LEARNING OUTCOMES

After studying this chapter, you should be able to do the following:

3-1 Describe the OUCH test and its four components and identify when it is useful in an organizational setting. PAGE 56

3-2 Identify the major equal employment opportunity (EEO) laws and the groups of people that each law protects. PAGE 59

3-3 Briefly discuss the major functions of the Equal Employment Opportunity Commission (EEOC). PAGE 66

3-4 Contrast the concepts of equal employment opportunity, affirmative action, and diversity. PAGE 68

3-5 Compare the two primary types of sexual harassment. PAGE 70

3-6 Briefly discuss the employer’s requirements concerning avoidance of religious discrimination in the workplace. PAGE 73

3-7 Define the key terms found in the chapter margins and listed following the Chapter Summary. PAGE 76
Practitioner’s Perspective

Cindy says: One of the reasons some agree with the Dilbert comic strip depiction of the HR manager as devoid of feeling is due to the necessity of fair and uniform enforcement of government rules and regulations, as well as the company’s own policies and procedures. Aaron—a favorite with the patients and a willing overtime worker—misread the schedule and missed a day of work at the hospital. A no-call/no-show merits a written warning, but Aaron’s supervisor didn’t want to administer the discipline.

“Well,” I asked, “what if we were talking about another less exemplary employee? What about, oh, let’s say—Sandy? What would you do if she was NC/NS?”

“Hey, no problem there—I’d write up Sandy in an instant!” replied the supervisor.

“Wait—wouldn’t that be discrimination?” Different treatment of individuals who are in similar circumstances opens the door to legal liability. In Chapter 3, we’ll explore why HR is required to advise and assist with compliance issues—no matter how “heartless” it may appear.

THE LEGAL ENVIRONMENT FOR HRM: PROTECTING YOUR ORGANIZATION

We all have to obey the law. In this chapter, we will explore some of the laws that HR managers have to work with on a daily basis, and we will also look in some more depth at diversity and why it is valuable in an organization.

WORK APPLICATION 3-1

Give examples of how you and other employees legally discriminate at work.

CHAPTER OUTLINE

The Legal Environment for HRM: Protecting Your Organization

A User's Guide to Managing People: The OUCH Test

Objective
Uniform in Application
Consistent in Effect
Has Job Relatedness

Major Employment Laws

Equal Pay Act of 1963
Title VII of the Civil Rights Act of 1964 (CRA)
Age Discrimination in Employment Act of 1967 (ADEA)
Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA)
Pregnancy Discrimination Act of 1978 (PDA)
Americans with Disabilities Act of 1990 (ADA), as Amended in 2008
Civil Rights Act of 1991
Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
Veterans Benefits Improvement Act of 2004 (VBLA)

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA)
Lilly Ledbetter Fair Pay Act of 2009 (LLFPA)

Equal Employment Opportunity Commission (EEOC)
What Does the EEOC Do?
Employee Rights Under the EEOC
Employer Rights and Prohibitions

EEO, Affirmative Action, and Diversity: What’s the Difference?
Affirmative Action (AA)
Diversity in the Workforce

Sexual Harassment: A Special Type of Discrimination
Types of Sexual Harassment
What Constitutes Sexual Harassment?
Reducing Organizational Risk From Sexual Harassment Lawsuits

Trends and Issues in HRM
Federal Agencies Are Becoming More Activist in Pursuing Discrimination Claims
The ADA and the ADA Amendments Act (ADAAA)
We have grown to believe in the value of a diverse workforce,\(^1\) and one of the primary jobs of an HR manager is to assist in avoiding any discriminatory employment situations that can create legal, ethical, or social problems with organizational stakeholders. As a result, one of the first things we need to do in this chapter is define **discrimination**, which is *the act of making distinctions or choosing one thing over another; in HR, it is making distinctions among people*. So you can see that if managers don’t discriminate, then they’re not doing their job. However, we want to avoid **illegal** discrimination based on a person’s membership in a protected class, and we want to avoid unfair treatment of any of our employees at all times. **Illegal discrimination** is *making distinctions that harm people and that are based on those people’s membership in a protected class*. This chapter will teach you some of the tools that we can use to avoid illegal discrimination.

**A USER’S GUIDE TO MANAGING PEOPLE: THE OUCH TEST**

Before we start talking about equal employment opportunity and all of the forms of illegal discrimination in the workplace, let’s take the opportunity to introduce you to the OUCH test.\(^2\) The **OUCH test** is *a rule of thumb rule used whenever you are contemplating any employment action, to maintain fairness and equity for all of your employees or applicants*.

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**SHRM HR CONTENT**

See Appendix: SHRM 2013 Curriculum Guidebook for the complete list

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**B. Employment Law (required)**

1. Age Discrimination in Employment Act of 1967
3. Equal Pay Act of 1963
5. Title VII of the Civil Rights Act of 1964 and 1991
6. Executive Order 11246 (1965)
15. Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
17. Enforcement agencies (EEOC, OFCCP)
24. Disparate impact
25. Disparate treatment
27. Unlawful harassment
   - Sexual
   - Religious
   - Disability
   - Race
   - Color
   - Nation of origin
28. Whistle-blowing/retribution
29. Reasonable accommodation
   - ADA
   - Religious
31. Lilly Ledbetter Fair Pay Act
32. Genetic Information Nondiscrimination Act (GINA)

**E. Job Analysis/Job Design (required)**

6. Compliance with legal requirements
   - Equal employment (job-relatedness, bona fide occupational qualifications and the reasonable accommodation process)

**F. Managing a Diverse Workforce (required)**

1. Equal opportunity employment
2. Affirmative action
4. Individuals with disabilities
6. Racial/ethnic diversity
7. Religion
9. Sex/gender issues
12. Business case for diversity

**I. Staffing: Recruitment and Selection (required)**

15. Bona fide occupational qualifications (BFOQs)
OUCH is an acronym that stands for (see Exhibit 3-1):

- **Objective**
- **Uniform in application**
- **Consistent in effect**
- **Has job relatedness**

### Objective

Is the action objective, or is it subjective? Something that is objective is based on fact, or quantifiable evidence. Something that is subjective is based on your emotional state/feelings or opinion. You should make your employment actions as objective as possible, in all cases.

### Uniform in Application

Is the action being uniformly applied? If you apply an action in an employment situation, are you applying that same action in all cases of the same type? If you ask someone to perform a test, you need to create the exact same testing circumstances, as much as you can control them. For instance, if one person took an exam in a quiet room and the other in a noisy hallway, you would not be uniform in application.

### Consistent in Effect

Does the action have a significantly different effect on one or more protected groups than it has on the majority group? We have to try to make sure that we don't affect one of the many protected groups disproportionately with an employment action. But how can we know?

The Department of Labor and the EEOC have given us the **Four-Fifths Rule**, a test used by various federal courts, the Department of Labor, and the EEOC to determine whether disparate impact exists in an employment test. If the selection ratio for any group (e.g., Asian males) is less than four-fifths of the selection rate for the majority group (e.g., white males) in any employment action, then it constitutes evidence of potential disparate impact.

For an example, take a look at Exhibit 3-2. Let's suppose that we live in an area that is basically evenly split between African-American and White, non-Hispanic populations. You are planning on hiring about 40 new employees for a general position in your company. You decide to give each of the potential employees a written test. If the results of the test disproportionately rule out the African-American applicants, then your written test is not consistent in effect. So let's look at the numbers in Exhibit 3-2.
If we are out of compliance with the Four-Fifths Rule, have we automatically broken the law? No. We do have to investigate why we are outside the four-fifths parameter, though. If there is a legitimate reason for the discrepancy that we can prove in a court case, then we are probably OK with a selection rate that is outside the parameters. We can also look at six fifths to determine the possibility of reverse discrimination, so we would want to have between 16 and 24 African-American males selected in the first example, since 6/5 of 20 is 24.

Consistency in effect is by far the most complex of the four OUCH test factors. However, it is also very important for us to show consistency in our actions as managers in an organization.

**Has Job Relatedness**

Is the action directly related to the primary aspects, or essential functions of the job in question? In other words, if your job has nothing to do with making coffee for the office in the morning, I cannot base any employment action such as a hiring or firing on whether or not you can make coffee.

Remember that the OUCH test is a rule of thumb and does not work perfectly. It is not a legal test by itself. It is a good guide to nondiscriminatory practices, but it is only a guide.
MAJOR EMPLOYMENT LAWS

Managers need a basic understanding of the major employment laws that are currently in effect. If you don’t understand what is legal and what isn’t, you can inadvertently make mistakes that may cost your employer significant amounts of money and time. Let’s take a chronological look at some of the laws listed in Exhibit 3-3.

Equal Pay Act of 1963

The Equal Pay Act requires that women who do the same job as men, in the same organization, must receive the same pay. It defines equal in terms of “equal skill, effort, and responsibility, and . . . performed under similar working conditions.” However, if pay differences are the result of differences in seniority, merit, quantity or quality of production, or any factor other than sex (e.g., shift differentials and training programs), then pay differences are legally allowable. While designed to equalize pay between men and women, the act was never fully successful, but our next law added serious consequences to such unequal treatment.

EXHIBIT 3-3 MAJOR EEO LAWS IN CHRONOLOGICAL ORDER

<table>
<thead>
<tr>
<th>Law</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equal Pay Act of 1963</td>
<td>Requires that women be paid equal to men if they are doing the same work</td>
</tr>
<tr>
<td>Title VII of the Civil Rights Act of 1964</td>
<td>Prohibits discrimination on the basis of race, color, religion, sex, or national origin in all areas of the employment relationship</td>
</tr>
<tr>
<td>Age Discrimination in Employment Act of 1967</td>
<td>Prohibits age discrimination against people 40 years of age or older and restricts mandatory retirement</td>
</tr>
<tr>
<td>Vietnam Era Veterans Readjustment Assistance Act of 1974</td>
<td>Prohibits discrimination against Vietnam veterans by all employers with federal contracts or subcontracts of $100,000 or more. Also requires that affirmative action be taken</td>
</tr>
<tr>
<td>Pregnancy Discrimination Act of 1978</td>
<td>Prohibits discrimination against women affected by pregnancy, childbirth, or related medical conditions</td>
</tr>
<tr>
<td>Americans with Disabilities Act of 1990</td>
<td>Strengthened the Rehabilitation Act of 1973 to require employers to provide “reasonable accommodations” to allow disabled employees to work</td>
</tr>
<tr>
<td>Civil Rights Act of 1991</td>
<td>Strengthened civil rights by providing for possible compensatory and punitive damages for discrimination</td>
</tr>
<tr>
<td>Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994</td>
<td>Ensures the civilian reemployment rights of military members who were called away from their regular (nonmilitary) jobs by US government orders</td>
</tr>
<tr>
<td>Veterans Benefits Improvement Act of 2004</td>
<td>Amends USERRA to extend health care coverage while away on duty, and requires employers to post notice of benefits, duties, and rights of reemployment</td>
</tr>
<tr>
<td>Genetic Information Nondiscrimination Act of 2008</td>
<td>Prohibits the use of genetic information in employment, prohibits intentional acquisition of same, and imposes confidentiality requirements</td>
</tr>
<tr>
<td>Lilly Ledbetter Fair Pay Act of 2009</td>
<td>Amends the 1964 CRA to extend the period of time in which an employee is allowed to file a lawsuit over pay discrimination</td>
</tr>
</tbody>
</table>
Title VII of the Civil Rights Act of 1964 (CRA)

This act changed the way that virtually every organization in the country did business, and it also helped change employers' attitudes about discrimination. The 1964 CRA states that it is illegal for an employer “(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”

The act applies to organizations with 15 or more employees who are working 20 or more weeks a year and who are involved in interstate commerce. The law also generally applies to state and local governments; educational institutions, public or private; all employment agencies; and all labor associations of any type.

Let's discuss some of the important concepts introduced by the CRA of 1964.

Types of Discrimination. The 1964 CRA identified three types of discrimination. Subsequent court rulings helped to further define the three types: disparate treatment; disparate impact; and pattern or practice.

- **Disparate (Adverse) Treatment.** Disparate treatment exists when individuals in similar situations are intentionally treated differently and the different treatment is based on an individual’s membership in a protected class. In a court case, the plaintiff must prove that the employer intended to discriminate in order to prove disparate treatment.

- **Disparate (Adverse) Impact.** Disparate impact occurs when an officially neutral employment practice disproportionately excludes the members of a protected group; it is generally considered to be unintentional, but intent is irrelevant.

- **Pattern or Practice.** Pattern or practice discrimination occurs when a person or group engages in a sequence of actions over a significant period of time that is intended to deny the rights provided by Title VII of the 1964 CRA to a member of a protected class.

Disparate treatment is generally illegal unless the employer can show that there was a “bona fide occupational qualification” (or BFOQ) that caused the need to intentionally disallow members of a protected group from applying for or getting the job.

Disparate impact is generally judged by use of the Four-Fifths Rule. If our investigation shows that an employment test or measure was biased toward or against a certain group, then we have to correct the test or measure unless there was a legitimate reason to measure that particular characteristic. However, if our investigation shows that the test was valid and reliable and that there was some other legitimate reason why we did not meet the four-fifths standard, then illegal discrimination may not exist.

Pattern or Practice. Pattern or practice discrimination occurs when a person or group engages in a sequence of actions over a significant period of time that is intended to deny the rights provided by Title VII of the 1964 CRA to a member of a protected class. If there is reasonable cause to believe that any organization is engaging in a pattern or practice that denies the rights provided by Title VII, the US Attorney General may bring a federal lawsuit against it.

In general, no individual can directly bring a pattern-or-practice lawsuit against an organization. As with the disparate treatment concept, it must be proven that the employer intended to discriminate against a particular class of individuals and did so over a protracted period of time.

President Barack Obama signed the Lilly Ledbetter Fair Pay Act into law in 2009.

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**Disparate Treatment**

Disparate treatment when individuals in similar situations are intentionally treated differently and the different treatment is based on an individual’s membership in a protected class.

**Disparate Impact**

Disparate impact when an officially neutral employment practice disproportionately excludes the members of a protected group; it is generally considered to be unintentional, but intent is irrelevant.

**Pattern or Practice**

Pattern or practice discrimination when a person or group engages in a sequence of actions over a significant period of time that is intended to deny the rights provided by Title VII of the 1964 CRA to a member of a protected class.
See Exhibit 3-4 for types of discrimination and types of organizational defenses against illegal discrimination charges.

**Organizational Defenses Against Discrimination Charges.** The organization can defend itself against discrimination charges by showing either that there was a need for a particular characteristic or qualification for a specific job or that there was a requirement that the business do certain things in order to remain viable and profitable so that we didn’t harm all of our employees by failing and shutting down. Let’s review these defenses.

**Bona Fide Occupational Qualification (BFOQs).** The first defense is a **bona fide occupational qualification (BFOQ)**, a qualification that is absolutely required in order for an individual to be able to successfully do a particular job. The qualification cannot just be a desirable quality within the job applicant—it must be mandatory.12 A BFOQ defense can be used against both disparate impact and disparate treatment allegations.

**Business Necessity.** Business necessity exists when a particular practice is necessary for the safe and efficient operation of the business and when there is a specific business purpose for applying a particular standard that may, in fact, be discriminatory. A business necessity defense is applied by an employer in order to show that a particular practice was necessary for the safe and efficient operation of the business and that there is a specific business purpose for applying a particular standard that may, in fact, be discriminatory. Business necessity defenses must be combined with a test for job relatedness. However, business necessity is specifically prohibited as a defense against disparate treatment.13

**Job Relatedness.** Job relatedness exists when a test for employment is a legitimate measure of an individual’s ability to do the essential functions of a job. For job relatedness to act as a defense against a charge of discrimination, it first has to be a business necessity, and then the employer must be able to show that the test for the employment action was a legitimate (valid) measure of an individual’s ability to do the job.14

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**EXHIBIT 3-4 ORGANIZATIONAL DEFENSES TO DISCRIMINATION CHARGES**

<table>
<thead>
<tr>
<th>Discrimination Type</th>
<th>Intent</th>
<th>Organizational Defense</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disparate Treatment</td>
<td>Intentional</td>
<td>BFOQ</td>
</tr>
<tr>
<td>Disparate Impact</td>
<td>Unintentional</td>
<td>BFOQ or business necessity and job relatedness</td>
</tr>
<tr>
<td>Pattern or Practice</td>
<td>Intentional</td>
<td>BFOQ (unlikely defense)</td>
</tr>
</tbody>
</table>

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**WORK APPLICATION 3-3**

Give examples of BFOQ for jobs at an organization where you work or have worked.

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**I:15 Bona Fide Occupational Qualifications (BFOQs)**

**Bona fide occupational qualification (BFOQ).** A qualification that is absolutely required in order for an individual to be able to successfully do a particular job

**Business necessity** When a particular practice is necessary for the safe and efficient operation of the business and when there is a specific business purpose for applying a particular standard that may, in fact, be discriminatory

**Job relatedness** When a test for employment is a legitimate measure of an individual’s ability to do the essential functions of a job
Age Discrimination in Employment Act of 1967 (ADEA)
The ADEA prohibits discrimination against employees age 40 or older, so it added the “protected class” of age. In this case, it applies if the organization has 20 or more workers instead of 15. The wording of this act almost exactly mirrors Title VII with the exception of the 20-worker minimum. This mirroring of the 1964 CRA is true of nearly all of the protected class discrimination laws that came about after 1964.

Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA)
This act again provides basically the same protection as the CRA does, but for Vietnam veterans. However, it only applies to federal contractors. It requires that “employers with federal contracts or subcontracts of $100,000 or more provide equal opportunity and affirmative action for Vietnam era veterans, special disabled veterans, and veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.”

Pregnancy Discrimination Act of 1978 (PDA)
The Pregnancy Discrimination Act prohibits discrimination against women affected by pregnancy, childbirth, or related medical conditions as unlawful sex discrimination under Title VII and requires that they be treated as all other employees for employment-related purposes, including benefits. Again, this law is mandatory for companies with 15 or more employees, including employment agencies, labor organizations, and state and local governments.

Americans with Disabilities Act of 1990 (ADA), as Amended in 2008
The ADA is one of the most significant employment laws ever passed in the United States. It prohibits discrimination based on disability in all employment practices, such as job application procedures, hiring, firing, promotions, compensation, and training. It applies to virtually all employers with 15 or more employees in the same basic ways as the CRA of 1964 does.

There are, however, many things about the ADA that make it difficult for employers to implement. The first of these is the definition of the word “disability.”

The ADA defines a disability as a physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment, or being regarded as having such an impairment.

What Does the ADA Require of Employers? An organization must make “reasonable accommodations” to the physical or mental limitations of an individual with a disability who was otherwise qualified to perform the “essential functions” of the job, unless it would impose an “undue hardship” on the organization’s operation.

A reasonable accommodation is an accommodation made by an employer to allow someone who is disabled but otherwise qualified to do the essential functions of a job to be able to perform that job. Reasonable accommodations are usually inexpensive and easy to implement. For example, if a job requires that the employee use a computer keyboard and a blind individual applies for that job, the organization can make a reasonable accommodation by purchasing a Braille keyboard. In this case, Braille keyboards are inexpensive and provide the blind individual with the ability to do the job based on the reasonable accommodation provided.
In defining reasonable accommodations, it is also necessary to distinguish between “essential” and “marginal” job functions. **Essential functions are the fundamental duties of the position.** Based on many court decisions, a function can generally be considered essential if it meets one of the following criteria:

1. The function is something that is done routinely and frequently in the job.
2. The function is done only on occasion, but it is an important part of the job.
3. The function may never be performed by the employee, but if it were necessary, it would be critical that it be done right.

**Marginal job functions,** on the other hand, are those functions that may be performed on the job but need not be performed by all holders of the job. Individuals with disabilities cannot be denied employment if they cannot perform marginal job functions.19

Under the ADA, employers are:

- Not required to make reasonable accommodations if the applicant or employee does not request it;
- Not required to make reasonable accommodations if applicants don’t meet required qualifications for a job;
- Not required to lower quality standards or provide personal use items such as glasses or hearing aids to make reasonable accommodations; and
- Not required to make reasonable accommodations if to do so would be an undue hardship.

An **undue hardship** exists when the level of difficulty for an organization to provide accommodations, determined by looking at the nature and cost of the accommodation and the overall financial resources of the facility, becomes a significant burden on the organization. However, an undue hardship may be different for different companies. For instance, a small company may have an undue burden based on a relatively low-cost accommodation to a disabled individual, while a larger company could not claim undue hardship for the same accommodation.

The biggest problem that employers have with the ADA is the fact that it contains a number of words and phrases that can be interpreted in a variety of ways. Because of these poorly defined terms, companies have had a difficult time in applying the ADA in a consistent manner, and as a result, they have quite likely been involved in more lawsuits per disabled employee than with any other protected group.21

**Civil Rights Act of 1991**

The CRA of 1991 was enacted as an amendment designed to correct a few major omissions of the 1964 CRA as well as to overturn several US Court decisions.22 One of the major changes in the amendment was the addition of compensatory and punitive damages in cases of intentional discrimination under Title VII and the ADA, when intentional or reckless discrimination is proven. **Compensatory damages** are monetary damages awarded by the court that compensate the injured person for losses. Such losses can include future pecuniary loss (potential future monetary losses like loss of earnings capacity), emotional pain, suffering, and loss of enjoyment of life. **Punitive damages** are monetary damages awarded by the court that are designed to punish an injuring party that has intentionally inflicted harm on others.
court that are designed to punish an injuring party that has intentionally inflicted harm on others. They are meant to discourage employers from intentionally discriminating, and they do this by providing for payments to the plaintiff beyond the actual damages suffered.

However, the act also provides for a sliding scale of upper limits or “caps” on the combined amount of compensatory and punitive damages based on the number of employees employed by the employer. The limitations are shown in Exhibit 3-5.23

Another major area in which the 1991 Act changed the original CRA is in the application of quotas for protected group members. Quotas were made explicitly illegal by the 1991 act. The act also prohibits “discriminatory use” of test scores, which is also called race norming. Race norming exists when different groups of people have different scores designated as “passing” grades on a test for employment. The 1991 act basically equated this with quotas and, as such, made it illegal.24 So you can’t have different passing grades for any group.

**Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)**

USERRA was passed to ensure the civilian reemployment rights of military members who were called away from their regular (nonmilitary) jobs by US government orders. Unlike other EEO laws, there is no minimum number of employees required for coverage by USERRA.25 Per the US Department of Labor website, “USERRA is intended to minimize the disadvantages to an individual that occur when that person needs to be absent from his or her civilian employment to serve in this country’s uniformed services. USERRA makes major improvements in protecting service member rights and benefits by clarifying the law and improving enforcement mechanisms.”26

USERRA covers virtually every individual in the country who serves or has served in the uniformed services, and it applies to all employers in the public and private sectors, including federal employers. It also provides protection for disabled veterans, requiring employers to make reasonable efforts to accommodate their disabilities.27

**EXHIBIT 3-5**

<table>
<thead>
<tr>
<th>Employer Size</th>
<th>Caps on Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>15 to 100 employees</td>
<td>$50,000</td>
</tr>
<tr>
<td>101 to 200 employees</td>
<td>$100,000</td>
</tr>
<tr>
<td>201 to 500 employees</td>
<td>$200,000</td>
</tr>
<tr>
<td>501 employees or more</td>
<td>$300,000</td>
</tr>
</tbody>
</table>
Veterans Benefits Improvement Act of 2004 (VBIA)

The VBIA was enacted as an amendment to USERRA. It extended the requirement for employers to maintain health care coverage for employees who were serving on active duty in the military (originally, this period was 18 months, but the VBIA changed it to 2 years), and it also required employers to post a notice of benefits, duties, and rights under USERRA/VBIA in a place where it would be visible to all employees who might be affected.28

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA)

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) “prohibits the use of genetic information in employment, prohibits the intentional acquisition of genetic information about applicants and employees, and imposes strict confidentiality requirements.”29

Because companies were starting to use genetic tests to make employment and health care decisions, Congress decided to address their use so that the general public would not fear adverse employment-related or health coverage-related consequences for having a genetic test or participating in research studies that examine genetic information.30 The result was GINA.

Lilly Ledbetter Fair Pay Act of 2009 (LLFPA)

This law amended Title VII of the 1964 CRA. In practical terms, the LLFPA extends the period of time in which an employee is allowed to file a lawsuit for compensation (pay) discrimination. The 1964 CRA only allowed 180 days from

Employment Laws

Review the laws listed below and then write the letter corresponding to each law before the statement(s) describing a situation where that law would apply.

a. Equal Pay
b. Title VII CRA 1964
c. ADEA
d. VEVRAA
e. PDA
f. ADA
g. CRA 1991
h. USERRA
i. VBIA
j. GINA
k. LLFPA

6. I had to take a medical test, and the company found out that I am at high risk to get cancer. So it decided not to hire me so it could save money on medical insurance.
7. Although I was the best qualified, I was intentionally not promoted because I am a woman.
8. I can’t understand why this firm doesn’t want to hire me just because I served my country. I didn’t want to go and fight overseas, but I was drafted into the Army in 1969 and had no choice; I didn’t want to go to jail for draft evasion.
9. My boss is laying me off because I serve in the National Guard and will be deployed overseas for six months. As a result, I will have to find a new job when I get back.
10. The firm is laying me off to hire some younger person to save money. Is this what I deserve for my 20 years of dedication?
11. I’m being paid less than the men who do the same jobs, just because I’m a woman.
12. The firm hired this new guy and bought a special low desk because he is so short.
13. I’m suing the firm for lost wages because they intentionally discriminated against me and fired me when I complained about it.
the time of the discriminatory action for an individual employee to file a lawsuit. The LLFPA allows an individual to file a lawsuit within 180 days after “any application” of that discriminatory compensation decision, including every time the individual gets paid, as long as the discrimination is continuing, which would usually be for the entire period of their employment.

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)**

The various federal equal employment opportunity (EEO) laws are enforced by the Equal Employment Opportunity Commission (EEOC). The EEOC is a federal agency that has significant power over employers in the process of investigating complaints of illegal discrimination.31

**What Does the EEOC Do?**

The EEOC basically has three significant responsibilities: (1) investigating and resolving discrimination complaints through either conciliation or litigation, (2) gathering and compiling statistical information on such complaints, and (3) running education and outreach programs on what constitutes illegal discrimination.32 Additionally, every company with more than 100 employees or with more than 50 employees and with federal contracts totaling $50,000 or more must file an EEO-1 Report with the EEOC each year.33 The EEO-1 identifies the company’s EEO compliance data based on protected classifications within federal law.

Generally, a discrimination complaint must be filed with the EEOC within 180 days of the date of discrimination. If the EEOC determines that discrimination has taken place, it will attempt to provide reconciliation between the parties. If the EEOC cannot come to an agreement with the organization, there are two options:

1. The agency may aid the alleged victim in bringing suit in federal court.
2. It can issue a “right-to-sue” letter to the alleged victim. A right-to-sue is a notice from the EEOC, issued if it elects not to prosecute an individual discrimination complaint within the agency, that gives the recipient the right to go directly to the courts with the complaint.

**Employee Rights Under the EEOC**

Employees have the right to bring discrimination complaints against their employer by filing a complaint with the EEOC. They also have the right to participate in an EEOC investigation, hearing, or other proceeding without threat of retaliation; rights related to the arbitration and settlement of the complaint; and the right to sue the employer directly in court over claims of illegal discrimination, even if the EEOC does not support their claim. For information on how to submit a written complaint, see the EEOC website link (http://www.eeoc.gov/employees/howtostart.cfm).

**Employer Rights and Prohibitions**

The employer has a right to defend the organization using the defenses noted earlier: BFOQ, business necessity, and job relatedness. However, the employer does not have a right to retaliate against individuals who participate in an EEOC action. The employer also is prohibited from creating a work environment that would lead to charges of constructive discharge.

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Retaliation. In addition to providing defenses against discrimination claims, the 1964 civil rights act identifies a situation in which organizations can be held liable for harming the employee because of retaliation. Retaliation is a situation where the organization takes an “adverse employment action” against an employee because the employee brought discrimination charges against the organization or supported someone who brought discrimination charges against the company. An adverse employment action is any action such as firings, demotions, schedule reductions, or changes that would harm the individual employee.

Retaliation is a form of harassment based on an individual filing a discrimination claim. Each of the EEO laws identifies retaliation as illegal harassment based on the protected class identified within that law.

Managers need to be aware that there are severe penalties for engaging in retaliation against an employee or applicant for participating in protected activity. In 2013, over 40% of all EEOC complaints had a retaliation claim as at least a component of the complaint.

Constructive Discharge. The organization can also be accused of “constructive discharge” due to discriminatory actions on the job. Constructive discharge exists when an employee is put under such extreme pressure by management that continued employment becomes intolerable and, as a result, the employee quits, or resigns from the organization. In a Supreme Court decision in 2004, the court noted that the US Court of Appeals had identified constructive discharge as the following: “(1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign . . . and (2) the employee’s reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances.”

So if an individual can show that constructive discharge caused them to resign from the organization, then the individual would be eligible for all employee rights associated with being involuntarily terminated from the company.

EEO, AFFIRMATIVE ACTION, AND DIVERSITY: WHAT’S THE DIFFERENCE?

Managers need to understand the terms equal employment opportunity (EEO), affirmative action, and diversity. These are significantly different concepts and they should not be used interchangeably. EEO is the term that deals with a series of laws

WORK APPLICATION 3-5

Has an organization where you work or have worked had any potential or actual cases brought to the EEOC against it? If so, explain the complaint(s). The HR staff at your employer may not be too eager to talk about this, but you can do some research on larger corporations.

Retaliation A situation where the organization takes an “adverse employment action” against an employee because the employee brought discrimination charges against the organization or supported someone who brought discrimination charges against the company.

Adverse employment action Any action such as firings, demotions, schedule reductions, or changes that would harm the individual employee.

Constructive discharge When an employee is put under such extreme pressure by management that continued employment becomes intolerable and, as a result, the employee quits, or resigns from the organization.

3-1 ETHICAL DILEMMA: WHAT WOULD YOU DO?

The United States was once known as the “melting pot,” as people from all over the world came to the country and adjusted to its culture. In the past, generally, immigrants had to learn English to get a job. Today, however, many organizations hire people who can’t speak English, and they use translators and have policies written in multiple languages for these employees. Government agencies at the federal, state, and local levels are also providing translators and written materials in other languages.

1. Why are some organizations no longer requiring workers to speak English?
2. Should a worker be required to be able to speak English to get a job in the United States?
3. Is it ethical to (or not to) hire people who can’t speak English and to provide translators and policies written in multiple languages?
and regulations put in place at the federal and state government level over the last 45 years. As such, EEO is very specific and narrowly defined within federal and state laws.

On the other hand, affirmative action was created in the 1960s through a series of policies at the presidential and legislative levels in the United States. Affirmative action, except in a few circumstances, does not have the effect of law. Therefore, affirmative action is a much broader concept based on policies and executive orders (orders from the president) to help legally protected groups.

Finally, diversity is not law, nor necessarily even policy within organizations. Diversity is a very broad set of concepts that deal with the differences among people within organizations. Today’s organizations view diversity as a valuable part of their human resources makeup. However, there are no specific federal laws that deal with requirements for diversity within organizations, beyond the EEO laws that specifically identify protected class members and require that organizations deal with those protected class members in an equal way when compared to all other members of the organization.

Let’s take a closer look at EEO, affirmative action, and diversity. Exhibit 3-6 provides a summary of these three concepts.

**Affirmative Action (AA)**

Affirmative action is a series of policies, programs, and initiatives that have been instituted by various entities within both government and the private sector that are designed to prefer hiring of individuals from protected groups in certain circumstances, in an attempt to mitigate past discrimination.

**Executive Order 11246 (1965)**

Affirmative action is a series of policies, programs, and initiatives that have been instituted by various entities within both government and the private sector that are designed to prefer hiring of individuals from protected groups in certain circumstances, in an attempt to mitigate past discrimination. There are only two specific cases in which AA can be mandated or required within an organization. In all other cases AA is strictly voluntary. The two situations where affirmative action is mandatory are:

- Executive Order 11246 If the company is a contractor to the federal government and receives more than $10,000 per year, they are required by presidential order (Executive Order 11246) to maintain an affirmative action program. Exemptions from this order include the following:
  - “(A) Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment...
of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities . . . “39

• “ . . . facilities of a contractor that are in all respects separate and distinct from activities of the contractor related to the performance of the (federal government) contract . . . “40

Federal Court Orders for AA Programs. If an organization is presented with a federal court order to create an affirmative action program to correct past discriminatory practices, it must comply. This is usually only done when there is a history of past discriminatory practices in the organization.

The Bakke v. California decision of 1978 is the basis for the concept of reverse discrimination, which is discrimination against members of the majority group by an organization, generally resulting from affirmative action policies within an organization. And there have been a number of other recent AA rulings in federal courts For example, the Supreme Court ordered a lower court to reconsider a “race-conscious” admissions plan at Texas state universities,41 and it also upheld a voter-backed AA ban in Michigan’s universities.42

Diversity in the Workforce

Diversity is simply the existence of differences—in HRM, it deals with different types of people in an organization. Let’s discuss why organizations are embracing diversity as it provides both opportunities and challenges.43

Demographic Diversity. Is diversity really all that important? The answer is yes.44 There is currently a shortage of skilled workers—and there will be for the foreseeable future, so to exclude a qualified person because that individual is different in some way is counterproductive to business success. Increasing cultural diversity in the workforce poses one of the most challenging human resource and organizational issues of our time.45

Why Do We Need Diversity? Diversity helps increase sales, revenues, and profits—in other words, embracing diversity creates business opportunities.46 Diverse employees allow us to see the diversity around us, in our customers and other stakeholders, much better than we would if our work groups were more homogenous.47 As a result, we are better able to provide products and services that will appeal to the larger and more diverse groups that we come into contact with during the course of doing business.48

What Are the Advantages of a Diverse Workforce? The primary advantages of a diverse workforce come from the ability to stimulate and provide more creative and innovative solutions to organizational problems.49 Creativity is a basic ability to think in unique and different ways and apply those thought processes to existing problems, and innovation is the act of creating useful processes or products based on creative thought processes.

A diverse group looking at a problem will analyze the problem from different directions and in different ways, and will discover more of the aspects of the problem than would a single person or a more homogeneous work group.50

Why is it so hard to be innovative and creative? Most of us have learned not to be creative—we have been told over and over as we grow up that we should do things the way everyone else does them. In other words, we have been trained not to be innovative! Over time, this has the effect of causing most of us to lose the ability to think differently. This ability, called divergent thinking, is necessary in

WORK APPLICATION 3-6

Has an organization where you work or have worked had an affirmative action program? If so, describe it. Also, has there been any reverse discrimination?
order to come up with creative solutions to a problem. Divergent thinking is the ability to find many possible solutions to a particular problem, including unique, untested solutions.

By introducing diversity into our workforce, we assist the process of divergent thinking. Different people think differently because they have different backgrounds and have solved problems differently in the past, so this has the effect of increasing the creativity and innovation in the organization without the individual having to relearn the ability to be highly creative.

Are There Any Challenges to Diversity? There are several things that can cause diversity to break down the organization instead of allowing it to become better and more creative. The first issue is conflict. Conflict is simply the act of being opposed to another. Conflict occurs in interactions between individuals. There are many reasons for conflict, but it is typically greater when people are significantly different from each other, which means that if we create a more diverse workforce, there’s a greater likelihood for more conflict.

The second big issue is group cohesiveness. Cohesiveness is an intent and desire for group members to stick together in their actions. In organizations, we have learned that in order for a work group to become as good as it possibly can be, the group has to become cohesive. The members have to learn to want to be part of the group and want to interact with other members of the group in order for the group to perform at a high level. However, the more diversity there is within the group, the more difficult it is to create the cohesiveness necessary for high performance. So, more diverse groups tend to be less cohesive—not always, but as a general rule.

Managing Diversity. Diversity affects bottom-line profits, but so do some of the challenges associated with diversity, like conflict and reduced cohesiveness. In other words, if all of our diverse employees don’t work well together, the organization does not work well. Managing diversity so that we gain the benefits available is one of the most critical jobs of a 21st century manager. Diversity can be managed successfully only in an organizational culture that values diversity.

Through managing diversity, affirmative action and diversity programs have been used to help women and minorities advance in organizations. Complete Self-Assessment 3-1 to determine your attitude toward women and minorities advancing at work:

**SEXUAL HARASSMENT: A SPECIAL TYPE OF DISCRIMINATION**

Sexual harassment is part of the 1964 CRA (the prohibition of discrimination based on sex), but it is one of the two items we mentioned earlier in the chapter that was not specifically recognized as a separate type of discrimination until federal courts started hearing cases on the act. Sexual harassment is a pervasive issue in organizations, and we all need to understand what it is and how to avoid creating a situation where it can occur at work.

**Types of Sexual Harassment**

Sexual harassment is defined by the EEOC as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance or creates an intimidating, hostile or offensive work environment.” There are two types of sexual harassment specifically delineated in law: quid pro quo harassment and hostile work environment. Both are discussed below.

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### Attitudes About Women and Minorities Advancing

Be honest in this self-assessment, as your assessment will not be accurate if you aren’t. Also, you should not be asked to share your score with others.

Each question below is actually two questions. It asks you about your attitude toward women, and it also asks you about your attitude toward minorities. Therefore, you should give two answers to each question: one regarding women and the other regarding minorities. Write the number corresponding to your answer (5 = agree, 3 = don’t know, 1 = disagree) about women in the Women column, and write the number corresponding to your answer about minorities in the Minorities column.

<table>
<thead>
<tr>
<th>Agree</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>4</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td></td>
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<tr>
<td>2</td>
<td></td>
</tr>
<tr>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>

**Women**

1. Women/Minorities lack motivation to get ahead. 
2. Women/Minorities lack the education necessary to get ahead. 
3. Women/Minorities working has caused rising unemployment among white men. 
4. Women/Minorities are not strong enough or emotionally stable enough to succeed in high-pressure jobs. 
5. Women/Minorities have a lower commitment to work than do white men. 
6. Women/Minorities are too emotional to be effective managers. 
7. Women/Minority managers have difficulty in situations calling for quick and precise decisions. 
8. Women/Minorities have a higher turnover rate than do white men. 
9. Women/Minorities are out of work more often than are white men. 
10. Women/Minorities have less interest in advancing than do white men.

**Minorities**

1. __________
2. __________
3. __________
4. __________
5. __________
6. __________
7. __________
8. __________
9. __________
10. __________

__Total__

**Women**: To determine your attitude score toward women, add up the total of your 10 answers in the Women column and place the total on the Total line and on the following continuum. The higher your total score, the more negative your attitude.

<table>
<thead>
<tr>
<th>Positive attitude</th>
<th>Negative attitude</th>
</tr>
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<tbody>
<tr>
<td>10</td>
<td>50</td>
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<tr>
<td>20</td>
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<td>50</td>
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</tbody>
</table>

**Minorities**: To determine your attitude score toward minorities, add up the total of your 10 answers from the Minorities column and place the total on the Total line and on the following continuum. The higher your total score, the more negative your attitude.

<table>
<thead>
<tr>
<th>Positive attitude</th>
<th>Negative attitude</th>
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<td>10</td>
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</table>

Each statement is a negative attitude about women and minorities at work. However, research has shown all of these statements to be false; they are considered myths. Such statements stereotype women and minorities unfairly and prevent them from advancing in organizations through gaining salary increases and promotions. Thus, part of managing diversity and diversity training is to help overcome these negative attitudes to provide equal opportunities for ALL.

---

**Quid Pro Quo Harassment**: Literally, quid pro quo means “This for that.” **Quid pro quo harassment** is harassment that occurs when some type of benefit or punishment is made contingent upon the employee submitting to sexual advances. “If you do something sexual for me, I will do something for you.” Quid pro quo is a direct form of harassment aimed at an individual and is most commonly seen in supervisor-subordinate relationships, although this is not always the case. It is, however, based on the power of one individual over another.

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Hostile work environment. Hostile work environment is harassment that occurs when someone’s behavior at work creates an environment that is sexual in nature and that makes it difficult for someone of a particular sex to work in that environment. Hostile work environment sexual harassment happens when a “reasonable person” determines that the behavior in question goes beyond normal human interaction and the jokes and kidding that accompany such interaction, instead rising to a level that such a reasonable person would consider the act or acts to be both harassing and sexual in nature. For the purposes of the law, a reasonable person is the “average” person who would look at the situation and its intensity to determine whether the accused person was wrong in their actions.

What Constitutes Sexual Harassment?

Sexual harassment does not have to occur between a male and female or between a supervisor and subordinates. Same-sex harassment also occurs at work.

As in other forms of illegal discrimination, the plaintiff only has to show a prima facie (literally “on the face of it,” meaning it looks like harassment to our reasonable person) case that harassment has occurred. To qualify as a prima facie case of sexual harassment, the work situation must include the following characteristics:

1. The plaintiff is a member of a protected class;
2. The harassment was based on sex;
3. The person was subject to unwelcome sexual advances; or
4. The harassment was sufficiently severe enough to alter the terms, conditions, or privileges of employment.

In order for the organization to be considered for liability, two critical conditions must exist:

1. The plaintiff did not solicit or incite the advances.
2. The harassment was undesirable, and was severe enough to alter the terms, conditions, and privileges of employment.

Sexual Harassment

Write the letter and number codes listed below before each statement to indicate the kind of behavior it describes.

a. Sexual harassment: After the harassment letter, write in if it is (1) quid pro quo or (2) hostile work environment harassment (i.e., write a/1 or a/2).

b. Not sexual harassment

14. Karen tells her coworker Jim an explicitly sexual joke, even though twice before, Jim told her not to tell him any dirty jokes.
15. Ricky-Joe typically puts his hand on his secretary’s shoulder as he talks to her, and she is comfortable with this behavior.
16. José, the supervisor, tells his secretary, Latoya, that he’d like to take her out for the first time today.
17. Cindy tells her assistant, Juan, that he will have to go to a motel with her if he wants to be recommended for a promotion.
18. Jack and Jill have hung up pictures of nude men and women on the walls near their desks, in view of other employees who walk by.
19. As coworker Rachel talks to Carlos, he is surprised and uncomfortable because she gently rubbed his buttock.
Reducing Organizational Risk From Sexual Harassment Lawsuits

Once the plaintiff has shown a prima facie case for the accusation, the courts will determine whether the organization is liable for the actions of its employee based on the answers to two primary questions:

1. Did the employer know about, or should the employer have known about, the harassment?
2. Did the employer act to stop the behavior?

In general, if the employer knew or should have known about the harassment and did nothing to stop the behavior, then the employer can be held liable. Sexual harassment should be treated very seriously, because the consequences can be grave for the organization if it doesn’t do what it should to prevent the harassment.

So how do you protect your organization from liability in case of a charge of sexual harassment? Exhibit 3-7 shows five important steps to follow.62

**EXHIBIT 3-7 LIMITING ORGANIZATIONAL LIABILITY FOR SEXUAL HARASSMENT**

1. Develop a policy statement making it clear that sexual harassment will not be tolerated. You have to delineate what is acceptable and what is not. The policy should also state that anyone participating in a sexual harassment complaint or investigation should not be retaliated against.

2. Communicate the policy by training all employees to identify inappropriate workplace behavior. Make sure that everyone is aware of the policy.

3. Develop a mechanism for reporting sexual harassment that encourages people to speak out. It is critical in this case to create a mechanism outside of the normal chain of command. The typical case of harassment is between an individual and the immediate supervisor. Because of this, if the organization does not have a way to report the behavior outside the normal supervisory chain of command, the courts will consider that the company does not have a mechanism for reporting.

4. Ensure that just cause procedures (we will talk about these in Chapter 9) are followed when investigating the complaint.

5. Prepare to carry out prompt disciplinary action against those who commit sexual harassment.

**WORK APPLICATION 3-9**

Describe the sexual harassment policy where you work or have worked. If you are not sure, check the company HR handbook or talk to an HR department staff member to get the answer.

**LO 3-6**

Briefly discuss the employer’s requirements concerning avoidance of religious discrimination in the workplace.

**RELIGIOUS DISCRIMINATION**

Religion-based discrimination and the ability of employers to create work rules that may affect religious freedom continue to be an issue in the workplace.53 The issue of standards of dress in a number of religions, most notably Islam’s standards for women’s attire in public (including the hijab or niqab), has become a point of contention in some workplaces. If an employer sees the niqab as a symbol of repression, can the employer deny the right to wear such head coverings and use the antidiscrimination statutes concerning gender as justification? Can an employer require drivers that work for them to deliver alcohol to customer warehouses when the drivers may have a religious opposition to drinking alcohol?54 There are many religious freedom questions that we are dealing with in companies today, and there are certainly no easy answers.

Remember that religious discrimination is a violation of the 1964 CRA because it identifies religion as a protected class. Because religion was specifically identified in the CRA, we can’t use it as a factor in making “any employment decision” with our employees. Religion is a less obvious characteristic than gender or race, so it is usually not a characteristic on which we base decisions. However, if a person’s religion requires a certain type of dress or observation of religious holidays or days of worship that is not in keeping with the normal workday practices of the
organization, and if the individual requests accommodation for these religious beliefs, then we generally would need to make every reasonable effort to accommodate such requests.

**TRENDS AND ISSUES IN HRM**

We again end this chapter with two significant issues that are affecting HRM. These issues include increasing federal agency activism in revising laws that have been in effect for as many as 80 years, and the 2008 amendment to the ADA.

### Federal Agencies Are Becoming More Activist in Pursuing Discrimination Claims

A number of federal agencies have become much more active over the past few years in pursuing large-scale claims against US businesses. The EEOC, the Occupational Safety and Health Administration (OSHA), the National Labor Relations Board (NLRB), and other agencies have begun to act directly against companies in many cases without a complaint being filed. Systemic discrimination investigations constitute one type of investigation that has increased dramatically.  

Systemic discrimination (23% of EEOC’s active cases in 2013) is defined by the EEOC as “a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area.” In one year alone, more than 300 systemic investigations resulted in 63 settlements or conciliation agreements worth more than $40 million.

As the HR manager, you need to know that there is no longer a minimal chance of being investigated for potential wrongdoing if there isn’t an employee complaint. Federal agencies are actively seeking out evidence of “pattern or practice” forms of discrimination and then prosecuting those cases. So you will need to be more diligent than ever in maintaining a fair and nondiscriminatory workplace.

### The ADA and the ADA Amendments Act (ADAAA)

Claims under the ADA increased from 17,734 in 2007 to more than 25,000 in 2011, mostly due to the changes in the ADAAA. This increase is at least in part due to the increase in association discrimination claims—claims that one has been discriminated against because one is, for example, associated with a partner who has HIV or has a family member who is disabled and needs care.

Recent EEOC guidance also notes several conditions that may be episodic or in remission where the changes in the ADAAA have made it clear that those conditions are covered by the law. Among these conditions are cancer, diabetes, and epilepsy. The Midwest Regional Medical Center in Oklahoma was charged by the EEOC with firing an employee because of her ongoing cancer treatments. The EEOC filed suit on behalf of the individual when she was terminated, noting that she could have returned to work after a short period of sick leave if she had been allowed to do so.

Enforcement actions based on the ADAAA revisions will almost certainly continue to evolve. As an HR manager, you will need to keep apprised of the developments in this amendment to the ADA to provide good counsel to the executives and managers in your company or other organization.
CHAPTER SUMMARY

3-1 Describe the OUCH test and its four components and identify when it is useful in an organizational setting.

The OUCH Test is a rule of thumb you should use whenever you are contemplating any employment action. You use it to maintain equity for all of your employees or applicants. OUCH is an acronym that stands for Objective, Uniform in application, Consistent in effect, and Has job relatedness. An employment action should generally be objective instead of subjective; we should apply all employment tests the same way, every time, with everyone, to the best of our ability; the employment action should not have an inconsistent effect on any protected groups; and the test must be directly related to the job to which we are applying it.

3-2 Identify the major equal employment opportunity (EEO) laws and the groups of people that each law protects.

The Equal Pay Act of 1963 requires that women be paid equal to men if they are doing the same work.
The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, or national origin, in all areas of the employment relationship.
The Age Discrimination in Employment Act of 1967 prohibits age discrimination against people 40 years of age or older, and it restricts mandatory retirement.
The Vietnam Era Veterans Readjustment Assistance Act of 1974 prohibits discrimination against Vietnam veterans by all employers with federal contracts or subcontracts of $100,000 or more. It also requires that affirmative action be taken.
The Pregnancy Discrimination Act of 1978 prohibits discrimination against women affected by pregnancy, childbirth, or related medical conditions, and it treats such discrimination as unlawful sex discrimination.

The Americans with Disabilities Act of 1990 requires employers to provide “reasonable accommodations” to allow disabled employees to work.
The Civil Rights Act of 1991 strengthened civil rights by providing for possible compensatory and punitive damages for discrimination.
The Uniformed Services Employment and Reemployment Rights Act (USERRA) ensures the civilian reemployment rights of military members who were called away from their regular (nonmilitary) jobs by US government orders.
The Veterans Benefits Improvement Act of 2004 amends USERRA to extend health care coverage while away on duty, and it requires employers to post a notice of benefits, duties, and rights of reemployment.
The Genetic Information Nondiscrimination Act of 2008 prohibits the use of genetic information in employment, prohibits intentional acquisition of the same, and imposes confidentiality requirements.
The Lilly Ledbetter Fair Pay Act of 2009 amends the 1964 CRA to extend the period of time in which an employee is allowed to file a lawsuit over pay discrimination.

3-3 Briefly discuss the major functions of the Equal Employment Opportunity Commission (EEOC).

The EEOC is a federal agency that investigates complaints of illegal discrimination based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information.
The EEOC has three significant functions: investigating and resolving discrimination complaints through either conciliation or litigation, gathering and compiling statistical information on such complaints, and running education and outreach programs on what constitutes illegal discrimination.
3-4 Discuss the differences among equal employment opportunity, affirmative action, and diversity.

Equal employment opportunity deals with a series of laws and regulations put in place at the federal and state government levels in the last 45 years. As such, equal employment opportunity is very specific and narrowly defined within US law and various state laws.

Affirmative action, except in a few circumstances, does not have the effect of law. Therefore, affirmative action is a much broader concept based on policy than is EEO, which is more narrowly based on law.

Finally, diversity is not law, nor necessarily even policy within organizations. Diversity is a very broad set of concepts that deal with the differences among people within organizations. Today’s organizations view diversity as a valuable part of their human resources makeup, but there are no specific laws that deal with requirements for diversity within organizations beyond the EEO laws.

3-5 Compare the two primary types of sexual harassment.

Quid pro quo harassment occurs when some type of benefit or punishment is made contingent upon the employee submitting to sexual advances. In other words, if you do something for me, I will do something for you, or conversely, if you refuse to do something for me, I will harm you.

Hostile work environment harassment occurs when someone’s behavior at work creates an environment that is sexual in nature and makes it difficult for someone of a particular sex to work in that environment. Hostile environment sexual harassment happens when a “reasonable person” would determine that the environment went beyond normal human interactions and the jokes and kidding that go with those interactions and rose to the level that such a reasonable person would consider the act or acts to be both harassing and sexual in nature.

3-6 Briefly discuss the employer’s requirements concerning avoidance of religious discrimination in the workplace.

Religious discrimination is one of the identified protected classes in the 1964 Civil Rights Act. As such, we can’t use it as a factor in making “any employment decision” with our employees. Issues such as standards of dress, time off for religious holidays, adherence to strongly held religious beliefs, and other questions of religious freedom should be accommodated to the best of our ability to avoid inadvertent violation of the law.

3-7 Define the key terms found in the chapter margins and listed following the Chapter Summary.

Complete the Key Terms Review to test your understanding of this chapter’s key terms.

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**KEY TERMS REVIEW**

Complete each of the following statements using one of this chapter’s key terms.

1. __________ is the act of making distinctions or choosing one thing over another—in HR, it is distinctions among people.

2. __________ is making distinctions that harm people by using a person’s membership in a protected class.

3. __________ is a rule of thumb used whenever you are contemplating any employment action, to maintain fairness and equity for all of your employees or applicants.
4. ________ is a test used by various federal courts, the Department of Labor, and the EEOC to determine whether disparate impact exists in an employment test.

5. ________ exists when individuals in similar situations are intentionally treated differently and the different treatment is based on an individual’s membership in a protected class.

6. ________ occurs when an officially neutral employment practice disproportionately excludes the members of a protected group; it is generally considered to be unintentional, but intent is irrelevant.

7. ________ occurs when, over a significant period of time, a person or group engages in a sequence of actions that is intended to deny the rights provided by Title VII (the 1964 CRA) to a member of a protected class.

8. ________ is a qualification that is absolutely required for an individual to successfully do a particular job.

9. ________ exists when a particular practice is necessary for the safe and efficient operation of the business, and when there is a specific business purpose for applying a particular standard that may, in fact, be discriminatory.

10. ________ exists when a test for employment is a legitimate measure of an individual’s ability to do the essential functions of a job.

11. ________ is a physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment, or a condition of being regarded as having such an impairment.

12. ________ is an accommodation made by an employer to allow someone who is disabled but otherwise qualified to do the essential functions of a job to be able to perform that job.

13. ________ consists of the fundamental duties of the position.

14. ________ are those functions that may be performed on the job but need not be performed by all holders of the job.

15. ________ occurs when the level of difficulty for an organization to provide accommodations, determined by looking at the nature and cost of the accommodation and the overall financial resources of the facility, becomes a significant burden on the organization.

16. ________ consists of monetary damages awarded by the court that compensate the person who was injured for their losses.

17. ________ consist of monetary damages awarded by the court that are designed to punish an injuring party that intentionally inflicted harm on others.

18. ________ occurs when different groups of people have different scores designated as “passing” grades on a test for employment.

19. ________ is a notice from the EEOC, if they elect not to prosecute an individual discrimination complaint within the agency, that gives the recipient the right to go directly to the courts with a complaint.

20. ________ is a situation in which the organization takes an “adverse employment action” against an employee because the employee brought discrimination charges against the organization or supported someone who brought discrimination charges against the company.

21. ________ consist of any actions such as firings, demotions, schedule reductions, or changes that would harm the individual employee.

22. ________ exists when an employee is put under such extreme pressure by management that continued employment becomes intolerable for the employee and, as a result of the intolerable conditions, the employee resigns from the organization.

23. ________ is a series of policies, programs, and initiatives that have been instituted by various entities within both government and the private sector to create preferential hiring of individuals from protected groups in certain circumstances, in an attempt to mitigate past discrimination.

24. ________ is discrimination against members of the majority group by an organization, generally resulting from affirmative action policies within an organization.

25. ________ is the existence of differences—in HRM, it deals with different types of people in an organization.

26. ________ is a basic ability to think in unique and different ways and apply those thought processes to existing problems.

27. ________ is the act of creating useful processes or products based on creative thought processes.

28. ________ is the ability to find many possible solutions to a particular problem, including unique, untested solutions.

29. ________ is the act of being opposed to another.

30. ________ is an intent and desire for group members to stick together in their actions.

31. ________ consists of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature; when submission to or rejection of this conduct explicitly or implicitly affects an individual’s employment; unreasonably interferes with an individual’s work performance; or creates an intimidating, hostile, or offensive work environment.
32. ________ is harassment that occurs when some type of benefit or punishment is made contingent upon the employee submitting to sexual advances.

33. ________ is harassment that occurs when someone’s behavior at work creates an environment that is sexual in nature and makes it difficult for someone of a particular sex to work in that environment.

34. ________ is the “average” person who would look at the situation and its intensity to determine whether the accused person was wrong in their actions.

• • • COMMUNICATION SKILLS

The following critical-thinking questions can be used for class discussion and/or for written assignments to develop communication skills. Be sure to give complete explanations for all answers.

1. Do you agree that applying the OUCH test to an employment situation will minimize illegal discrimination? Why or why not?

2. Are there any groups of people in the United States that you think should be covered by federal laws as a protected group but are not currently covered? Why or why not?

3. In your opinion, is most discrimination in the United States unintentional (disparate impact), or is most discrimination intentional (disparate treatment)? Why do you think so?

4. What is your opinion of organizations using bona fide occupational qualifications (BFOQs) to limit who they will consider for a job?

5. Do you agree that most employers probably want to obey the Americans with Disabilities Act but don’t know exactly what they are required to do under the law? Do you think that most employers would rather not hire disabled people? Justify your answer.

6. How would you define the terms “reasonable accommodation” and “undue hardship” if you were asked by one of your company managers?

7. Has affirmative action gone too far in creating a preference for historically underrepresented groups over other employees and applicants instead of treating everyone equally?

8. Do you think that sexual harassment in the workplace is overreported or underreported? Justify your answer.

• • • CASE 3-1 ENGLISH-ONLY: ONE HOTEL’S DILEMMA

Erica, the Human Resource Manager, was frustrated by many of her hotel staff speaking Spanish in the hallways and rooms as they were cleaning them.

The Sawmill Hotel where Erica works is situated in downtown Minneapolis, Minnesota. Its target market includes sports enthusiasts attending nearby professional (Twins, Vikings, Timberwolves, Wild) games but also business professionals and families. This four-star hotel features an indoor and outdoor swimming pool, a message center, three stores, two restaurants, and a beauty shop. Total staff includes about 10 managers, 30 cleaning assistants to take care of rooms, 10 front desk specialists, and 25 who are involved with the stores, restaurants, and beauty shop. All are required to focus on customer service as their number-one value.

Erica hires everyone in the hotel except for the Chief Executive Officer, Vice President of Finance, and Vice President of Marketing. For the rest of the managers, the 30 cleaning assistants, and the store, restaurant, and beauty shop workers, she advertises for openings with the local job service and the Minneapolis Star Tribune (with the associated website). A typical Tribune ad for a cleaning assistant reads as follows: Cleaning Assistants Wanted, Sawmill Hotel, $9–$11/hour. Prepare rooms for customers and prepare laundry. Contact: Erica Hollie, Human Resource Manager, 555-805-1234.

As a result of the advertising, Erica has been able to obtain good help through the local target market. Twenty-seven of the 30 cleaning assistants are women. Twenty of the 30 have a Hispanic background. Of the Hispanics, all can speak English at varying levels.

Rachel, the lead cleaning assistant, believes that maximizing communication among employees helps the assistants become more productive and stable within the hotel system. She uses both English and Spanish to talk to assistants under her. Spanish is useful with many assistants because they know Spanish much better than English. Spanish also is the “good friends” language that allows the Spanish speakers to freely catch up on each other’s affairs and that motivates them to stay working at the hotel. The use of the Spanish language among cleaning assistants has been common practice among them for the two years since the hotel opened.
In the last few months, top management decided to have an even greater focus on customer service by ensuring customer comment cards are available in each room and at the front desk. Customers also can comment online about their stay at the hotel.

There have been several customer complaints that cleaning assistants have been laughing about them behind their back in Spanish. One customer, Kathy, thought that staffers negatively commented about her tight pink stretch pants covering her overweight legs. Other customers have complained they didn’t think asking staff for help was easy given the amount of Spanish spoken. In all, about 15 out of 42 complaints in a typical month were associated with the use of the Spanish language.

Though bellhops and front desk clerks are typically the workers who handle complaints first, Erica, the Human Resource Manager, has the main responsibility to notify workers about customer complaint patterns and to set policy in dealing with the complaints. The prevalence of complaints concerning workers speaking Spanish each month led Erica to make a significant change in policy concerning the use of Spanish. In consultation with top management, Erica instituted the following employee handbook policy effective immediately:

“English is the main language spoken at the hotel. Any communication among employees shall be in English. Use of Spanish or other languages is prohibited unless specifically requested by management or the customer.”

In an e-mail explanation for the new policy, Erica stated the number of complaints that had come from the use of Spanish and the need for customer courtesy and communication.

Rachel immediately responded to Erica’s e-mail by stating that the new policy was too harsh on the native Spanish-speaking assistants at the hotel. She thought that a better policy is to allow her assistants to communicate with each other through Spanish but by quietly doing so away from customer earshot. If there is a general discussion in front of a customer, it is recommended to speak English. There should never be discussions in any language about customer appearances.

Though Rachel grumbled, the policy stuck because Erica and top management wanted to stop customer complaints. As a result of the policy, 10 of the 20 Spanish-speaking assistants quit within two months. These were high-quality assistants who had been with the hotel since the start. Their replacements came from a job service and have not worked out as well in their performance.

Questions
1. What law(s) do you think might apply in this case?
2. Should a complete ban of Spanish be instituted among staff of the hotel unless customers use Spanish themselves, or should the use of Spanish be completely allowed by staff among themselves as long as it is quiet (why or why not)?
3. What rules, if any, would you put into effect in this situation, knowing about the customer complaints? Explain your answer.

Case created by Gundars Kaupins of Boise State University

**SKILL BUILDER 3-1 THE FOUR-FIFTHS RULE**

For this exercise, you will do some math.

**Objective**
To develop your skill at understanding and calculating the Four-Fifths Rule

**Skills**
The primary skills developed through this exercise are as follows:

1. *HR management skill*—Analytical and quantitative business skills

Complete the following Four-Fifths Problems

1:

<table>
<thead>
<tr>
<th></th>
<th>Males</th>
<th>Females</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicants</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>Selected</td>
<td>50</td>
<td>40</td>
</tr>
<tr>
<td>Selection rate</td>
<td>50% (50/100)</td>
<td>40% (40/100)</td>
</tr>
</tbody>
</table>

\[
\frac{4}{5} = \underline{80\%}
\]

The selection rate of \(80\%\) is equal to, less than, or greater than \(\underline{60\%}\) or \(4/5\).

Therefore, the Four-Fifths Rule is or is not met. How many total females and how many more females should be hired? \(\underline{40\%}\)
2: White Nonwhite

| Applicants | 120 | 75 |
| Selected   | 80  | 25 |
| Selection rate |  |  |

\[ \frac{4}{5} = \text{___\%}. \]

The selection rate of \text{___\%} is equal to, less than, or greater than \text{___\%} or \frac{4}{5}.

Therefore, the Four-Fifths Rule is or is not met. How many total and how many more nonwhites should be hired? \text{___ ___}

3: White Females Nonwhite Females

| Applicants | 63  | 109 |
| Selected   | 17  | 22  |
| Selection rate |  |  |

\[ \frac{4}{5} = \text{___\%}. \]

The selection rate of \text{___\%} is equal to, less than, or greater than \text{___\%} or \frac{4}{5}.

Therefore, the Four-Fifths Rule is or is not met. How many total and how many more nonwhite females should be hired? \text{___ ___}

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**SKILL BUILDER 3-2 DIVERSITY TRAINING**

**Objective**

To become more aware of and sensitive to diversity

**Skills**

The primary skills developed through this exercise are as follows:

1. *HR management skill*—Human relations skills
2. *SHRM 2013 Curriculum Guidebook*—L: Training and Development

**Answer the following questions:**

**Race and Ethnicity**

1. My race (ethnicity) is ___.
2. My name, ____, is significant because it means ____ [or] My name, ____, is significant because I was named after ____.
3. One positive thing about my racial/ethnic background is ____.
4. One difficult thing about my racial/ethnic background is ____.

**Religion**

5. My religion is ____.
6. One positive thing about my religious background is ____.
7. One difficult thing about my religious background is ____.

**Gender**

8. I am ____ (male/female).

9. One positive thing about being (male/female) is ____.
10. One difficult thing about being (male/female) is ____.

**Age**

11. I am ____ years old.
12. One positive thing about being this age is ____.
13. One difficult thing about being this age is ____.

**Other**

14. One way in which I am different from other people is ____.
15. One positive thing about being different in this way is ____.
16. One negative thing about being different in this way is ____.

**Prejudice, Stereotypes, and Discrimination**

17. Describe an incident in which you were prejudged, stereotyped, or discriminated against. It could be something minor, such as having a comment made to you about your wearing the wrong type of clothes/sneakers or being the last one picked when selecting teams.

**Apply It**

What did I learn from this experience? How will I use this knowledge in the future?

Your instructor may ask you to do this Skill Builder in class in a group. If so, the instructor will provide you with any necessary information or additional instructions.