

Legal and Practical Issues Associated With Today's Diverse Workplaces

Northern Hudson Valley Job Service Employer Committee

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Diversity of American Workforce

- In 1999, 12% of American workers were immigrants.
- In 2000, American Indians, Asians, and Hispanics composed 15.2% of employees of private employers with 100+ employees.
- In 2002, one in ten American citizens were foreign born.



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The Law

- Title VII of the Civil Rights Act of 1964 (Title VII)
 - ◆ Prohibits employment discrimination on the basis of race, color, religion, sex, and national origin
- Age Discrimination in Employment Act
 - ◆ Prohibits employment discrimination on the basis of age (40+ years of age)
- Americans with Disabilities Act
 - ◆ Prohibits employment discrimination on the basis of disability
- New York Human Rights Law
 - ◆ Prohibits employment discrimination on the basis of race, color, creed, sex, national origin, age (18+ years of age), disability, marital status, arrest and criminal convictions, and sexual orientation.



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The Law

- These protections exist regardless of whether the individual:
 - ◆ was born in the United States or in a foreign country; or
 - ◆ is a citizen of the United States.



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National Origin Discrimination

- Includes discrimination based on:
 - ◆ Ethnicity – e.g., discrimination against someone because he is Arab, or because he is *not* Hispanic;
 - ◆ Physical, linguistic, or cultural traits – e.g., discrimination against someone because she has physical, linguistic or cultural traits closely associated with a national origin group (e.g. dresses in African-style dress); or
 - ◆ Perception – e.g., discrimination based upon a belief a person is a member of a particular national origin group (e.g. perceiving someone to be Muslim based upon his speech, mannerisms, or appearance).



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Citizenship

- Under Title VII, Employers may not use citizenship to screen out applicants or discriminate against employees because of national origin.
 - ◆ For example, an employer may not require that higher paying positions be filled by U.S. citizens.



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Citizenship

- Other Laws that may affect Employers' treatment of non-citizens:
 - ◆ Immigration Reform and Control Act of 1986 ("IRCA"): prohibits employers with 4 or more employees from discriminating in hiring, referral, or discharge against U.S. citizens and foreign citizens authorized to work in the U.S.
 - ◆ Fair Labor Standards Act: requires that employees, including non-citizens, must be paid federal minimum wage
 - ◆ Special Visa Programs: may impose special requirements relating to wages, working conditions, and other terms and conditions of employments.



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Recruitment

- Recruiters, Temporary Agencies, and other Employers cannot discriminate on the basis of membership in a protected class.
 - ◆ Should not screen out employees based on these protected traits; and
 - ◆ Should not adopt recruiting practices that have the purpose or effect of screening out individuals based on these protected traits (i.e., word of mouth recruitment).



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Recruitment

- Use a variety of recruitment tools (job fairs, open houses, professional associations, search firms, internships) to attract applicants from diverse backgrounds.
- Advertisements should state any language requirements required by business necessity and state that the employer is an “equal opportunity employer.”



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Hiring

- Employer cannot limit the type of positions for which employees can be hired based on their protected status.
 - ◆ For example, an Employer cannot keep employees “in the back” and in positions without customer contact because of the employee’s national origin.
- Employer cannot rely on discomfort of customer, client, or coworkers as the basis for discrimination (e.g., the desire for an “All-American image”).



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Hiring

- In certain circumstances, an employer may lawfully decide not to hire an employee based on the employee's failure to meet job requirements imposed by federal statute or Executive Order.
- The EEOC cannot review the substance of a security clearance determination, even if the decision to deny a security clearance was based on national origin. The EEOC can only review the decision to ensure that procedural safeguards were followed.



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Hiring

- Recommendations:
 - ◆ Determine criteria for evaluation of all applicants and apply consistently.
 - ◆ Insure that all criteria are business related.



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Race/Color/National Origin Inquiries

- **Not Recommended:**
 - ◆ Where are your ancestors from?
 - ◆ What nationality is your last name?
 - ◆ What is your place of birth?
 - ◆ Where is your accent from?
- **Not Recommended Unless Business Necessity Exists:**
 - ◆ Can you speak English fluently?
- **Recommended:**
 - ◆ None



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Religion Inquiries

- **Not Recommended:**
 - ◆ Applicant's religious affiliation, denomination, church or parish.
 - ◆ What religious holidays an applicant observes.
 - ◆ Applicant's involvement in clubs, organizations, etc. which are not directly related to applicant's ability to do his/her job.
- **Recommended:**
 - ◆ None.



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Age Inquiries

➤ **Not Recommended:**

- ◆ How old are you? What is your date of birth?
- ◆ How old are your children?
- ◆ What year did you graduate from high school?
- ◆ Do you have a driver's license? If so, please attach a photocopy.

➤ **Recommended:**

- ◆ Are you at least 18 years of age? If not, state your age.



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Citizenship Inquiries

➤ **Not Recommended:**

- ◆ Of what country are you a citizen?

➤ **Recommended:**

- ◆ Are you a citizen of the United States?
- ◆ If not a citizen of the United States, have you the legal right to remain permanently in the United States?



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Language Requirements

- Fluency requirements should be necessary for the position for which they are imposed and be tailored to the requirements of that position.



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Race and Religious Discrimination

- Race and religious discrimination often overlap with national origin discrimination. For example:
 - ◆ An employee who faces derogatory comments about his Arab ethnicity and Islam may state a claim for national origin and religious discrimination.
 - ◆ An applicant who is not hired for a position in a Greek restaurant because she is Chinese and has Asian physical features states a claim for national origin and racial discrimination.

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Employer Restrictions on Personal Appearance

- The Employer may not discriminate in the dress code, e.g., requiring Hispanic employees to dress differently than other Non-Hispanic employees in similar positions.
- The Employer may impose the same dress code on similar positions, so long as the dress code is enforced evenhandedly and was not adopted for discriminatory reasons.



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Employer Restrictions on Personal Appearance

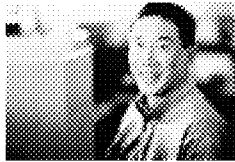
- Title VII only requires accommodation of religion, not national origin.
- Employer must accommodate religious practices, such as making an exception to the Employer's dress code, if the accommodation does not result in undue hardship.
 - ◆ For example, if an employee's religion requires that the employee wear a turban, the employer must accommodate that religious practice and permit the employee to wear the turban even if the employer's dress code would normally prohibit it.



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Language Requirements

- English-only rules must be adopted for non-discriminatory reasons and may not prohibit some but not all foreign languages (e.g. “a rule that prohibits Spanish-speaking in the workplace”).



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Language Requirements

- Non-discriminatory reasons that would justify an English-only rule include:
 - ◆ safety;
 - ◆ supervision by an English-speaking supervisor of employees whose job duties include communication with coworkers or customers; and
 - ◆ efficient communication for cooperative work assignments.



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Accents

- Generally, an Employer may make employment decision based on foreign accent only where:
 - ◆ the job requires effective oral communication in English; and
 - ◆ the individual's accent **materially interferes** with the individual's ability to perform job duties.



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Reasonable Accommodation of Religious Beliefs Under NYHRL

- September 17, 2002 - Governor Pataki signed a bill expanding the NYHRL concerning religious discrimination
- The amendment makes it unlawful to require an employee to violate or forego a sincerely-held religious practice as a condition of employment
- Examples of religious practices include:
 - ◆ observance of Sabbath
 - ◆ dress
 - ◆ hair-style, grooming
 - ◆ prayer



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Reasonable Accommodation of Religious Beliefs Under NYHRL

- Previously, the NYHRL only dealt with accommodating an employee's observance of his/her Sabbath
- Previously, the NYHRL also excluded certain types of jobs (e.g., health and safety positions) from the obligation to accommodate Sabbath observance



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Reasonable Accommodation of Religious Beliefs Under NYHRL

- Under the amendment, an employer may require an employee to violate a sincerely-held religious practice only if allowing the practice would cause undue hardship
- Undue hardship is defined as incurring "significant expense or difficulty"
 - ◆ In contrast, under Title VII, undue hardship is defined as any accommodation that imposes more than a "*de minimus*" burden



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Reasonable Accommodation of Religious Beliefs Under NYHRL

- Factors considered in determining whether undue hardship exists under the NYHRL:
 - ◆ cost in relation to size or resources of operation
 - ◆ number of employees who need accommodation
 - ◆ other factors such as multiple sites of employment, geographic separateness, etc.



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Reasonable Accommodation of Religious Beliefs Under NYHRL

Anna informs her manager that her religion calls for prayer at certain times throughout the day, and that she needs to take breaks to pray . . .

- ◆ Under former provisions of NYHRL, the employer was not obligated to accommodate this practice
- ◆ Under Title VII, the employer is required to accommodate unless it imposes more than a *de minimus* burden
- ◆ Under the amendment to the NYHRL, the employer must accommodate Anna's religious practice unless it can show "significant expense or difficulty"



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Workplace Harassment

- Harassment based upon race, color, physical or mental disability, religion, age, national origin, marital status, sex, sexual orientation and military status in matters pertaining to employment or education is prohibited under applicable law



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Other Types of Harassment

- Includes behavior similar to sexual harassment, such as:
 - ◆ Verbal conduct such as threats, epithets, derogatory comments, or slurs
 - ◆ Visual conduct such as derogatory posters, photographs, cartoons, drawings, or gestures
 - ◆ Physical conduct such as assault, unwanted touching, or blocking normal movement
- Employee may claim harassment based on actions of supervisors, coworkers, or third parties, such as customers or business partners.



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Tips on Avoiding Liability for Harassment and Discrimination

- Adopt a comprehensive harassment and discrimination policy that
 - ◆ covers all protected characteristics including sexual orientation and military service
 - ◆ covers sexual AND other unlawful harassment (sexual orientation, national origin, race, disability, religion, marital status)



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Workplace Harassment Policy

- Expressly states organization's prohibition of and commitment to maintaining a workplace free of prohibited harassment and discrimination.
- Describes what constitutes harassment and discrimination, providing examples.
- Tells employees what they can do if they believe they are a victim of harassment
 - ◆ Provides multiple avenues of complaint



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Workplace Harassment Policy

- Requires any employee aware of harassment to report such.
- Provides overview of process employer will follow in response to a complaint
- Prohibits retaliation



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Mistake

As long as you have an EEO policy somewhere in your employee handbook or posted in your break room, you don't have to worry about legal exposure for harassment and discrimination.



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Train, Train, Train

- Train All Supervisors, Managers & Executives
 - ◆ Individuals at this level in your organization are the organization's agents. Therefore, what they know, the organization is deemed to know and their actions are considered the actions of the company.
- Train those individuals who will handle complaints from employees
- Consider training all employees



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Discipline, Demotion, and Discharge

- Discipline, demotion, and discharge cannot be based on national origin.
 - ◆ Neutral rules and policies must be enforced evenhandedly.
 - ◆ Layoffs must be based on nondiscriminatory reasons, such as seniority or work performance.



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Discipline, Demotion, and Discharge

- Employers should develop and apply clear, objective criteria for discipline and discharge.
- Employers should document carefully the efforts made to address performance or conduct issues and the reason for discipline, demotion, or discharge.

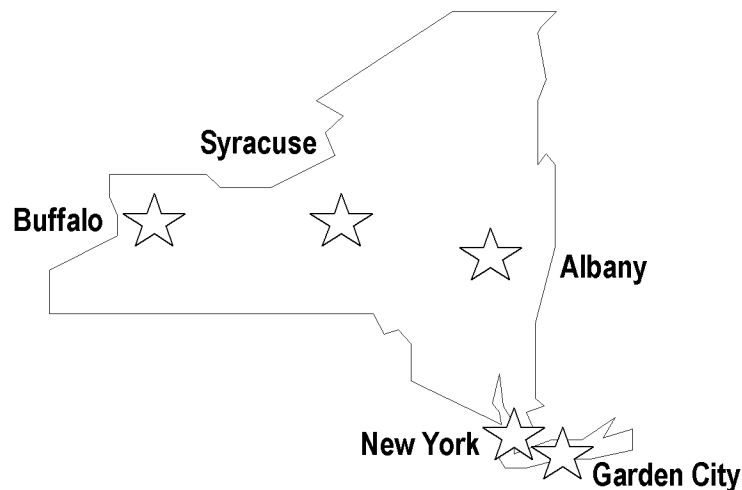


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