Analysis of State and Federal Anti-Discrimination Laws

Seminar Topic: This material provides an in-depth examination the process and procedure of complying with state and federal anti-discrimination laws.

This material is intended to be a guide in general. As always, if you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.
About The Author

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COMPLYING WITH STATE AND FEDERAL ANTI-DISCRIMINATION LAWS

The employment relationship is, in theory, a simple contract between two parties, entered into freely. The employer tells the employee what to do, the employee does as directed and receives agreed upon compensation for his or her efforts.

This contract is determined by state laws which recognize the principle that such a relationship is presumptively “at will.” In the absence of a written agreement or express promise, either side may cancel the employment contract at any time for any reason without consequence.¹

In truth, virtually every aspect of the employment contract is heavily regulated by both state and federal law from the moment an employer considers hiring someone until well after the relationship has ended.

What I will be talking about today are state and federal laws that prohibit employment discrimination and what you as advisers to business can do to ensure your clients are in compliance with these laws.

Let me be very clear that this is a primer. It is not legal advice. Every employment situation must be evaluated on the facts of the case, the applicable laws and the type and size of the business you’re advising. One size does not fit all in evaluating employment cases. Having said that, as of December 2015, here are the laws you’ll have to be familiar with:

**State Laws**

1. I am licensed to practice in the state of Illinois. The Illinois Human Rights Act applies to employers with fifteen or more employees who work for twenty weeks during the twelve months immediately preceding an alleged act of discrimination. The IHRA (775 ILCS 5, et seq.) prohibits discrimination in employment based on “race, religion, sex, national origin, ancestry, age, order of protections status, marital status, physical or mental disability, military status, sexual orientation, or unfavorable discharge from military service.”
   a. In cases involving physical or mental disability or sexual harassment, an employer is defined as having one or more employees.
   b. Every state has a similar statute which defines what entity is considered an employer and proscribes discrimination based on certain protected categories. It is critical to familiarize yourself with the specifics of the statute as well as how the law is enforced, either administratively or through the courts.
2. The Illinois Equal Pay Act (820 ILCS 112) prohibits paying different wages on the basis of sex for work that is the “same or substantially similar” requiring the same amount of skill, effort or responsibility." There are exceptions when the wages are based on a bona fide merit or seniority system or when the differential is based on some factor other than sex. It applies to all employers with more than six employees.
   a. I have not done a survey of all states on equal pay laws but my estimation is that a vast majority probably have one. Again, familiarize yourself with who is required to comply and how it is enforced.
3. There are many other state laws regulating minimum wage, overtime, pay practices and mandated leaves and benefits that will not be addressed today.

Federal Laws

1. The Age Discrimination in Employment Act (29 USC 621, et seq) defines an employer as an entity engaging twenty or more employees. ADEA prohibits discrimination against workers or applicants between the ages of forty and seventy in all aspects of employment. A related law, the Older Workers Benefits Protection Act imposes certain obligations such as a twenty one day notice requirement when employers seek a release of rights from workers covered by ADEA through a severance agreement.
   a. This and most other federal anti-discrimination laws are investigated and enforced by the Equal Employment Opportunity Commission.
   b. Complainants must file an administrative charge of discrimination with the EEOC but they may request a “right to sue” letter in order to bring a lawsuit in federal court before the matter is investigated.
   c. Unlike most state fair employment practice agencies, the EEOC has broad authority to enforce its mandate and in certain instances will sue employers. They have a large staff of trial counsel which handles nothing but discrimination cases in federal court. The EEOC’s resources are vast and should never be underestimated. They typically pursue cases where they believe there is evidence of “systemic discrimination” or particularly egregious behavior by an employer. If you have a client who is concerned about adverse publicity, be aware that the EEOC is never shy
about publicizing its activities, whether it concerns a lawsuit or a settlement.

2. Title VII of the Civil Rights Acts of 1964 and 1991 (42 USC 2000 e) is the seminal law regarding employment discrimination. It outlaws discrimination on the basis of race, sex, color, religion, national origin and pregnancy or maternity in all aspects of employment. It defines an employer as having fifteen or more employees for 20 calendar weeks in the calendar year or twelve months preceding an alleged act of discrimination.
   a. Although not specifically stated, included within these prohibitions are sexual harassment or harassment based on any of these protected statuses. The EEOC has expanded its administrative interpretation of sex discrimination to include sexual orientation or “caregiver” discrimination despite no specific reference to either in the law.
   b. The 1991 law conferred the right to a jury trial as well as the potential for compensatory or punitive damages under certain circumstances and depending on the size of the employer.
   c. The Civil Rights Act of 1866, Section 1981 (42 USC 1981) prohibits discrimination on the basis of race in making contracts and has been interpreted to include the employment relationship. This is the statute that encoded the Thirteenth Amendment. The law is little used but is sometimes included as a separate count in Title VII cases since there are no administrative filing requirements and the damages are theoretically not capped.
   d. The administrative filing requirements for Title VII are the same as for ADEA (see above).

3. The Americans with Disabilities Act (42 USC 12101) outlaws discrimination against individuals with physical or mental disabilities in all aspects of employment, including the application process. Employers are obliged to make “reasonable accommodations” for employees with disabilities to enable them to work, provided that such accommodations don’t impose an “undue hardship” on the employer.
   a. ADA defines an employer as having fifteen or more employees.
   b. The ADA was amended in 2008 to broaden the definition of a “disabled” employee to include almost anyone with a
condition limiting the ability to perform the essential functions of a job.

c. Employers may not require pre-employment physical exams until a conditional offer of employment has been extended to the applicant.

d. Administrative enforcement is also through the EEOC.

e. When an employee self-identifies as being disabled and submits documentation from a physician certifying the disability and work restrictions, a new obligation falls on the employer. The EEOC requires the employer and employee to sit down and engage in an “interactive process” which is a dialogue designed to determine whether the accommodations are feasible or pose an “undue hardship” on the business. Do not ignore this process. It is a critical stage.

f. The Rehabilitation Act of 1973 is a forerunner to the ADA and applies to federal contractors or subcontractors only.

4. The Genetic Information and Nondiscrimination Act of 2008 (42 USC 2000ff) prohibits employers with fifteen or more employees from seeking or using genetic information acquired from applicants or employees to deny employment or benefits.

a. This law also prohibits the use of “perceived” genetic information acquired through a pre-employment physical or other means.

b. Most employers don’t seek this information directly but may acquire it through insurance providers who are also similarly restricted.

c. EEOC also enforces this law.

5. The Equal Pay Act (29 USC 206 (d)) applies to all employers and mandates that employees performing jobs requiring the same amount of skill and responsibility be paid the same. There are allowances for differences based on seniority or a bona fide merit system.

a. Administrative enforcement through the EEOC.

6. Executive Order 11246 requires employers who are contractors or subcontractors with the federal government to submit affirmative action plans annually and to have procedures in place to address potential employment discrimination issues. Employees may not invoke this order individually but the US Department of Labor which enforces it may bring proceedings to “debar” the contractor from doing business with the federal government in the event of non-
compliance and to seek recovery such as back pay and promotions for those it contends were the victims of discrimination.
  a. Because this is an executive order and not a statute, the DOL regulations and administrative decisions form the only guidance available as to interpretation and compliance.

General Considerations

It is illegal to retaliate against any employee who invokes the protection of these laws either on his or her own behalf or on behalf of a co-worker. You must consider this in advising a client on an employee’s termination when the employee has complained about workplace practices.

Administrative charges of discrimination must be filed with the EEOC or the Illinois Department of Human Rights or similar state agency within 300 days of the alleged discrimination. The EEOC issues “right to sue” letters when it closes its file or the charging party requests such a letter. The employee then has ninety days to file a lawsuit based on those allegations. Failure to file within ninety days extinguishes any claim forever. The administrative procedures for state agencies may vary so don’t assume that what applies to the EEOC will carry over to the state.

If you represent a staffing agency, professional employer organization, labor union or other entity involved in the employment process, these laws apply to all of them with equal force. In certain instances, a temp agency or staffing firm may be considered a “co-employer” and is subject to a discrimination claim from a person who is a victim of discrimination or harassment at a client company.

What is Illegal Employment Discrimination?

There are three types: Disparate treatment, disparate impact and workplace harassment.

1. Disparate treatment discrimination occurs when an employer takes adverse action against an individual employee on the basis of that person’s protected status. The complaining employee must point to a co-worker of different status or a situation wherein non-protected employees received more favorable treatment. This is the most commonly alleged form of discrimination.
  a. Example: A Caucasian employee and a Hispanic employee get into a fight in the workplace with each being equally culpable. The employer keeps the white employee but fires the Hispanic worker and comments in doing so that Latinos are too hot-
blooded to make good employees. Absent other circumstances, a clear cut case of disparate treatment.

b. Bear in mind that there is no law requiring employers to be “fair.” Employers may make utterly irrational decisions or base those decisions on factors such as the color of an employee’s car. That is not illegal discrimination and the employer must live with the consequences of its irrational decision making. Employees often invoke “fairness” as a basis for a lawsuit but the EEOC or state agency won’t consider it. If they did, the litigation would never end and employers would spend all day justifying their decisions.

2. Disparate impact discrimination occurs when an employer has a policy that adversely affects a group of protected individuals and the employer’s justification is not legally sufficient.

a. Example: For years, police departments had minimum height and strength standards that precluded most women and Hispanic applicants from consideration for a police job because of their generally smaller stature even though there was no showing of bias against any individual. This is a classic disparate impact case. The police departments were required therefore to justify these standards as being necessary to carry out the physically demanding aspects of the job, such as restraining suspects. The departments had to demonstrate that greater size and strength were “bona fide occupational qualifications” or BFOQs. In the 1960s and 70s many lawsuits challenged this alleged justification as saying the height/ strength benchmarks did not rise to the level of a (BFOQ). The cases overwhelmingly were settled or decided in behalf of plaintiffs and the standards were dropped or lowered. Plaintiffs pointed to overweight and out of shape incumbent officers as evidence that the standards could not be legally justified and that women and Latinos were capable of performing the job regardless of size.

3. Harassment on the job due to a protected status. It includes any sort of workplace harassment, sexual or otherwise, that subjects the protected individual or groups of employees to demeaning behavior or hostile working conditions based on their protected status. Examples:

   a. A female employee is told her continued employment is contingent on agreeing to sex with her supervisor. She is repeatedly propositioned despite her objections. She is fired after refusing to comply with his demands.
b. An African American employee frequently finds a noose hanging in his locker and racial epithets are directed toward him anonymously in his company email box. He complains to HR and management who turn a deaf ear and tell him to ignore the threats.

c. Employees routinely display “pin up” calendars in the workplace and co-workers make sexually explicit jokes during staff meetings. Supervisors look the other way despite complaints from female employees and a company policy that bans such behavior. Senior management dismisses the women’s complaints saying that boys will be boys.
   i. This type of harassment has been the basis for numerous claims against white collar employers such as brokerage houses and law firms. If you have a client with a “frat house” atmosphere make them aware of the exposure.

d. Please note that an employee does not have to be discharged or demoted in order to maintain a harassment lawsuit and may recover punitive damages despite no “adverse action” resulting in loss of pay or benefits. A single instance of harassment is not typically sufficient to state a claim for hostile working environment, particularly when the employee has complained and management has addressed the issue. The behavior normally has to be a pattern of egregious misconduct on the part of an employee or manager.

e. However, it is not illegal for an employer to have or promote a “hostile work environment” so long as it is not based on any of the protected statuses. Employers may curse, yell or belittle employees and may act arbitrarily. The daily stress of a work environment is legal. Hurt feelings are not automatically a cause of action. Again, the issue of fairness does not come into play in discrimination cases.

**Preventing Liability for Employment Discrimination**

Here are a couple of rules of thumb in advising clients on employment practices that serve to limit liability.

1. Make sure that every action taken with respect to a new hire or incumbent employees is based only on qualifications for the job or an objective evaluation of the person’s job performance. In the mix of emotions that is the workplace this is not easy to do.
2. Never let your clients allow individual managers to make decisions on employee discipline or discharge. Doing so vests too much power in the hands of individuals whose decisions may be based on personal animosity if not outright prejudice. There needs to be a check on this and the only method of doing so is to have employment decisions approved by a less interested party, preferably one with an idea of the requirements of the anti-discrimination laws.

3. Understand and convey to your clients that in employment lawsuits, appearances matter. The plaintiff in a case will be an object of sympathy to a jury or judge. Behavior that is bullying, demeaning or just plain mean may be legal but it can come back to haunt the employer later.

4. Employees must be treated consistently and in accordance with the rules of the workplace as the employer has written them. It helps greatly to have worked with a client for a period of time and to have knowledge of the history of employee terminations and what action was taken in similar circumstances. Decisions to terminate should not be made in a vacuum. They must be placed in historical context and compared to other discharges of the recent past. Always assume that a discharged employee/plaintiff is acutely aware of more favorable treatment given to others and will use that against the employer to prove illegal discrimination.

5. If your client seeks information about an applicant or employee’s religion, sexual preference, age, plans for pregnancy or other protected status that will return to haunt the employer. Even casual remarks in a job interview about these subjects can lead to allegations of discrimination. The EEOC and IDHR and other agencies take the position that any information sought, even informally, was used to discriminate against the person. Make sure managers are aware that they should limit small talk during the interview. Focus on qualifications is the objective.

6. Get to know your client’s HR processes, employee handbook and ways of treating workers. Make sure the required posters are in place and available to all employees.

This is a complex area and a real minefield for employers who have enough to worry about in running their businesses. The lawyer’s role in advising employers should not begin after the claimant has filed a discrimination charge with IDHR or EEOC or brought a lawsuit in federal court.

Your clients must understand that your role is to assist them in establishing company policies that govern workplace behavior and to advise them as necessary BEFORE they make a decision that may result in litigation. If a
client does not have the best advice before those decisions are made, the battle is frequently lost. An ounce of prevention is worth a pound of cure.

What steps can you take to do this?

**Employment Policy Manual**

Every employer, regardless of size, must have a personnel policy manual that sets forth company polices on employment discrimination, sexual and other workplace harassment, compliance with the Americans with Disabilities Act and a code of conduct. This is the absolute bare minimum but a good manual will also advise managers how to deal with workplace situations as they arise, such as overtime pay, days off, leaves of absence and employee benefits.

a. A policy manual is mandatory. Do not allow your clients to download a “fill in the blanks” version off the Internet or use one provided by their payroll service. Every business is different and the manual must reflect that.

i. Example: A health care provider is required by law to have a policy notifying employees of the need to comply with the privacy rules of HIPAA. A manufacturer has no such obligation. A downloaded HR manual is very unlikely to have addressed this crucial issue.

Compliance begins with a thorough review of every aspect of the client’s employment practices from the hiring process to termination decisions. This includes the questions they ask on an employment application and in screening interviews. Make sure your clients understand the potential exposure to their business (and potentially to individual managers) when they make employment decisions. Tell them that having counsel review the decision beforehand in cases of discipline or termination can limit exposure and save money later. Sadly, this is advice that is all too often unheeded.

**Reviewing Employment Decisions**

In an ideal world your client calls you before they terminate someone and asks you to review the situation. If your client waits until after a lawsuit is filed your options for defending will be very limited. A smart plaintiff’s lawyer will have seized the advantage and your client will likely lose the case. Here’s why:

The method of proof in a discrimination case has remained essentially unchanged for well over forty years since the Supreme Court decision in **McDonnell Douglas v. Green, 411 US 792 (1973)**. Plaintiff must allege facts sufficient to establish that:

- He or she is an employee and a member of a protected group;
- That the employer took adverse action against the employee.

This normally means the employee has been discharged but it
could include demotion or other event which causes economic loss.

The burden shifts to the employer to:

- Articulate a legitimate business reason for taking the action that it did against the plaintiff. **Your job is to know the facts that establish this legitimate business reason and to present them to a government agency or a court. This is your most important role.** Being able to prove this legitimate business reason through testimony or documentation is critical to the defense and to your chances of winning at the administrative stage or through motion or trial.

The burden of proof shifts back to the employee who must show that the proffered reason for the action is a pretext for discrimination. This is usually done by giving evidence of bias on the part of management in a pattern of dissimilar treatment to the detriment of a protected individual. Or, witnesses attribute statements to co-workers or management indicating bias against the protected group.

**Advising a client on the proper way to avoid liability requires the following steps:**

1. Make sure your client provides you with all the relevant documentation and doesn’t hold back anything. This includes correspondence, performance appraisals, application documents, e-mails, disciplinary records and statements from any witnesses.
2. Don’t allow yourself to be rushed into making a decision if the client has asked you to review a discharge before conveying it to the employee. If the employer insists on immediate action tell them to suspend the employee with or without pay pending your approval.
3. Press your client hard to make sure you’ve gotten everything. Some managers will not disclose documents that cast them in a bad light, they think will hurt the defense or, most likely, are embarrassing. This is potentially disastrous from a defense lawyer’s standpoint. Individual managers will be subject to questioning and cross examination over unproduced documents that surface later and which, invariably, ruin your case. Your client will be viewed as trying to cover up their illegal activities and will lose all credibility in explaining the reasons for termination.
4. Question the relevant witnesses closely about their roles in the decision. Do not accept on its face any statement they make that is contradicted by the documentary evidence.
   a. Example: Managers will frequently say the claimant was a bad employee and deserved to be fired. The same managers often
have completed performance appraisals that say the opposite. Press them on this and make sure they understand how this undermines your defense and assessment of the case. Tell them they will be star witnesses and will look foolish if they don’t have a good explanation for the contradictions between written appraisals and their verbal opinions on the employee’s worth. Make them explain everything in detail.

5. Interview disinterested employees who may have some knowledge of the situation leading to adverse action. They can offer insights into the claimant’s character or motive for bringing a lawsuit that managers cannot.

6. Make sure the client explains other similar situations, such as terminations for fighting or theft, and what action was taken against all the other employees involved. If there is a pattern of favorable treatment to non-protected employees that is a very large obstacle to overcome. Make sure they understand that. As stated previously, assume the plaintiff is aware of any co-workers who were treated more favorably.

The Administrative Stage

From a defense standpoint, the requirement that claimants file discrimination charges with the EEOC or a state fair employment practices agency is an advantage in that both sides must lay out the facts of their cases for investigation. It’s like having the discovery process before a case is ever brought to court. Claimants are required to raise all potential claims during the administrative process or lose the right to litigate them later. In short, they must spell out their case in detail under oath. They will be required to produce documentary evidence to support their contentions or the investigating agency will ask you to provide records from your client.

The designated agency will ask your client to produce personnel records and other documents and to write a summary “position statement” setting forth the employer’s version of events. This is almost the equivalent of writing a trial brief in that you can present the facts your client intends to rely on but also argue how claimant’s charge is legally insufficient. It is also your first opportunity to present the legitimate business reason for the adverse action. **Do not take this aspect of the process lightly. A properly prepared position statement will often persuade the other side and the investigative agency that the employer’s case is much stronger than they originally thought. This can lead to quick settlements or dismissals.**

Wise defense counsel will use the administrative process to learn as much as possible about the allegations that might be brought in court. Likewise,
they will fully develop and set forth the facts that “articulate a legitimate business reasons” for the actions their clients took against the claimant. Don’t hold back and assume that you’ll have the opportunity at trial to offer a full defense. A good rule of thumb is that what you didn’t use during the administrative process will not be available to you at trial.

Neither the EEOC nor the Illinois Department of Human Rights has the legal authority to issue judgments against the employer. Your state agency may have such authority. Make sure you understand everything about the agency to advise your client properly. If you take the administrative stage seriously and view it as the first stage of litigation you will increase your chances of settling the case for a nominal amount or getting the case dismissed with a right to sue letter.

Once the administrative stage is complete, you should have a full understanding of the facts that both sides will present at trial. The agency will assuredly attempt to mediate the dispute to see if there is a means of settling the cases before a lawsuit is filed. Don’t ignore this opportunity. Most claimants view the government agency as their advocate even though they are legally neutral investigators. If you have convinced the agency of the strength of your client’s case they can be very persuasive in telling the claimant that he or she should accept a settlement at a lower value than the employee might otherwise take.

1 Montana law recognizes that employees are “at will” for the first six months of employment and after that stage may only be terminated for cause. California imposes a duty of good faith and fair dealing in employment contracts which may allow an aggrieved employee to challenge an “at will” dismissal.