public scrutiny and accountability for perpetrators and employers.
- **Increased Transparency and Accountability:** By allowing survivors to choose litigation in court, the law aims to increase transparency around sexual assault and harassment claims, potentially leading to greater accountability for individuals and companies.
- **Shift in Power Dynamic:** It shifts power back to the individual, giving them more control over how their claims are resolved, rather than being bound by a prior agreement that might have been signed without full understanding of its implications for such sensitive matters.
- **Still an Option for Arbitration:** It's crucial to note that the EFAA does *not* ban arbitration for sexual harassment or assault claims entirely. If a survivor *chooses* to go to arbitration after a dispute arises, they can still do so. The law simply removes the employer's ability to *force* arbitration based on a predispute agreement.
- **Ongoing Interpretation:** Since its enactment, courts have been interpreting the specific contours of the EFAA, particularly concerning when a "dispute" arises or accrues, and how it applies when sexual harassment claims are brought alongside other types of claims (e.g., wage and hour claims). Some courts have taken a broad view, holding that if a "case" involves a sexual harassment claim, the entire case might be kept out of arbitration.

Proving the discrimination case

Proving a discrimination claim in employment law typically involves specific legal frameworks designed to balance the rights of employees against the legitimate interests of employers. These frameworks include a burden-shifting process, which is applied to different types of discrimination claims, namely disparate treatment and disparate impact.

Burden-Shifting Process

In most employment discrimination cases, the burden of proof shifts between the plaintiff employee and the defendant employer. This process involves three primary steps:

1. **Plaintiff's *Prima Facie* Case:** The plaintiff must first make an initial showing, or establish a ***prima facie* case**, of employment discrimination. This is considered a "low hurdle to overcome" and creates a presumption of discrimination, though it does not definitively prove that discrimination occurred. Generally, a plaintiff needs to show, by a preponderance of the evidence, that they are a **member of a protected class**, suffered an **adverse employment action**, and the challenged action occurred under circumstances giving rise to an **inference of discrimination**. An inference of discrimination can arise from an employer's favoritism toward a similarly situated employee who is not part of the protected class.
2. **Employer's Articulated Defense:** Proving the *prima facie* case shifts the **burden of production** to the defendant employer. The employer must then articulate a legitimate, nondiscriminatory reason for its actions.
3. **Plaintiff's Showing of Pretext:** If the employer articulates such a reason, the burden shifts back to the plaintiff. The plaintiff may challenge that defense by establishing that the employer's reason is **pretextual**.

Disparate Treatment Claim

Disparate treatment involves a policy or action that is discriminatory on its face, meaning an employer **intentionally treats similarly situated individuals differently** based on a protected characteristic. This is the "most easily understood type of discrimination" and primarily focuses on proving a discriminatory motive.

- **Elements:** To establish a *prima facie* case, the plaintiff must generally show:
  - They belong to a **protected class**.
  - They suffered an **adverse employment action**.
  - The circumstances give rise to an **inference of discrimination**
  - They suffered damages as a result
    - The Supreme Court, in *Muldrow v. City of Saint Louis*, has lowered the threshold for "adverse employment actions," indicating that plaintiffs no longer need to show "significant harm" but rather "some" harm, though the precise definition of "some" harm remains unclear. Examples of "some harm" could include job transfers, changes in schedule (days to nights, weekdays to weekends), or changes in supervisory duties or advancement opportunities.

Employer Defense

Once a *prima facie* case is established, the employer must articulate a **legitimate, nondiscriminatory reason (LNDR)** for its actions. An employer seeking to establish an LNDR must show that the adverse employment action was taken for reasons unrelated to discrimination.

The LNDR defense is an employer's assertion that its adverse employment action (e.g., termination, failure to hire, demotion, non-promotion) was based on a lawful, non-discriminatory reason, and *not* on the employee's protected characteristic (e.g., race, sex, age, religion, national origin, disability).

This reason must be clear, specific, and capable of objective verification. The employer does *not* need to prove that its reason was true or that it was the *best* decision, only that it was non-discriminatory.

- **Examples of common LNDRs:**
  - Poor job performance (e.g., failing to meet sales quotas, frequent errors, not following company policy).
  - Lack of qualifications for the position.
  - Misconduct or violation of company policy (e.g., insubordination, theft, attendance issues).
  - Reduction in force or legitimate business restructuring.
  - Better qualifications of another candidate.
  - Budgetary constraints.
  - Tardiness or absenteeism.

Bona Fide Occupational Qualification

- The **Bona Fide Occupational Qualification (BFOQ)** is a very narrow and rarely successful defense to employment discrimination claims, specifically those alleging **disparate treatment**.
  - It's an **affirmative defense** under Title VII of the Civil Rights Act of 1964 (and the Age Discrimination in Employment Act - ADEA). This means the employer admits to discriminating based on a protected characteristic but argues that such discrimination is legally permissible because the characteristic is "reasonably necessary to the normal operation of that particular business or enterprise."
  - Essentially, the employer claims that only individuals with a specific protected characteristic can perform the job's essential duties.

Which Protected Characteristics it Applies To:

- Sex (gender)
- Religion
- National Origin
- Age (under the ADEA)
- **It NEVER applies to Race or Color.** Courts and the EEOC have consistently held that race or color can never be a BFOQ, meaning an

employer can never justify discrimination based on these characteristics. **How it's Applied in Disparate Treatment Claims:**

When an employee alleges disparate treatment based on sex, religion, national origin, or age, and the employer admits to the discrimination but asserts a BFOQ, the employer bears a heavy burden to prove:

1. **The "Essence of the Business" Would Be Undermined:** The employer must demonstrate that the discriminatory qualification relates to the fundamental purpose or "essence" of their business. It's not enough to show that it's merely convenient or preferred.
2. **"All or Substantially All" of the Excluded Class Cannot Perform the Job:** The employer must prove that all or virtually all individuals of the excluded group are unable to perform the job's essential duties safely and efficiently. This is a very high bar and generally cannot be based on stereotypes or generalized assumptions.
3. **No Less Discriminatory Alternative:** The employer must show that there is no reasonable alternative that would allow them to achieve their legitimate business objective without discriminating.

Common Scenarios Where BFOQ Might Be Considered (and often still limited):

- **Authenticity/Privacy/Decency:**
  - **Actors/Models:** Hiring a specific gender or age for a role where authenticity is crucial (e.g., an actress for a female role, a male model for men's clothing).
  - **Bathroom Attendants/Locker Room Staff:** Requiring attendants of the same sex as the patrons for privacy reasons.
  - **Counselors in Shelters:** Requiring staff of a particular gender in shelters for victims of domestic violence of that same gender.
- **Religious Institutions:** A religious organization may be able to require that employees in certain positions (e.g., ministers, teachers of religious doctrine) adhere to the tenets of their faith. However, this typically wouldn't extend to secular roles like janitors or accountants within the organization.
- **Safety (particularly for age):**
  - **Airline Pilots/Bus Drivers:** Mandatory retirement ages may be upheld as BFOQs due to safety concerns regarding the decline of certain physical and mental functions with age, where individual testing is impractical. **What is NOT a BFOQ:**
- **Customer Preference:** The most common argument rejected is "customer preference." For example, an airline cannot justify hiring only female flight attendants because customers prefer them (as famously ruled in *Diaz v. Pan American World Airways*).
- **Stereotypes:** Assuming a group is inherently less capable (e.g., women are too weak for a certain job, or men are not nurturing enough).

- **Cost/Inconvenience:** It's too expensive or inconvenient to accommodate individuals of the excluded group.
- **Lack of Separate Facilities:** The absence of separate restrooms or changing facilities is generally not a valid BFOQ defense.

Why it's so Narrowly Construed:

The BFOQ defense is a very limited exception because it allows for intentional discrimination, which is fundamentally at odds with the purpose of anti-discrimination laws. Courts and enforcement agencies like the EEOC interpret it strictly to prevent employers from using it as a loophole to perpetuate bias.

Plaintiff's rebuttal

- **Plaintiff's Rebuttal (Overcoming the Defense):** The plaintiff can **overcome this defense** by demonstrating that the employer's stated reason was "merely pretextual". This can be achieved by showing "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons".

Disparate Impact Claim

Disparate impact occurs when policies, practices, rules, or other systems that **appear to be neutral** on their face result in a **disproportionate negative impact** on a protected group. Unlike disparate treatment, disparate impact claims **do not require proof of intentional discrimination**. The law of disparate impact regulates screening devices – any device that is used to screen out potential candidates. A screening device may be a physical requirement, a scored test, or even an interview.

- **Elements:** The plaintiff's initial burden is to demonstrate that a **particular employment practice caused the disproportionate exclusion** of protected group members, typically through statistical evidence. A common metric for this is the **"four-fifths (or 80%) rule,"** where a selection rate for any group less than 80% of the highest selection rate for another group may indicate disparate impact.
- **Employer Defense:** If disparate impact is shown, the employer can defend itself by proving "business necessity." An employer does this by demonstrating that the challenged practice is **"job-related" and "consistent with business necessity"**. This means establishing a substantial relationship between the requirement and the type of job.
- **Plaintiff's Rebuttal (Overcoming the Defense):** Even if the employer establishes business necessity, the plaintiff has "one last option" to

overcome the defense: proving that an **equally valid, job-related alternative practice exists that causes less disparate impact**.

Age discrimination defense differs in its disparate impact defense

- **Age Discrimination in Employment Act (ADEA) Specifics for Disparate Impact:** For disparate impact claims under the ADEA, a different defense applies. Instead of "business necessity," employers may defend their actions by showing the differentiation is based on a **"Reasonable Factor Other than Age (RFOA)"**. In ADEA disparate impact cases, the **employer bears both the burden of production and persuasion for the RFOA defense**. The "business necessity" test, used in Title VII disparate impact claims, is not applicable to ADEA disparate impact cases. This approach makes it "harder and costlier for employers to defend" against ADEA suits compared to if the burden were on the plaintiffs.

The hiring process

The hiring process is a critical series of steps for any business, designed to maximize productivity, reduce risks, and promote growth by selecting the most suitable employees. It involves navigating various legal requirements, particularly those aimed at avoiding wrongful discrimination. The hiring process generally consists of three main stages: **recruitment, information gathering, and selection**.

Recruitment

The first stage of the hiring process involves efforts to attract potential candidates for open positions. A key goal during recruitment is to ensure a **broad applicant pool**, which signals that the employer does not intend to restrict applications based on protected characteristics.

Before gathering applications, an employer should **create a written job description** that details the essential functions and duties, both fundamental and occasional, of the position. This is especially important for employers subject to the Americans with Disabilities Act (ADA), as "essential functions" are fundamental to the role. Evidence of essential functions can include the employer's judgment, written job descriptions, time spent on the function, and consequences of not performing it. Additionally, employers must determine and list **job qualifications** such as education, skills, experience, and licenses, ensuring a legitimate connection between the qualification and the job to avoid the appearance of discrimination.

Recruitment methods include:

- **Advertisements:** Employers commonly advertise job openings through the internet, newspapers, magazines, and trade journals. Advertisements **must not indicate any preference, limitation, specification, or discrimination based on protected categories** (e.g., sex, age, race), unless a bona fide occupational qualification (BFOQ) is involved. The focus should be on job requirements, not the type of person needed. Employers should also use sex-neutral job titles (e.g., "server" instead of "waitress" or "waiter") and avoid language implying youth (e.g., "recent college graduate"). It is a strategic point to include a statement that the business is "**An Equal Employment Opportunity Employer**" in all recruitment processes. Information about positions should be available in different media to accommodate individuals with various disabilities.
- **Word-of-Mouth Recruiting:** While not inherently discriminatory, reliance solely on this method may violate Title VII if the existing workforce lacks diversity compared to the relevant labor market, as it could **perpetuate existing demographic imbalances**.
- **Nepotism:** Policies encouraging the recruiting of relatives are not barred by Title VII, but similar to word-of-mouth recruiting, they can lead to discrimination claims if they perpetuate existing workforce characteristics and adversely impact protected classes. Employers should actively recruit members of adversely affected protected classes to avoid such claims.
- **Promoting from Within:** Exclusive reliance on internal promotions can also lead to a **disparate impact challenge** if the current workforce is not diverse.
- **Recruiting Agents:** Employers using third-party recruiters (e.g., private employment agencies) can be held **liable for their discriminatory recruiting and referral practices** under agency principles. Employers should inform agents of their obligation to comply with ADA and other nondiscrimination requirements.
- **Walk-in Applications:** Accepting "walk-in" applications can raise Title VII liability if there's a substantial disparity between the employer's workforce and the labor market. Employers are not required to accept all unsolicited applications but must administer their policy in a nondiscriminatory manner.
- **Internet Recruitment:** The internet significantly expands the applicant pool but raises legal concerns, particularly regarding when an individual becomes an "applicant." For government contractors, an "Internet Applicant" must submit an expression of interest online, be considered for a particular position, possess basic qualifications, and not withdraw from consideration.
- **Using Social Media:** Employers using social media for recruitment or research can unwittingly violate anti-discrimination laws. Targeted advertising on social media, for example, may exclude older workers and face legal challenges under the ADEA.

Information Gathering

This stage involves collecting information to screen applicants. Even common employment applications act as screening devices, and their use is governed by **disparate impact theory**. If a screening device yields a disproportionate result on a protected class, the employer can be liable, even without discriminatory intent.

Employers should exercise caution with pre-employment inquiries:

- **Direct Inquiries Regarding Protected Class Status:** Employers should eliminate all pre-employment inquiries eliciting protected class information unless for affirmative action or EEO reporting, in which case data should be collected on a separate, voluntary, and confidential form.
- **Age:** While inquiring about age or date of birth isn't strictly illegal, it can lead to scrutiny. Questions that are proxies for age, like high school graduation dates, should be avoided. Employers can ask if an applicant is over 18 for minor employment laws.
- **Citizenship, Place of Birth, or National Origin:** The Immigration Reform and Control Act (IRCA) prohibits hiring unauthorized aliens but also discrimination based on citizenship or immigration status. Employers should ask if applicants are authorized to work in the U.S. and require documentation *after* hiring, avoiding questions about national origin or place of birth.
- **Familial Status:** Some states prohibit discrimination based on marital status. Inquiries about pregnancy, child-bearing, or children can lead to claims of **sex-plus discrimination** or **disparate impact** against women. Such information should be collected only after employment for tax or insurance purposes, on a separate form.
- **Financial Status:** Requiring a good credit record may have a **disproportionate impact on minority groups**. Federal EEO laws prohibit using financial information if it doesn't accurately identify responsible employees and significantly disadvantages a protected group. Inquiries about personal assets, liabilities, or credit ratings should be job-related.
- **Height and Weight:** These requirements often constitute a **disparate impact** violation, disproportionately affecting women and certain ethnic groups, and may conflict with disability laws. Such information should not be collected before a conditional employment offer.
- **Physical and Mental Condition:** The ADA prohibits pre-offer inquiries into the existence, nature, or severity of disabilities. Employers can inquire about the applicant's ability to perform **essential job functions** with or without reasonable accommodation, but not in terms of disability. Guidance recommends avoiding questions about mental illness history.
- **Photograph Requests:** Employers should not require photographs or physical descriptions from job applicants before a hiring decision is made.
- **Weekend or Holiday Work Availability:** Employers should ask about availability directly, not about religious observances, to avoid religious

discrimination claims. Reasonable accommodation for religious needs is required unless it causes undue hardship.

- **Military Experience:** Inquiries about military discharge type may have a **disproportionate impact** on minority applicants and should be job-related and evaluated case-by-case.
- **Education, Skills, and Work Experience:** If these requirements have a **disparate impact** on a protected class, the employer must prove **business necessity** and a substantial relationship to the job. Periodic reviews and empirical validation are recommended.
- **Social Media Activity:** Many states prohibit employers from requiring social media passwords. Employers should be cautious, as reviewing profiles before an interview can reveal protected class information.
- **"Ban the Box" Initiatives:** These initiatives delay inquiries about conviction history until later in the hiring process, aiming to increase fairness for applicants with criminal records. Because Black and Latino men are arrested and convicted at disproportionately higher rates, asking about criminal records upfront has a **disproportionate impact**. Federal "Ban the Box" laws apply to federal employers and contractors. Oklahoma's version applies to public employers, allowing criminal history questions during interviews but not on initial applications. Employers should respect EEOC guidance, which suggests individualized assessment considering the nature and gravity of the offense, time passed, and job sought. Inquiries about arrests should be avoided, focusing instead on convictions or guilty pleas if business necessity requires it.

Employers should generally limit pre-employment inquiries to those directly related to safe and efficient job performance. An **"equal employment opportunity" statement** should be included on application forms. A **disclaimer** regarding at-will employment can also be useful to counter claims of implied contracts.

Interviews are a key part of information gathering. Interviewers should be trained to ask only appropriate, business-related questions and to avoid questions concerning health and disability. Employers should prepare written interview questions and ask each applicant the same basic set of questions to avoid discriminatory lines of questioning. Interview notes can be used as evidence in discrimination cases, so references to protected categories should be avoided. Social media profiles should generally not be reviewed *before* an interview.

Selection

At this stage, the employer determines if an applicant can satisfy the job's requirements, often utilizing **tests**. While testing can help identify good employees, it carries legal risks.

Testing in Selection

Workplace testing broadly falls into two categories: **eligibility testing** and **ineligibility testing**.

Eligibility Testing Eligibility tests assess a potential employee's skills and qualifications to perform job requirements or to identify the most capable applicants.

- **Disparate Impact:** Eligibility tests may have a **disparate impact** on protected classes. To be exempt from such claims, a test must be **professionally developed, job-related, and consistent with business necessity**.
- **Types of Cognitive Ability Tests:** These measure mental abilities and cognitive functions to predict job performance. Examples include:
  - **Verbal Comprehension and Reasoning Tests:** Assess ability to process and interpret written information.
  - **Numerical Reasoning and Ability Tests:** Focus on interpreting and analyzing numbers.
  - **Learning Agility Tests:** Assess how quickly someone can understand and master new concepts.
  - **Perception Tests:** Measure speed and accuracy in gathering and retaining information.
  - **Logical Reasoning Tests:** Require candidates to apply logic to scenarios based on provided information.
- **Integrity Tests:** Used to assess personality, honesty, and propensity to steal. Employers must keep information obtained from these tests confidential and obtain appropriate releases. A significant risk arises if an integrity test is found to constitute an **illegal medical exam** under the ADA, which can only be required after a conditional job offer.
- **Physical or Skills Tests:** Often given for physically demanding jobs, these tests must be **related to an essential function of the job**. Job simulations, which involve components that are examples of normal job activity, are a common approach.
- **Validation:** If a test has a **disparate impact**, the employer must show it is **"job-related" and justified by "business necessity"**. The **Uniform Guidelines on Employee Selection Procedures** outline three methods for validating employment tests:
  - **Criterion-Related Validation:** Shows a correlation between test scores and job performance.
  - **Content Validation:** Demonstrates that the test content represents a substantial portion of the actual job, often based on job analysis.
  - **Construct Validation:** Measures identifiable characteristics (e.g., leadership) important for job performance, requiring careful job analysis.
  - The **"four-fifths (or 80%) rule"** is an informal guide used by the EEOC to assess disparate impact, where a selection rate for any group

less than 80% of the highest selection rate for another group may indicate disparate impact.

Ineligibility Testing Ineligibility tests identify traits that would prevent an employee from performing job duties, such as drug or alcohol addictions.

- **Pre-Employment Physical Medical Examinations:** These can ensure fitness, detect communicable diseases, and establish a medical baseline. Under the ADA, such exams can only be required **after a conditional offer of employment** and must be given to all entering employees in the same job category. Results must be kept confidential. If an offer is withdrawn based on medical information, the employer must show the criteria are **job-related and consistent with business necessity**, and the individual cannot perform essential functions even with reasonable accommodation.
- **Drug and Alcohol Testing:**
  - **Illegal Drug Use Tests:** Not considered a medical examination under the ADA, so they can be given *prior* to a job offer.
  - **Alcohol Testing:** Is considered a medical examination under the ADA and can only be conducted on a **post-offer basis**.
  - Information revealed by these tests, particularly prescription drug use, is subject to ADA confidentiality requirements. Oklahoma law permits drug and alcohol testing for applicants and employees under specific conditions, including pre-employment, reasonable suspicion, and post-accident. Oklahoma also has rules against direct observation during urine sample collection and requires confirmation of positive tests.
- **Polygraph Tests:** The **Employee Polygraph Protection Act (EPPA)** generally **prohibits most private employers from using lie detector tests** for pre-employment screening or during employment. Exceptions exist for security service firms and pharmaceutical companies, and for employees reasonably suspected of workplace incidents resulting in economic loss. Strict standards for test conduct and disclosure apply where tests are permitted. Oklahoma law also has a "Polygraph Bill of Rights" that ensures voluntariness and specific examinee rights, being more restrictive than federal law in some areas.
- **Genetic Tests:** The **Genetic Information Nondiscrimination Act (GINA)** prohibits employers from discriminating based on genetic information and generally prevents requesting or requiring genetic information from individuals or their family members, with rare exceptions. Information obtained must be kept strictly confidential. Employers can use a "safe harbor" warning to third parties providing medical information to avoid inadvertent acquisition of genetic information. Oklahoma has its own version, the **Genetic Nondiscrimination in Employment Act**, which similarly prohibits employers from seeking or using genetic tests or information to discriminate.
- **Credit Investigations:** The **Fair Credit Reporting Act (FCRA)**

limits employers' use of commercial reporting agencies for evaluating applicants. Employers must provide **written notice and obtain permission** from applicants/employees before obtaining a consumer report. If an adverse employment action is taken based on a report, the applicant/employee must receive a copy of the report and their rights. The EEOC views credit requirements as potentially having a **disparate impact on minority groups** and can file lawsuits if such requirements are not job-related and justified by business necessity. Many states also limit the use of credit information in employment.

- **Arrest and Conviction Records:** Employers' use of criminal records can have an **adverse impact on ex-offenders**, particularly minority groups, due to disproportionate arrest and conviction rates. The **EEOC Guidance** recommends against broad use of criminal histories and encourages an **individualized assessment** that considers the nature and gravity of the offense, the time passed, and the nature of the job. The "ban the box" movement encourages delaying criminal history inquiries until later in the hiring process to allow employers to first assess job readiness. While Oklahoma law for private employers doesn't prohibit discriminating based on unsealed criminal records, employers should still utilize the EEOC Guidance. Employers must also comply with the FCRA when using third parties for background checks, including notification and consent requirements. Oklahoma law explicitly bars employers from inquiring about **sealed criminal records**.

Throughout the selection process, and indeed the entire hiring process, employers must remain vigilant to ensure their practices are non-discriminatory and legally compliant, balancing their business needs with the protected rights of applicants and employees.

Restrictions on employee mobility

Employers often implement various measures to restrict employee mobility, primarily to safeguard their legitimate business interests, such as protecting confidential information, trade secrets, and customer relationships. These restrictions generally include noncompetition agreements, confidentiality or nondisclosure agreements, and protections afforded by trade secret law and the common law duty of loyalty.

Noncompetition Agreements

A **noncompetition agreement**, also known as a "covenant not to compete" or "restrictive covenant," is a contractual promise that limits an employee's ability, upon leaving employment, to engage in the same type of business for a stated time in the same market as the former employer. The primary purpose of these agreements is not to punish the former employee, but to **protect the employer from unfair competition**, including its customer base, trade secrets, and

other vital information, and to encourage employers to invest in their employees. Noncompetition agreements can also deter employee movement and make it more difficult for competitors to poach key employees, reducing the risk of lawsuits for tortious interference with contracts.

Oklahoma Law on Noncompetition Agreements: Oklahoma has a strong public policy against noncompetition agreements in the employment context. Oklahoma law, specifically **Okla. Stat. tit. 15, §§ 217–219**, explicitly states that "Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by Sections 218 and 219 of this title, . . . is to that extent void". This statutory ban predates Oklahoma's statehood, first enacted in 1908, and remains largely enduring, reflecting the state's motto, "Labor Conquers All Things".

The **judicial interpretation of this ban in Oklahoma has fluctuated** over time.

- Initially, courts rigidly prohibited nearly all such agreements.
- However, in 1970, *Tatum v. Colonial Life & Accident Insurance Co.*, the Oklahoma Supreme Court began to modify this rigid stance, enforcing an agreement that only prevented a departing salesman from selling *to his former employer's customers* for two years, rather than broadly restraining his profession.
- Further easing occurred in 1977 with *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association*, where the court applied a **common-law reasonableness analysis**, suggesting that only *unreasonable* restraints on trade were void. This "reasonableness" was determined by factors such as whether the restraint was "no greater than is required for the employer's protection from unfair competition," did "not impose undue hardship on the employee," and was "not injurious to the public".
- Despite this period of flexibility, the Oklahoma Supreme Court returned to its previous strict position in **2011 with *Howard v. Nitro-Lift Technologies, L.L.C.***. The Court refused to enforce a broad noncompetition agreement, emphasizing the "plain, clear, unmistakable, unambiguous, and unequivocal language of Okla. Stat. tit. 15 § 219A (2001) prohibits employers from binding employees to agreements which bar their ability to find gainful employment in the same business or industry as that of the employer". The court noted that the agreement "conceivably could be interpreted to prevent the employees from taking jobs in any capacity from a competing business".
- This strict interpretation was reinforced by the Fifth Circuit in *Cardoni v. Prosperity Bank*, which determined that Oklahoma had a "clear policy against enforcement of most noncompetition agreements" and that applying Texas law (which is more permissive) would "contravene Oklahoma's statutory aversion".

Nonsolicitation Agreements as a Limited Exception: In 2001, the Okla-

homa legislature amended its noncompetition law to create a specific exception for **nonsolicitation agreements**. Under Title 15 O.S. § 219A, an employee may engage in the same or similar business as a former employer, provided they "do not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer". Any contract provision conflicting with these terms is "void and unenforceable".

Federal Regulation of Noncompete Agreements: On January 5, 2023, the Federal Trade Commission (FTC) proposed a new rule to **ban most noncompete agreements** between employers and workers, aiming to protect workers' freedom to change jobs, ensure marketplace competition, and facilitate new business creation. The final rule was published on May 7, 2024, with an effective date of September 4, 2024. However, a federal court in Texas issued a nationwide injunction on August 20, 2024, preventing this rule from taking effect, leaving the legal landscape uncertain. Despite the injunction, the FTC can still investigate and take case-by-case enforcement actions against noncompetes that harm competition.

Other Means of Restricting Employee Mobility

Beyond noncompete agreements, employers use other legal mechanisms to protect their interests and, by extension, restrict certain types of employee mobility.

1. Trade Secret Law: Oklahoma has adopted the **Uniform Trade Secrets Act (OUTSA)**, which provides a framework for protecting valuable confidential information.

- A **trade secret** is defined as information that derives economic value from not being generally known and is subject to "efforts that are reasonable under the circumstances to maintain its secrecy". This can include confidential operating and pricing policies.
- Oklahoma courts use a **six-factor test** to determine if information qualifies as a trade secret, considering factors like how widely the information is known outside and inside the business, measures taken to guard its secrecy, its value to the business and competitors, and the effort/money expended in its development.
- The OUTSA provides causes of action for **misappropriation**, defined as improper acquisition or unauthorized disclosure of a trade secret. To prove misappropriation, a plaintiff must show "(i) the existence of a trade secret: (ii) misappropriation of the secrets by Defendant; and (iii) use of the secrets by Defendant to the Plaintiff's detriment".
- Remedies include **injunctive relief** (to prevent actual or threatened misappropriation) and **monetary damages**. The OUTSA generally displaces other causes of action for misappropriation, but it does exempt other remedies not based on misappropriation, including contractual claims like breach of non-compete, breach of fiduciary duty, and breach of loyalty.

2. Confidentiality Agreements (Nondisclosure Agreements): These

agreements are designed to prevent a former employee from using or disclosing confidential information obtained during employment. The sources indicate that **nondisclosure agreements "resemble noncompetition agreements, with the same restrictions on enforceability"** and are subjected to "the same sort of balancing tests" by courts. While the law does not intend them to punish the former employee, they aim to protect an employer's confidential information. It is considered a best practice for employers to have employees sign **written agreements specifically prohibiting the disclosure of trade secrets or confidential information**, with a careful definition of what information is considered confidential.

3. Common Law Duty of Loyalty: Even in the absence of a written agreement, employees typically have a common law duty to their employers. This duty, while not explicitly detailed in the provided sources as a direct *restriction on mobility* in the same way as non-competes, is implied as a protection for employers. The sources state that "Even without a written agreement, **employees must keep confidential information they know or should have known the employer desires to keep secret**". Furthermore, the sources list "disclosing trade secrets to a competitor" and "working for a competitor" as forms of "disloyalty". The concept of "breach of fiduciary duty" and "breach of loyalty" are also mentioned as contractual remedies that are *not* displaced by the Oklahoma Uniform Trade Secrets Act, suggesting they are recognized legal claims that can arise from an employee's actions.

4. Inevitable Disclosure Doctrine: The "inevitable disclosure" doctrine is a legal principle that allows an employer to prevent a former employee from working for a competitor, even in the absence of a non-compete agreement, if it can be shown that the employee's new role will **inevitably lead to the disclosure or use of the former employer's trade secrets**.

In essence, it's a way for companies to protect their valuable confidential information when an employee, due to the nature of their knowledge and the similarity of their new role, would find it impossible to perform their new job without relying on or inadvertently disclosing their former employer's trade secrets.

How it can be used in situations where there is no noncompete agreement:

The inevitable disclosure doctrine is particularly relevant in situations where a former employee did not sign a non-compete agreement, or where such an agreement is deemed unenforceable. It operates under the premise that even without an explicit contractual restriction, an employee has a common law and/or statutory duty to protect their former employer's trade secrets.

Here's how it generally works and key factors courts consider:

1. **Trade Secret Existence:** The former employer must first prove that the information in question qualifies as a trade secret. This generally means the information:

- Derives independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

2. **Threatened Misappropriation:** The employer must show that the former employee's new employment poses a "threatened misappropriation" of these trade secrets. This is where "inevitable disclosure" comes in. Instead of proving actual theft or disclosure, the employer argues that disclosure is highly probable or unavoidable due to:

    - **Similarity of Roles:** The new job responsibilities are so similar to the old ones that it would be extremely difficult, if not impossible, for the employee to perform the new job without drawing upon or disclosing the former employer's confidential information.
    - **Employee's Knowledge:** The employee had extensive access to and intimate knowledge of the former employer's highly sensitive trade secrets (e.g., strategic plans, pricing strategies, customer lists, unique manufacturing processes).
    - **Competition:** The new employer is a direct competitor offering similar products or services.
    - **Lack of Trustworthiness/Bad Faith (in some jurisdictions):** While the doctrine can apply even without intent to misappropriate, some courts look for evidence of deceit or a lack of trustworthiness on the employee's part, which could suggest an unwillingness to protect the former employer's secrets.

Examples

- **Senior Executive Joining a Direct Competitor:** A vice president of sales for a beverage company who has intimate knowledge of their former employer's upcoming marketing campaigns, distribution strategies, and new product development joins a direct competitor in a similar executive role. A court might find it inevitable that they would use this knowledge, even if unintentionally, to benefit the new company.- **Highly Specialized Engineer:** A lead engineer with access to proprietary manufacturing processes and product designs for a tech company leaves to join a rival firm producing very similar products. It might be argued that their expertise is so intertwined with the former company's trade secrets that they cannot help but apply that knowledge in their new role.
- **Pharmaceutical Scientist:** A scientist with deep knowledge of a pharmaceutical company's confidential drug formulations and clinical trial data takes a position with a competing drug developer working on similar compounds.

Controversy and Limitations The inevitable disclosure doctrine is highly controversial and not universally accepted across all U.S. states or by all federal courts. Critics argue that it effectively creates a "de facto" non-compete agreement where none existed, restricting employee mobility and their right to pursue their chosen career.

Courts that are reluctant to apply the doctrine often emphasize the public policy favoring employee mobility and the need for clear evidence of threatened misappropriation beyond just an employee possessing knowledge and taking a similar job.

Therefore, while a powerful tool for trade secret protection, its application is highly fact-specific, varies by jurisdiction, and is generally used in rare circumstances. Employers seeking to rely on this doctrine must be prepared to present strong evidence demonstrating the inevitability of disclosure.

Race discrimination

The key legal principles underlying race discrimination in employment are primarily derived from federal laws, most notably Title VII of the Civil Rights Act of 1964 and the Reconstruction Era Acts (specifically 42 U.S.C. § 1981 and § 1983), and state law, the Oklahoma Anti-Discrimination Act (OADA).

Here are the key principles:

- **Prohibition of Discrimination Based on Race:** Both federal and state laws explicitly prohibit discrimination in employment because of race. This protection extends to individuals of all races, including non-minority white employees. Discrimination based on "color," which refers to pigmentation, complexion, or skin shade/tone, is also prohibited by Title VII and can occur between persons of different races or the same race.
- **Scope of Prohibited Practices:** Race discrimination is prohibited in all phases of the employment relationship. This includes, but is not limited to:
  - Hiring and refusing to hire.
  - Discharge/Termination.
  - Compensation/Pay.
  - Terms, conditions, privileges, or responsibilities of employment.
  - Training programs.
  - Promotion/Advancement.
  - Layoff.
  - Discipline.
  - Job assignments.
  - Benefits.
  - Transfers.
  - Limiting, segregating, or classifying employees in a manner that deprives them of employment opportunities or adversely affects their

status.

- **Applicability to Employers:** The Oklahoma Anti-Discrimination Act (OADA) applies to **all public and private employers** in Oklahoma, including those with only one employee. Federal law, like Title VII, generally applies to employers with **15 or more employees**. The number of employees is considered an element of a plaintiff's claim under Title VII, not a jurisdictional issue.
- For many years, certain federal contractors had obligations regarding race under Executive Order 11246. While Executive Order 14173 effectively removed the requirement for federal contractors to implement affirmative action programs under EO 11246, employers remain subject to general anti-discrimination laws like Title VII.

Theories for Proving Discrimination:**

Discrimination claims, including those based on race, can be proven using different legal theories: - **Disparate Treatment:** This involves **intentional discrimination**where an employer treats individuals less favorably because of their race. Proof of discriminatory motive is critical, though it can sometimes be inferred. This is typically proven using the **three-step burden-shifting framework** established in *McDonnell Douglas Corp. v. Green*, where the plaintiff first establishes a prima facie case, the employer offers a legitimate non-discriminatory reason, and the plaintiff attempts to show that reason is a pretext for discrimination. Establishing a prima facie case requires showing membership in a protected class (race), suffering an adverse employment action, and circumstances inferring discrimination. The standard for an adverse employment action now requires showing only "some harm," a standard being applied in Oklahoma federal courts following the *Muldrow* Supreme Court decision. - **Disparate Impact:** This occurs when seemingly neutral policies, practices, or rules have a **disproportionate discriminatory effect** on a protected racial group, even without proof of intent to discriminate. Employers can defend against disparate impact claims by demonstrating that the practice is **job-related and consistent with business necessity**. However, the plaintiff can still prevail by showing that an equally valid, job-related alternative practice exists that causes less disparate impact. Statistical evidence is often used to demonstrate disparate impact. - **Pattern or Practice:** This theory applies when employers engage in **systemic, routine, intentional discrimination** as part of their standard operating procedures.

- **Hostile Work Environment:** Racial harassment that is sufficiently **severe or pervasive** to alter the conditions of employment and create an **abusive working environment** is prohibited. Courts assess the environment from both an objective and subjective perspective, considering factors like the frequency and severity of the conduct. Conduct that appears facially neutral can support a hostile work environment claim if viewed in the context of other race-based behavior.

- **Reconstruction Era Acts:** The Civil Rights Acts of 1866 and 1871 provide additional protection against racial discrimination, notably through **42 U.S.C. § 1981** and **42 U.S.C. § 1983**.
  - **Section 1981** guarantees equal rights to make and enforce contracts, which includes employment contracts. Claims under § 1981 often accompany Title VII race discrimination claims. The standard for a hostile work environment claim under § 1981 is the same as under Title VII.
  - **Section 1983** applies when discriminatory acts are committed by a **public employer** acting under color of state law.
  - An advantage of bringing a claim under these acts is that it **frees claimants from the requirement of filing an administrative charge** with the EEOC or state agency, unlike Title VII or OADA claims. The statutes of limitations and available damages (including compensatory and punitive damages without Title VII caps for intentional discrimination under § 1981) can also differ favorably for the plaintiff.
- **Remedies:** Remedies available for race discrimination under the Civil Rights Act of 1964 include reinstatement, back pay (limited to two years prior), court costs, attorney fees, reinstatement of seniority, and injunctive relief. For cases of intentional discrimination, compensatory damages (including for future lost income, emotional pain, inconvenience, mental anguish, loss of enjoyment of life, and other nonmonetary losses) and punitive damages are available, although there are statutory limits on these damages that are not revealed to the jury. Section 1981 also allows for compensatory and punitive damages.
- **Protection Against Retaliation:** Employees are protected from retaliation by an employer for opposing discriminatory practices or filing a charge of discrimination based on race. To prove retaliation under Title VII, a plaintiff must show that **"but for"** the protected activity, the adverse action would not have occurred; a mixed motive is not sufficient. The adverse action must be one that would deter a reasonable employee from engaging in protected activity. This protection can extend to closely related third parties. While "after-acquired evidence" of employee misconduct may limit certain remedies like back pay, it does not eliminate liability for the discrimination itself.
- **Exclusive State Remedies:** The Oklahoma Anti-Discrimination Act (OADA) provides the **exclusive remedies within Oklahoma** for individuals alleging employment discrimination based on race (among other protected statuses). This means that any common law remedies, such as the *Burk* tort cause of action, have been expressly abolished for these types of discrimination claims under state law. To file a claim under the OADA, a charge must be filed with the EEOC or the state administrative agency within 180 days of the alleged discrimination.

Sex discrimination

Based on the sources provided, the key legal principles underlying the law of sex discrimination in employment are derived primarily from Title VII of the Civil Rights Act of 1964 and the Oklahoma Anti-Discrimination Act (OADA), along with specific related laws like the Equal Pay Act and Pregnancy Discrimination Act.

Here are the core principles:

- **Fundamental Prohibition:** Both federal and state laws prohibit discrimination in employment based on sex. This means it is illegal for an employer to treat individuals differently regarding employment because of their sex.
- **Scope of Prohibited Practices:** Discrimination based on sex is prohibited in **all phases of the employment relationship**. This includes, but is not limited to:
  - Hiring and refusing to hire.
  - Discharge or termination.
  - Compensation or pay.
  - Terms, conditions, privileges, or responsibilities of employment.
  - Promotion and transfers.
  - Training programs.
  - Discipline.
  - Job assignments.
  - Benefits.
  - Layoff.
  - Limiting, segregating, or classifying employees in any manner that may deprive them of employment opportunities or adversely affect their status because of sex.
- **Key Federal Law (Title VII):** Title VII of the Civil Rights Act of 1964 is the cornerstone of anti-discrimination law in the United States, prohibiting discrimination based on sex. It generally applies to employers with **15 or more employees**. The number of employees is considered an element of a plaintiff's claim, not a jurisdictional issue. Title VII prohibits both intentional and unintentional discrimination that eliminates or restricts employment opportunities for a protected group.
- **Evolution of Sex Discrimination Law under Title VII:**
  - The prohibition on sex discrimination was added as a controversial amendment just before the bill was voted on in the House, with little legislative history to guide interpretation.
  - Initially, "because of sex" was not interpreted to include sexual orientation or gender identity by the EEOC and courts.
  - However, the EEOC reversed its position in 2015, and subsequent circuit court decisions followed.
  - In 2020, the **Supreme Court found that Title VII's protection against sex discrimination included both sexual orientation**

and gender identity.

- **Oklahoma State Law (OADA):** The Oklahoma Anti-Discrimination Act (OADA) also prohibits employment practices that discriminate based on sex. The OADA applies to **all public and private employers** in Oklahoma, including those with only one employee. The Legislature stated that the **OADA provides the exclusive remedies within Oklahoma** for individuals alleging discrimination in employment based on sex, abolishing common law remedies. To file a claim under the OADA, a charge must be filed with the EEOC or state administrative agency within 180 days. Oklahoma law mirrors federal law in defining prohibited discriminatory practices.
- **Theories for Proving Discrimination:** Sex discrimination can be proven through various legal theories:
  - **Disparate Treatment:** This involves **intentional discrimination** where an employer treats individuals less favorably because of their sex. Proof of discriminatory motive is critical, though it can be inferred. This is typically proven using the three-step **burden-shifting framework** from *McDonnell Douglas Corp. v. Green*. The plaintiff establishes a prima facie case (member of protected class, adverse action, circumstances inferring discrimination), the employer provides a legitimate non-discriminatory reason, and the plaintiff attempts to show the reason is a pretext for discrimination. The standard for an adverse employment action now requires showing only "some" harm, not "significant harm".
  - **Disparate Impact:** This occurs when seemingly neutral policies, practices, or rules have a **disproportionate discriminatory effect** on a protected sex group, even without intent to discriminate. Statistical evidence is often used to prove this. Employers can defend by showing the practice is **job-related and consistent with business necessity**. The plaintiff can still prevail by showing an equally valid, less discriminatory alternative exists. The four-fifths (80%) rule is a common metric, but not a rigid standard.
  - **Pattern or Practice:** This theory applies when employers engage in **systemic, routine, intentional discrimination** as part of their standard operating procedures.
- **Specific Forms of Sex Discrimination:**
  - **Pregnancy Discrimination:** The Pregnancy Discrimination Act (PDA) amended Title VII to explicitly prohibit discrimination "because of or on account of pregnancy, childbirth, or related medical conditions". Women affected by pregnancy must be treated the same as others similar in their ability or inability to work. Fetal protection policies that exclude only fertile females can be discriminatory. Failure to accommodate pregnancy-related limitations can also be a basis for a claim (*Young v. UPS*). While pregnancy is distinct from disability under the ADA, some pregnancy-related conditions may qualify as disabilities.

  - **Dress and Grooming Codes:** Historically, courts often permitted different dress codes for men and women that conformed to gender stereotypes, provided they did not impose a greater burden on one sex (*Jespersen*). However, the *Bostock* decision, which held discrimination based on gender identity is sex discrimination, has led to caution, suggesting the age of differing dress codes based solely on sex "seems to be ending," particularly if they involve treating individuals differently based on sex regardless of group comparability. Dress codes may also raise religious discrimination issues.
  - **Sexual Harassment:** Sexual harassment is considered a form of sex discrimination under Title VII. It is prohibited when it is sufficiently **severe or pervasive** to alter the conditions of employment and create an **abusive working environment**. Harassment must be based on sex or stem from discriminatory animus. It must be both objectively and subjectively offensive. Courts consider the **totality of the circumstances** when assessing severity or pervasiveness (frequency, severity, physical threat/humiliation vs. mere offense, interference with work). There are two types: **Quid Pro Quo** (tangible job action depends on sexual favors) and **Hostile Work Environment** (severe/pervasive conduct creates an abusive environment). Employer liability depends on whether the harasser is a coworker or supervisor. Having a comprehensive anti-harassment policy with accessible complaint procedures is crucial.
- **Equal Pay Act:** This federal law mandates the **same rate of pay for men and women doing substantially equal work**. Jobs must be substantially equal in skill, effort, responsibility, and working conditions. Employers can defend pay disparities based on seniority, a merit system, a pay-by-quantity/quality system, or any factor other than sex.
- **Bona Fide Occupational Qualification (BFOQ):** This is a **narrow exception** that permits discrimination based on sex if sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business.
- **Remedies:** Remedies for sex discrimination under Title VII can include reinstatement, back pay (limited to two years prior), court costs, attorney fees, reinstatement of seniority, and injunctive relief. For cases of **intentional discrimination**, compensatory and punitive damages are also available, subject to statutory caps not revealed to the jury.
- **Retaliation:** Employees are protected from retaliation for opposing sex discrimination or filing a charge based on sex. To prove retaliation under Title VII, a plaintiff must show that **"but for"** the protected activity, the adverse action would not have occurred. Protection can extend to closely related third parties. While "after-acquired evidence" of misconduct can limit remedies like back pay, it doesn't eliminate liability for the discrimination itself.

Sexual harassment

The key legal principles underlying the law of sexual harassment in employment are:

1. **Sexual Harassment as a Form of Sex Discrimination:** Sexual harassment is considered a form of sexual discrimination prohibited under **Title VII of the Civil Rights Act of 1964**. While Title VII's text does not explicitly mention harassment, the U.S. Supreme Court defined it as a form of discrimination in *Meritor Savings Bank v. Vinson*. The rules established for sexual harassment in *Meritor* apply to harassment based on other protected categories under Title VII.
2. **Governing Law:** The primary federal law is Title VII of the Civil Rights Act of 1964. The EEOC enforces laws including Title VII and cases involving workplace retaliation and sexual harassment.
3. **Scope of Protection:** Discrimination in employment based on sex is prohibited in all phases of the employment relationship, including terms, conditions, and privileges of employment. Harassment is prohibited because it can alter the terms or conditions of employment.
4. **Definition:** Sexual harassment involves **"unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"** under specific circumstances. To violate Title VII, the conduct must be **"because of sex"** or other protected classifications, not just general workplace harassment.
5. **Types of Sexual Harassment:** The law recognizes two main types of sexual harassment:
    - **Quid Pro Quo:** This occurs when **"submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment"** or when **"submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual"**. It involves employer conduct that takes a tangible job action in reaction to sexually harassing conduct. This often involves a supervisor demanding sexual favors and the employee's rejection leading to job detriment. The unwelcome nature of the behavior is key, and voluntary acceptance of demands does not invalidate a claim.
    - **Hostile Work Environment:** This arises when **"such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment"**. It must be based on the plaintiff's sex, color, or national origin or stem from discriminatory animus.
6. **Standard for Hostile Work Environment:** To be actionable, the

harassment must be **"sufficiently severe or pervasive"** that it alters the terms or conditions of employment and creates an **abusive working environment**. It is not a civility code, and courts must consider the context.

- **Objective and Subjective Offense:** The environment must be both **objectively and subjectively offensive**; a reasonable person would find it hostile or abusive, and the victim must actually perceive it to be so.
- **Totality of the Circumstances:** Courts consider **all the circumstances**, including the **frequency** of the conduct, its **severity**, whether it is **physically threatening or humiliating or merely offensive**, and whether it **unreasonably interferes with work performance**. The level of severity or pervasiveness required is high.
- Conduct is judged by looking at the **workplace conduct as a whole**, not in isolation.

7. **Employer Liability:** Employer liability for harassment is nuanced.
   - **Strict Liability:** Employers are generally **strictly liable** for the acts of a **supervisor** if the supervisor takes a **tangible adverse employment action**, such as termination or demotion. A supervisor is someone empowered to take tangible employment actions (hire, fire, demote, promote, transfer, discipline).
   - **Affirmative Defense (Faragher Defense):** If **no tangible job action results** from the harassment by a supervisor, the employer can escape liability by establishing an affirmative defense. This defense requires the employer to prove (a) that they took **reasonable measures to prevent or correct** the harassment, and (b) that the complainant employee **failed to take advantage** of those measures.
   - The possibility of vicarious liability depends on whether the alleged harasser is a coworker or supervisor. The employer may be liable for supervisor harassment even if they didn't know about it, provided no tangible action occurred and the affirmative defense is not proven.
8. **EEOC Guidance on Prevention:** The EEOC recommends employers maintain a comprehensive and effective **anti-harassment policy**, an effective and accessible **harassment complaint system**, and effective **harassment training** for all employees and managers. These measures are crucial for preventing harassment and can be part of the employer's affirmative defense. The EEOC provides detailed recommendations for these components.

National origin discrimination

The key legal principles underlying the law of national origin discrimination in employment are:

- **Fundamental Prohibition:** Both federal and state laws explicitly prohibit discrimination in employment based on national origin.
- **Governing Laws:** The primary federal law is **Title VII of the Civil Rights Act of 1964**. In Oklahoma, the **Oklahoma Anti-Discrimination Act (OADA)** also prohibits national origin discrimination. Additionally, the **Immigration Reform and Control Act (IRCA)** prohibits certain immigration-related employment practices, including national origin discrimination, and **Executive Order 11246** requires affirmative action based on national origin for certain federal contractors.
- **Scope of Protection:** Discrimination based on national origin is prohibited in **all phases of the employment relationship** under Title VII, including hiring, refusing to hire, discharge, compensation, terms, conditions, privileges, and responsibilities of employment. Employers may not limit, segregate, or classify employees in a way that deprives them of employment opportunities or adversely affects their status because of national origin. IRCA's prohibition is more focused on **hiring, firing, or recruitment/referral for a fee**. Federal contractors covered by Executive Order 11246 are prohibited from discriminating in hiring, promoting, demoting, transferring, recruiting, terminating, training, or paying employees based on national origin.
- **Employer Coverage:**
  - **Title VII** applies to employers with **15 or more employees**.
  - The **OADA** applies to **all public and private employers** in Oklahoma, including those with only one employee.
  - **IRCA** applies to employers with **four or more employees**; those with 15 or more are also covered by Title VII regarding national origin.
  - **Executive Order 11246** covers federal contractors with contracts exceeding $10,000.
- **Definition of National Origin Discrimination:** This is defined as the denial of equal employment opportunity because of an individual's, or their ancestor's, **place of origin**, or because an individual has the **physical, cultural, or linguistic characteristics of a national origin group**. Discrimination can occur between persons of different races or ethnicities or between persons of the same race or ethnicity.
- **Theories for Proving Discrimination:** National origin discrimination can be proven through:
  - **Disparate Treatment:** This involves **intentional discrimination** where an employer treats individuals less favorably because of their national origin. This is typically proven using the **three-step burden-shifting framework** (prima facie case, legitimate non-discriminatory reason, pretext). The prima facie case requires showing membership in a protected class, an adverse employment action, and circumstances giving rise to an inference of discrimination.
  - **Disparate Impact:** This occurs when seemingly neutral policies

or practices have a **disproportionate discriminatory effect** on a protected national origin group, even without intent. Statistical evidence is often used. Employers can defend by showing the practice is **job-related and consistent with business necessity**, but the plaintiff can still prevail by showing an equally valid, less discriminatory alternative exists. While not explicitly stated for national origin, the sources describe disparate impact under the general "Proving Discrimination" section and provide examples related to race, implying it is a general theory applicable across protected classes under Title VII.
  - **Pattern or Practice:** This applies to systemic, routine, intentional discrimination. While discussed generally, the sources do not specifically tie this theory to national origin claims in the provided text.
  - **Hostile Work Environment:** National origin harassment is considered a form of discrimination. To be actionable, the harassment must be **so severe or pervasive** that it alters the terms, conditions, or privileges of employment and creates an **abusive working environment**. It must be based on national origin or stem from discriminatory animus. Courts consider the **totality of the circumstances** (frequency, severity, physical threat/humiliation vs. mere offense, interference with work).
- **Specific Issues as Proxies:** Language issues can be a proxy for national origin discrimination.
  - **Accent Discrimination** is permitted only if the accent materially interferes with communication skills necessary for the job.
  - **Fluency Requirements** may also indicate discrimination.
  - **English-Only Rules** are presumed to violate Title VII if they apply to casual conversations between employees on break or not performing a job duty because they are a burdensome term and condition of employment. Such rules may be permissible if they are job-related and consistent with business necessity, such as for safety or client interaction, but employers should weigh business justifications against discriminatory effects and consider alternatives.
- **State vs. Federal Law:** The OADA prohibits national origin discrimination and states it provides the **exclusive remedies within Oklahoma** for such claims, abolishing common law remedies. Oklahoma law generally **resembles federal law** in defining discriminatory practices. The OADA has broader employer coverage (1+ employee) compared to Title VII (15+ employees).
- **Enforcement and Remedies:** Title VII national origin discrimination claims are administered by the EEOC. Claims under the OADA must be filed with the EEOC or state administrative agency within 180 days. IRCA immigration-related discrimination claims are handled by the Office of Special Counsel within the Justice Department, with a 180-day time limit for filing. Remedies for intentional discrimination under Title VII can include compensatory and punitive damages, subject to statutory caps.

Religious discrimination

Religious discrimination in employment is broadly prohibited by both federal and state laws, most notably Title VII of the Civil Rights Act of 1964, and in Oklahoma, by the Oklahoma Anti-Discrimination Act (OADA).

Here's a breakdown of religious discrimination, focusing on accommodation and undue hardship:

Religious Discrimination Overview

Title VII protects **sincerely held religious beliefs and practices**. The term "religion" is defined broadly, encompassing established, formal religions, new ones, and those followed by only a few individuals, including all aspects of religious observance, practice, and belief. Employers typically **should not question the sincerity of an employee's religious beliefs** and should assume requests for religious accommodation are legitimate, unless there is strong evidence to the contrary. Political and social views are generally not considered religious beliefs.

Employers are prohibited from discriminating against individuals based on their religion in all aspects of employment, including compensation, hiring, promotion, transfers, training, discipline, and termination. Additionally, Title VII allows for claims of **racial harassment based on a hostile work environment**, which applies when a workplace is "permeated with discriminatory intimidation, ridicule, and insult" severe enough to "alter the conditions of the victim's employment and create an abusive working environment". This principle extends to national origin discrimination and religious harassment.

Exemptions:

- **Religious Organizations Exemption:** Section 702 of Title VII exempts religious organizations from the prohibition against religious discrimination, allowing them to prefer members of their own faith in employment decisions. Courts consider various factors to determine if an entity is "primarily religious," such as its purpose, activities, affiliations, and whether it holds itself out as secular or sectarian. However, this exemption **does not permit religious organizations to discriminate on other protected bases** like race, sex, or age.
- **Ministerial Exception:** This exception, stemming from both Title VII and the First Amendment, **prohibits clergy members from bringing claims for alleged violations of federal anti-discrimination laws** against religious organizations. The Supreme Court has clarified that the "essential factor is 'what an employee does'," not merely their job title or formal religious training, when determining if this exception applies.
- **Bona Fide Occupational Qualification (BFOQ):** Religion can also serve as a BFOQ, allowing discrimination if it is "reasonably necessary to the normal operation of that particular business or enterprise". Courts interpret the BFOQ defense very narrowly. For example, a university was

allowed to insist on hiring only Jesuit candidates for philosophy professors to maintain its religious identity.

Theory of Accommodation

Title VII requires employers to **reasonably accommodate an employee's or prospective employee's religious observance or practice, unless doing so would impose an undue hardship** on the conduct of the employer's business. This means allowing the individual to engage in a religious practice despite the employer's normal rules.

To establish a **prima facie case for failure to accommodate**, an employee typically needs to show:

1. They have a **bona fide religious belief** that conflicts with a job requirement.
2. They **informed the employer of this conflict**.
3. The employer **fired them for failing to comply** with the job requirement, or took another adverse action.

An employer with actual knowledge of a need for religious accommodation violates Title VII if their motive is to avoid accommodation, even if they only have an unsubstantiated suspicion that accommodation would be needed. The employee also has a duty to cooperate with the employer's attempts to accommodate.

Undue Hardship Defense

The employer must prove that it cannot offer a reasonable accommodation without **undue hardship**. For nearly 50 years, "undue hardship" in religious accommodation was defined as anything more than a "de minimis" (minimal) cost.

However, the U.S. Supreme Court "clarified" this standard in **June 2023**:

- **New Standard:** An employer seeking to deny religious accommodation must now demonstrate that "the **burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business**". This replaces the "de minimis" cost standard.
- **Impact on Coworkers:** While impacts on coworkers previously held more significance, the new standard requires employers to demonstrate how any impact on other employees **directly relates to the "conduct of [its] business" and constitutes a "substantial increased cost"**. This imposes a more rigorous burden on employers.
- **Reasonableness:** A reasonable accommodation does not require a total accommodation or sparing the employee any cost whatsoever. The employer is not obligated to provide the employee's preferred accommodation. What constitutes reasonable is a fact-specific determination made on a case-by-case basis.

Latest Accommodation Cases

1. ***Groff v. DeJoy* (2023)**: This landmark Supreme Court case directly addressed the "undue hardship" standard for religious accommodation under Title VII. The Court moved away from the "de minimis" cost standard, requiring employers to show **"substantial increased costs"** to deny an accommodation. The decision's impact on seniority-based bidding systems is not yet fully clear, but employers should not assume their seniority system alone protects them, and should analyze the specific facts and bidding system when evaluating religious accommodation requests. This new standard is expected to make it harder for employers to deny religious accommodation requests, especially for larger employers who may have more available talent to perform other tasks and can better afford accommodation costs.
2. ***Gunkel v. OU Medicine, Inc.* (2024)**: This federal district court case in Oklahoma involved a plaintiff claiming religious discrimination after being terminated for refusing a COVID-19 vaccine mandate based on "philosophical or religious beliefs". The court dismissed the claim because the plaintiff **failed to provide enough detailed information about his sincere religious beliefs** for the employer to consider or potentially accommodate them, thus making it impossible to infer discrimination. This case highlights the employee's burden in articulating their religious beliefs.
3. ***EEOC v. Abercrombie & Fitch* (2015)**: The Supreme Court held that an employer **cannot refuse to hire an applicant based on a desire to avoid accommodating a religious practice**, even if the employer only suspects an accommodation would be needed and does not have concrete knowledge of the need for accommodation. This case involved a Muslim applicant who wore a hijab, which conflicted with the employer's "Look Policy".
4. **Dress Codes and Religious Accommodation (e.g., *Cloutier v. Costco Wholesale Co.* (2004) and *Camara v. Epps Air Serv.* (2017))**: These cases illustrate that employers may need to accommodate individuals whose religious requirements necessitate clothing that would otherwise violate a dress code. While reasonable dress codes grounded in safety, efficiency, or business concerns may be upheld, employers must **reasonably accommodate religious beliefs and practices unless doing so would impose an undue hardship**.

In summary, the landscape of religious discrimination law emphasizes an employer's duty to reasonably accommodate religious practices, with the burden to prove "undue hardship" now set at a "substantial increased costs" level following the *Groff* decision. Both employers and employees have responsibilities in the interactive process of finding suitable accommodations.

Disability Discrimination and Employer's Duty to Accommodate

Disability discrimination laws aim to ensure equal employment opportunities for individuals with disabilities. This area of law has evolved significantly, particularly with the advent of federal statutes that prohibit discrimination and mandate accommodations.

History and Development of Disability Discrimination Law

The foundation of federal disability discrimination law can be traced to the **Rehabilitation Act of 1973**, which preceded the Americans with Disabilities Act (ADA) and applied to federal contractors and grant recipients.

The **Americans with Disabilities Act (ADA) of 1990** significantly expanded federal protections, marking one of the most important civil rights bills since the Civil Rights Act of 1964. Title I of the ADA prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in all aspects of employment, including hiring, firing, advancement, compensation, and training. The ADA initially covered employers with 25 or more employees, a threshold later lowered to 15, matching the coverage of Title VII of the Civil Rights Act of 1964. The Rehabilitation Act essentially mirrors the ADA with regard to employee protections and prohibited employer conduct.

In response to narrow judicial interpretations of "disability" and "substantially limits," Congress passed the **Americans with Disabilities Act Amendments Act of 2008 (ADAAA)**. This amendment aimed to broaden the class of workers protected by the ADA and to make it easier to conclude that individuals with a wide range of impairments, such as cancer, diabetes, epilepsy, and intellectual disabilities, are covered. The **Equal Employment Opportunity Commission (EEOC)** consistently issues guidance emphasizing this broader coverage and provides resources for employers regarding medical information and reasonable accommodations.

Oklahoma also has its own law, the **Oklahoma Anti-Discrimination Act (OADA)**, which prohibits discrimination based on disability and largely mirrors federal provisions, including the requirement for reasonable accommodation unless it imposes an undue business hardship.

Key Definitions Under the ADA

- **Qualified Individual with a Disability**: This refers to a disabled individual who can perform the essential functions of a job with or without "reasonable accommodations".
- **Disabled Individual**: The ADA defines a disabled individual as a person who:

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**.

- **Substantially Limits**: This term is to be **construed broadly** in favor of expansive coverage and is not meant to be a demanding standard. It means the impairment limits the ability to perform a major life activity as compared to most people in the general population, not necessarily preventing or severely restricting it. An individualized assessment is required, but the threshold issue should not demand extensive analysis.
- **Major Life Activities**: These include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and **working**. It also includes the operation of major bodily functions such as those of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The EEOC considers basic obesity, even without an underlying condition, to sufficiently impact life activities to qualify as a disability or perceived disability.
- **Direct Threat Exception**: The ADA provides an exception if an individual's disability poses a "direct threat". A **"direct threat" is defined as a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation**. Factors considered include the duration of the risk, nature and severity of potential harm, likelihood of occurrence, and imminence of the harm.
- **Association Discrimination**: The ADA also prohibits discrimination based on an employer's association or relationship with an individual who has a known disability.
- **Pre-employment Inquiries**: Employers are generally prohibited from making inquiries about the existence, nature, or severity of disabilities at the pre-offer stage. However, they may ask about an applicant's ability to perform essential job functions with or without reasonable accommodation.
- **Testing**: A test for illegal drug use is *not* considered a medical examination under the ADA and can be given pre-offer. However, **alcohol testing is considered a medical examination** and can only be conducted post-offer. Information from drug and alcohol testing about prescription drug use must be kept confidential.
- **HIV/AIDS**: The ADA prohibits discrimination based on HIV-positive status or AIDS diagnosis and restricts testing to post-job offer, applied universally to all in the position. Medical information, including HIV status, must be kept confidential.

- **Pregnancy**: While pregnancy itself is generally not considered a disability under the ADA, pregnancy-related impairments *can* qualify as disabilities if they substantially limit major life activities. The **Pregnant Workers Fairness Act (PWFA)**, effective June 27, 2023, requires employers to provide reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions. The EEOC's final rule implementing PWFA provides examples of accommodations (e.g., additional breaks, a stool, time off for appointments, temporary reassignment). Employers are encouraged to communicate early and frequently with workers and should only seek supporting documentation when reasonable. State laws may offer even broader protections.

Employer's Duty to Accommodate

The requirement for employers to make "reasonable accommodations" for disabled employees or applicants is often considered the most challenging duty under the ADA.

- **Defining Reasonable Accommodation**: A reasonable accommodation is broadly defined as **"any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities"**. This can include:
  - Job restructuring.
  - Modification of work schedules, including allowing part-time employment.
  - Job reassignments.
  - Acquisition of devices to help accommodate an individual with a disability.
  - Use of interpreters or other support personnel.

Work from home is increasingly recognized as a reasonable accommodation in many situations.

- **Interactive Process**: Employers and employees **must engage in an interactive process** to determine appropriate accommodations. This involves open communication to understand the employee's needs and explore potential solutions. Failure to engage in this process can make it difficult for an employer to defend against a claim of failing to provide a reasonable accommodation. Similarly, the employee has a duty to cooperate by providing input and necessary documentation.

What is Not Required

◦ Employers are **not required to create new positions** that do not already exist.

- They are **not required to eliminate essential functions** of a job to

accommodate a disabled individual, though changing nonessential functions is considered reasonable.

- The ADA generally **does not require an employer to assign a disabled employee to a particular job if another employee is entitled to that position according to an established seniority system**. However, simply providing a "preference" (e.g., violating a rule others must obey) does not automatically make an accommodation unreasonable. ◦ The law **does not require employers to accommodate an employee's religious practices in a way that spares the employee any cost whatsoever**. ◦ The ADA also **does not require employers to overlook past misconduct** that resulted from an employee's disability.
- **Undue Hardship**: An employer is excused from providing an accommodation if it can demonstrate that the accommodation would impose an **"undue hardship"** on the operation of the business. Undue hardship arises when the proposed modification requires **"significant difficulty or expense in relation to the size of the business, its available resources, and the nature of its operations"**. Factors considered include the nature and cost of the accommodation, and the size, type, and financial resources of the employer and the place of employment.

Distinction from Religious Accommodation: It is important to note that the standard for "undue hardship" under the ADA differs from the standard for religious accommodations. For religious accommodations, the U.S. Supreme Court, in *Groff v. DeJoy* (2023), clarified that an employer must demonstrate the "burden of granting an accommodation would result in **substantial increased costs** in relation to the conduct of its particular business," moving away from the previous "de minimis" cost standard. This "substantial increased cost" standard applies to religious accommodations, while for **ADA disability accommodations, the "significant difficulty or expense" standard** remains.

Leave as an Accommodation:

- Employers may be required to provide leave as a reasonable accommodation, even if no leave benefit is offered, the employee is ineligible, or all other leave (e.g., FMLA, workers' compensation) has been exhausted.
- However, the ADA **does not require paid leave as a reasonable accommodation**.
- Employers should not use rigid maximum leave policies or require employees to be restriction-free to return to work, as this may violate the ADA. The interactive process should continue even if an employee is on extended leave.
- **Resources**: The federally funded **Job Accommodation Network (JAN)** provides free assistance and resources to employers and employ-

ees on reasonable accommodations. The EEOC also publishes extensive guidance documents on various aspects of disability accommodation.

Proving a Disability Discrimination Claim

To prove a claim of disability discrimination under the ADA, a plaintiff generally must show:

1. Membership in the **protected class** (i.e., being a qualified individual with a disability).
2. The employer took an **adverse employment action**.
3. The individual was **performing satisfactorily** at the time of the action.
4. The circumstances surrounding the employer's action **indicate discrimination**.

Once the plaintiff establishes a prima facie case, the **burden shifts to the employer** to articulate a legitimate, nondiscriminatory reason for its action. The plaintiff may then attempt to prove that the employer's stated reason is a **pretext** for discrimination, and that disability was a determining factor.

For a **failure to accommodate claim**, specifically, the plaintiff must show:

1. The plaintiff is **disabled**.
2. The plaintiff is **otherwise qualified for the job**.
3. The plaintiff **requested a plausibly or facially reasonable accommodation**.

A notable point is that a person claiming to be totally disabled for Social Security or other purposes may still be a "qualified individual with a disability" under the ADA, as the standards differ. However, statements made during Social Security applications can be used to challenge an individual's qualification for a job. Employers are generally not liable if they were unaware of the employee's disability when the adverse employment action was taken.

Age Discrimination

The **federal Age Discrimination in Employment Act of 1967 (ADEA)** prohibits discrimination against employees who are **age 40 or over**. This law is similar in operation to the general Title VII provisions of the 1964 Civil Rights Act, but it specifically allows for preferences in favor of older workers.

Coverage and Scope

- **Employers Covered**: The ADEA applies to employers that have **20 or more employees** for each working day in at least 20 weeks in the

current or preceding calendar year. This threshold differs from Title VII, which applies to employers with 15 or more employees. Like Title VII, this numerosity requirement is an element of the plaintiff's claim, not a jurisdictional hurdle.

- **Protected Group**: Individuals who are **40 years of age or older** are protected.
- **Prohibited Discrimination**: The ADEA prohibits age-based discrimination in various employment aspects, including hiring, promotion, compensation, retirement, layoff, discharge, and all other terms, conditions, or privileges of employment. Discrimination in apprenticeship programs is also prohibited.
- **Mandatory Retirement**: Generally, employers cannot force mandatory retirement unless the employee past age 40 is no longer capable of performing the job. A narrow exception exists for employees aged 65 or older who were in executive or high policymaking positions for at least two years before retirement, provided they are entitled to significant annual retirement benefits. Safety reasons can justify a mandatory retirement age, such as for airline pilots, but cannot be used as a pretext for forcing older employees to retire.
- **Retaliation**: The ADEA also prohibits employers from retaliating against employees for exercising their rights or filing a claim under the Act.

Permitted Practices and Defenses

The ADEA allows for certain employment policies and decisions based on age, though courts interpret these defenses narrowly.

- **Bona Fide Seniority Systems**: Employers may use a bona fide seniority system, even if it adversely affects some workers over age 40, as long as it is not intended to evade the ADEA's purposes.
- **Employee Benefit Plans**: Benefits under a bona fide employee benefit plan may be adjusted based on age using an "equal benefits or equal costs" principle. For example, health insurance benefits for retirees can be eliminated or reduced at age 65 when they become eligible for Medicare.
- **Voluntary Early Retirement Programs**: Employers can establish voluntary early retirement programs, but these incentives must be offered on a nondiscriminatory basis.
- **Bona Fide Occupational Qualification (BFOQ)**: Similar to Title VII, the ADEA recognizes a BFOQ defense, which applies if the employer reasonably believes that all people over a certain age are unable to perform a job-related task safely, and it is impossible to test individuals over that age safely. Courts have rejected economic considerations (e.g., cost of training older employees) as a basis for a BFOQ.

Proving Age Discrimination: Key Differences from Title VII

While both ADEA and Title VII cases often utilize the **three-step burden-shifting framework** established in *McDonnell Douglas Corp. v. Green* (plaintiff establishes prima facie case, defendant articulates a legitimate non-discriminatory reason, plaintiff proves pretext), a crucial difference lies in the **causation standard** and the **disparate impact defense**.

Causation Standard: "But-For" Causation

- **ADEA requires "but-for" causation**: To prevail on an age discrimination claim, an employee must demonstrate that **"but for" the employee's age, the employer would not have taken the discriminatory action**. This means age must be the **sole reason** for the employer's action.
- **Title VII allows "mixed-motive" claims**: In contrast, Title VII anti-discrimination claims (e.g., race, sex) can be proven if the plaintiff shows that a protected characteristic was a **"motivating factor"** for the employment practice, even if other factors also motivated the practice. This "mixed motive" standard is **not sufficient** for ADEA claims. The Supreme Court explicitly stated that the ADEA's "because of" language precludes a mixed-motive framework.
- **Stray Remarks**: For a statement to constitute evidence of discrimination, it must be made by a decision-maker and have a nexus between the discriminatory statement and the adverse decision, rather than being a "stray remark".

Disparate Impact Claims

- **Both ADEA and Title VII allow disparate impact claims**: In these cases, a seemingly neutral business practice disproportionately affects a protected group, even without discriminatory intent.
- **ADEA's "Reasonable Factor Other Than Age (RFOA)" Defense**: This is where ADEA significantly diverges from Title VII.
- For ADEA disparate impact claims, an employer can defend its action by establishing it was based on a **"Reasonable Factor Other than Age" (RFOA)**.
- The **employer bears both the burden of production and the burden of persuasion** for the RFOA defense.
- Crucially, the RFOA defense does **not require the employer to show that there is no equally valid, less discriminatory alternative practice**. This differs from Title VII's "business necessity" test, which requires the employer to prove the practice is job-related and consistent

with business necessity, and then the plaintiff can rebut by showing a less discriminatory alternative exists. The Supreme Court has stated that the "business necessity test has no place in ADEA disparate impact cases".

- **Practical Impact**: This standard can make ADEA disparate impact cases "harder and costlier for employers to defend" than if the burden were on plaintiffs to show a less discriminatory alternative. When successful, the RFOA defense typically involves showing that a reduction in force was based on performance evaluations designed to retain employees best able to perform remaining work, or other legitimate business reasons like lack of qualifications or loss of funding.