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**SUBJECT:** EEOC COMPLIANCE MANUAL

**PURPOSE:** This transmittal covers the issuance of Section 2 of the new Compliance Manual on "Threshold Issues." The section provides guidance and instructions for investigating and analyzing coverage, timeliness, and other threshold issues that are generally addressed when a charge is first filed with the EEOC.

**EFFECTIVE DATE:** Upon receipt

**DISTRIBUTION:** EEOC Compliance Manual holders

**OBSOLETE DATA:** This section of the new Compliance Manual supersedes the following: Section 605: *Jurisdiction*, EEOC Compliance Manual, Volume II; Enforcement Guidance on the *Bona Fide Private Membership Club Exception*, EEOC Compliance Manual, Volume II, Appendix 605-A; Enforcement Guidance on *Sheriffs' Deputies*, EEOC Compliance Manual, Volume II, Appendix 605-C; Enforcement Guidance on *Work Release Programs*, EEOC Compliance Manual, Volume II, Appendix 605-D; Enforcement Guidance on *Partners, Officers, Members of Boards of Directors, and Major Shareholders*, EEOC Compliance Manual, Volume II, Appendix 605-E; Enforcement Guidance on *Integrated Enterprises and Joint Employers*, EEOC Compliance Manual, Volume II, Appendix 605-G; Enforcement Guidance on *Independent Contractors and Independent Businesses*, EEOC Compliance Manual, Volume II, Appendix 605-H; Enforcement Guidance on *Counting Employees to Determine Title VII Jurisdiction* (1997); Policy Guidance on *Whether Part-time Employees Are Employees Within the Meaning of &sect; 701(b) of Title VII and &sect; 11(b) of the ADEA* (1990); Policy Statement on *Effect of 1986 Amendments to ADEA on Commission's Enforcement Activities* (1988).

**FILING INSTRUCTIONS:** This is the second section issued as part of the new Compliance Manual.

/s/  
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Chairwoman

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## SECTION 2: THRESHOLD ISSUES

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## SECTION 2: THRESHOLD ISSUES

### 2-I OVERVIEW<sup>(1)</sup>

#### THRESHOLD ISSUES

- Cognizable claims: Does the charge allege discrimination pertaining to a covered basis and a covered issue?
  - Covered bases: Does the charge allege discrimination based on an individual's protected status?
  - Covered issues: Is the issue in the charge covered by the EEO statutes?
- Covered parties: Does the charge allege that a covered individual was subjected to discrimination by a covered entity?
  - Covered individuals: Does the individual allege discrimination against an individual protected by the EEO statutes?
  - Covered entities: Was the alleged discrimination engaged in by a covered entity?
- Additional threshold requirements:
  - Timeliness: Is the charge timely?
  - Standing: Does the charging party have standing to file a charge?
  - Preclusion: Is the charge precluded by a prior state or federal court decision?

When a charge is filed with the Commission, the assigned investigator ordinarily will determine whether certain threshold requirements are satisfied *before* considering the merits of the discrimination claims.<sup>(2)</sup> This Section discusses coverage, timeliness, and other threshold issues to be considered when a charge is first filed under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), the Americans with Disabilities Act of 1990 (ADA),<sup>(3)</sup> or the Equal Pay Act of 1963 (EPA).<sup>(4)</sup> This Section does not address defenses that a respondent may raise to defeat a charge of discrimination that satisfies the threshold requirements, such as the bona fide occupational qualification defense or substantive defenses to benefits claims under the ADEA.

Typically, it is fairly simple to determine whether threshold requirements are met. Sometimes, however, an investigator will be unable to readily determine whether a particular threshold requirement has been met without additional investigation. If a charge does not satisfy threshold requirements, it should be dismissed.<sup>(5)</sup> Where satisfaction of a particular requirement is a close question, the charge should be taken and processed.

While the principles discussed in this Section apply in most jurisdictions, a few may be inconsistent with the law in a particular jurisdiction.<sup>(6)</sup> The investigator should consult with the legal unit if applicable case law differs from the Commission's position on a particular issue.

### 2-II COGNIZABLE CLAIMS

A charge filed with the Commission must present a claim that is cognizable under the laws enforced by the Commission. Specifically, the charge must allege a basis and an issue covered by the EEO statutes.

#### A. Covered Bases

A charge must allege that an individual was subjected to employment discrimination based on his/her membership in one or more of the following protected categories:

### COVERED BASES

- Title VII:
  - Race/color
  - National origin
  - Religion
  - Sex (including pregnancy)
- EPA:
  - Sex (compensation discrimination only)
- ADEA:
  - Age (40 years or older)
- ADA:
  - Disability
- All Statutes:
  - Retaliation for protected activity
    - Opposition to discrimination
    - Participation in the EEO process

The following issues can arise under any of the bases: [\(7\)](#)

- **Discrimination by a Member of the Same Protected Class:** The EEO statutes prohibit a member of a protected class from discriminating against another member of the same protected class. For example, Title VII prohibits a male supervisor from sexually harassing his male subordinates on the basis of sex. [\(8\)](#)
- **Discrimination Against a Subclass:** The EEO statutes prohibit discrimination against a subclass of a particular protected group. For example, an employer cannot refuse to hire women with preschool age children if it hires men with preschool age children. [\(9\)](#)
- **Intersectional Discrimination:** The EEO statutes prohibit discrimination against an individual based on his/her membership in two or more protected classes. For example, Title VII prohibits discrimination against African-American males even if an employer does not discriminate against white males or African-American females. [\(10\)](#) Similarly, intersectional discrimination can involve more than one EEO statute, e.g., discrimination based on age and disability, or based on sex and age. [\(11\)](#)
- **Stereotype:** Discrimination on a protected basis includes discrimination because of stereotypical assumptions about members of the protected class. For example, discrimination against a woman because she is perceived as "too aggressive" or because she uses profanity, which is seen as "unfeminine," is a form of sex discrimination. [\(12\)](#)

#### 1. Title VII

Title VII prohibits employment discrimination against *any* individual on the basis of his/her race, color, national origin, religion, or sex. Thus, for example, the statute protects Whites, African-Americans, and Asians from race and color discrimination; men and women from sex discrimination; Iranians, Cubans, and Americans from national origin discrimination; and Christians, Jews, Muslims, and atheists from religious discrimination. The following sections describe some specific kinds of charges that can be raised under the Title VII bases. [\(13\)](#)

## a. Race and Color

Title VII prohibits *both* race and color discrimination. Courts, however, do not always distinguish them.<sup>(14)</sup> Consequently, an investigator generally need not determine whether an adverse action was based on race or on color as long as the charging party alleges one or the other, or both.<sup>(15)</sup>

- **Physical characteristics:** Race discrimination includes discrimination on the basis of physical characteristics associated with a particular race, even where the charging party and the alleged discriminator are members of the same race. For example, Title VII prohibits discrimination against an Asian individual because of physical characteristics, e.g., facial features or height.<sup>(16)</sup>
- **Skin color:** Race/color discrimination includes discrimination on the basis of shade of skin color. For example, it would be unlawful for an employer to discriminate against dark- or light-skinned African-Americans.<sup>(17)</sup>
- **Association with a protected individual:** Title VII prohibits discrimination against an individual because of his/her association with another individual of a particular race or color. For example, it is unlawful to take an adverse employment action against a white employee because s/he is married to an individual who is Native American or because s/he has a mixed-race child.<sup>(18)</sup>

## b. National Origin

National origin discrimination includes discrimination based on place of origin or on the physical, cultural, or linguistic characteristics of a national origin group. Sometimes, national origin discrimination overlaps with race discrimination, and in such cases, the basis of discrimination can be categorized as both race and national origin. For example, discrimination against a Native American may be race and/or national origin discrimination.<sup>(19)</sup>

- **Accent/Language:** National origin discrimination includes discrimination on the basis of accent, manner of speaking, or language fluency.<sup>(20)</sup> It also applies to rules requiring employees to speak only English in the workplace.<sup>(21)</sup>
- **Multilingualism:** National origin discrimination may include requiring multilingual employees to perform more work than unilingual colleagues without additional compensation.
- **Citizenship:** The EEO statutes protect all employees who work in the United States for covered employers,<sup>(22)</sup> regardless of citizenship status or work authorization.<sup>(23)</sup> In addition, discrimination based on citizenship violates Title VII's prohibition on national origin discrimination if it has the purpose or effect of discriminating on the basis of national origin.<sup>(24)</sup>
- **Association with a protected individual:** National origin discrimination includes discrimination based on an individual's association with someone of a national origin group. Thus, for example, it would be unlawful to discriminate against an individual because s/he is married to someone of Middle Eastern origin.
- **National security:** Employment decisions based on national security considerations, including security clearance determinations, are subject to limited review under the EEO statutes. See [§ 2-III B.4.b.iv](#), below.

For further discussion of national origin discrimination, refer to the Commission's "Guidelines on Discrimination Because of National Origin," [29 C.F.R. Part 1606](#).

## c. Religion

The Commission defines "religion" to include moral or ethical beliefs as to right and wrong that are sincerely held with the strength of traditional religious views.<sup>(25)</sup> This broad coverage ensures that individuals are protected against religious discrimination regardless of how widespread their particular religious beliefs or practices are. It also ensures that the Commission will not have to determine what is or is not a religion, something which it would be inappropriate for the government to do. Religious discrimination also includes discrimination against someone because s/he is an atheist.<sup>(26)</sup>

**Reasonable accommodation:** Title VII requires a covered entity to provide reasonable accommodations for an individual's religious practices, such as leave to observe religious holidays, unless doing so would cause an undue hardship. [\(27\)](#)

- **Association with a protected individual:** Title VII prohibits discrimination against an individual because s/he is associated with another person of a particular religion. For example, it would be unlawful to discriminate against a Christian because s/he is married to a Muslim.

For further discussion of religious discrimination, refer to the Commission's "Guidelines on Discrimination Because of Religion," [29 C.F.R. Part 1605](#).

#### d. Sex

Title VII prohibits discrimination based on sex, including both sexual harassment, where the prohibited conduct is sexual in nature, [\(28\)](#) and sex-based harassment that is not of a sexual nature, sometimes called gender-based harassment.

**Example 1** - CP alleges that her supervisor made frequent derogatory comments about women and referred to female employees as "girls." CP has alleged discrimination based on sex covered by Title VII.

**Example 2** - CP alleges that her supervisor refused to promote her because she refused to engage in sexual relations with him. CP has alleged discrimination based on sex covered by Title VII.

- **Pregnancy:** Discrimination on the basis of sex includes discrimination because of pregnancy, childbirth, and related medical conditions. For example, an employer must provide leave and benefits for women affected by pregnancy and childbirth on the same terms as it does for other individuals similarly unable to work.

For further discussion of sex discrimination, refer to the Commission's "Guidelines on Discrimination Because of Sex," [29 C.F.R. Part 1604](#).

#### 2. EPA

The EPA prohibits compensation discrimination based on sex. [\(29\)](#) It protects both men and women. If a charge alleges compensation discrimination based on sex, the investigator should treat it as alleging a violation under both Title VII and the EPA, subject to statutory requirements such as timeliness. For a more detailed discussion of compensation discrimination covered by the EPA, refer to [29 C.F.R. Part 1620](#).

#### 3. ADEA

The ADEA prohibits age discrimination against individuals 40 years of age or older.

- **Intra-class discrimination:** The ADEA prohibits discrimination between individuals in the protected group as well as between individuals inside and outside the protected group. Thus, a 55-year-old can allege an ADEA violation where he is replaced by a 48-year-old. [\(30\)](#)
- **Individuals under 40:** The ADEA does not protect persons under age 40 from age discrimination; however, they are protected from retaliation for engaging in protected activity. See [§ 2-II A.5](#), below.
- **Years of service:** An employment action based solely on an individual's years of service constitutes disparate *treatment* under the ADEA where years of service is a proxy for age. [\(31\)](#) Such an action may also be unlawful if it has a disparate *impact* based on age. [\(32\)](#)

For a more detailed discussion of age discrimination, refer to [29 C.F.R. Part 1625](#).

#### 4. ADA

## a. Generally

In most circumstances, the ADA only prohibits employment discrimination against a "qualified individual with a disability."<sup>(33)</sup> Unlike Title VII and the ADEA, under which the charging party's status as a member of a protected group is seldom in doubt, coverage is frequently a significant issue in ADA cases. In such cases, it is necessary to determine whether the individual has a disability *and* is also qualified.

### COVERAGE UNDER THE ADA

- **Disability**
  - Physical or mental impairment that substantially limits one or more major life activities
  - Record of such an impairment
  - or
  - Being regarded as having such an impairment
- **Qualified**
  - Satisfies the requisite skills, education, experience, and other job-related requirements of the employment position that the individual holds or desires, and
  - Can perform the essential functions of such position with or without reasonable accommodation

Some investigation may be required before it can be determined whether an individual is a qualified individual with a disability. When the investigator is uncertain about whether an individual is covered, the charge should be taken and the issue investigated.

- **Mitigating measures:** The determination of whether a person has a disability must take into consideration whether the person is substantially limited in a major life activity when using a mitigating measure, such as medication, a prosthesis, or a hearing aid.<sup>(34)</sup> Both the benefits and the harmful effects of the mitigating measure should be considered.<sup>(35)</sup>
- **Qualification standards:** A qualification standard that screens out or tends to screen out an otherwise qualified individual with a disability or a class of individuals with disabilities is prohibited unless the employer shows that it is job-related and consistent with business necessity.<sup>(36)</sup>
- **Reasonable accommodation:** The ADA requires a covered entity to provide reasonable accommodation for an individual's known physical or mental limitations unless doing so would cause an undue hardship.<sup>(37)</sup>

For detailed discussion of how to assess coverage, refer to the Commission's ["Instructions to EEOC Field Offices on Analyzing ADA Charges After Supreme Court Decisions Addressing 'Disability' and 'Qualified'"](#) (1999); "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," [29 C.F.R. Part 1630](#); and [Section 902: Definition of the Term "Disability"](#), EEOC Compliance Manual, Volume II (1995) (all available at [www.eeoc.gov](http://www.eeoc.gov)).

## b. Protection of an Individual Who Is Not a Qualified Individual with a Disability

In some circumstances, the ADA protects someone who is not a qualified individual with a disability. These include:

- **Medical examinations and inquiries:** The ADA's restrictions on medical examinations and inquiries apply regardless of whether an individual has a disability.<sup>(38)</sup> See [§ 2-II B.8](#), below.
- **Confidentiality:** The ADA's provisions regarding maintenance and confidentiality of medical records apply<sup>(39)</sup>

regardless of whether an individual has a disability. See [§ 2-II B.9](#), below.

- **Association:** The ADA prohibits discrimination against a qualified individual because of his/her association with a person with a disability. For example, an employer may not refuse to hire someone who is qualified, but does not have a disability, because she has a child with a disability.
- **Retaliation:** The ADA prohibits retaliation against any individual who has engaged in protected activity. See [§ 2-II A.5](#), below.

#### 5. All Statutes: Retaliation

The EEO statutes prohibit retaliation against an individual because s/he has engaged in protected activity, which includes either: [\(40\)](#)

### PROTECTED ACTIVITY

- **Opposition:** opposing a practice made unlawful by one of the EEO statutes, or
- **Participation:** filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute

Protected activity also includes testifying or presenting evidence as part of an internal investigation pertaining to an alleged EEO violation. [\(41\)](#)

An individual is protected from retaliation for opposition to discrimination as long as s/he had a reasonable and good faith belief that s/he was opposing an unlawful discriminatory practice, and the manner of opposition was reasonable. An individual is protected against retaliation for participation in the charge process, however, regardless of the validity or reasonableness of the original allegation of discrimination.

An individual need not establish a violation of the underlying statute to be afforded protection from retaliation. For detailed guidance on the determination of whether an individual has engaged in protected activity, refer to [Section 8: Retaliation](#), EEOC Compliance Manual, Volume II (BNA) §§ 8-II B, 8-II C, 614:0001-0004 (1998).

- **Retaliation against individuals not members of the protected class subjected to discrimination:** A charging party alleging retaliation need not be a member of the protected class that was subjected to the underlying discrimination. Thus, a white individual may allege that he was retaliated against for opposing discrimination against African-Americans; a 25-year-old may allege retaliation for testifying on behalf of an ADEA claim filed by a fellow employee; [\(42\)](#) and an individual who is not disabled and/or qualified may allege that he was subjected to retaliation for filing a prior charge alleging that he was unlawfully denied a reasonable accommodation. [\(43\)](#)
- **Association with a protected individual:** The EEO statutes also prohibit discrimination against someone closely related to or associated with an individual who has engaged in protected activity. For instance, an employer may not retaliate against an employee whose spouse or friend has engaged in protected activity by firing the employee. [\(44\)](#)
- **ADA coverage of retaliation for opposition to any violation of the statute:** The ADA prohibits retaliation against an individual for opposition to any violation of the statute, not just employment discrimination. This includes opposition to discrimination in state and local government services, public accommodations, commercial facilities, and telecommunications. [\(45\)](#)

#### B. Covered Issues

The investigator must determine whether a charge alleges discrimination pertaining to an issue covered by the EEO statutes. The range of issues covered by the EEO laws is very broad, and covers any matter related to an individual's employment. Covered issues include, but are not limited to, the following:

### COVERED ISSUES

- Job decisions, employment practices, and other terms, conditions, and privileges of employment
- Harassment based on a protected basis
- Reasonable accommodation
- Referral practices
- Labor organization practices
- Practices undertaken by apprenticeships and other training programs
- Advertising and recruitment
- Medical inquiries and examinations
- Maintenance and confidentiality of medical records
- Limiting, segregating, and classifying
- Retaliation: Actions likely to deter protected activity

### 1. Job Decisions, Employment Practices, and Other Terms, Conditions, and Privileges of Employment

EEOC's coverage in this area is broad. Title VII, the ADEA, and the ADA prohibit discrimination related to job decisions, employment practices, or other terms, conditions, or privileges of employment<sup>(46)</sup> based on an individual's protected status or, in some circumstances, an individual's relationship to a protected individual.<sup>(47)</sup> In addition, the EPA prohibits compensation discrimination based on sex.<sup>(48)</sup>

Specific issues of this type that a charging party may raise include, but are not limited to, the following:

- Failure to hire
- Termination
- Denial of promotion
- Undesirable reassignment
- Awards
- Leave
- Compensation
- Benefits
- Training
- Work assignments

### 2. Harassment Based on a Protected Basis

A charging party may allege harassment based on any of the protected bases.<sup>(49)</sup> Harassment that results in a tangible employment action or is sufficiently severe or pervasive to alter the conditions of employment will establish an actionable claim under the EEO statutes.<sup>(50)</sup> For a discussion of this standard, refer to the Commission's [Enforcement Guidance on \*Harris v. Forklift Sys. Inc.\*](#) (1994) (available at [www.eeoc.gov](http://www.eeoc.gov)). See also [Enforcement Guidance on \*Vicarious Employer Liability for Unlawful Harassment by Supervisors\*](#) (1999) (available at [www.eeoc.gov](http://www.eeoc.gov)).

### 3. Reasonable Accommodation

#### a. Religion

A charging party may allege that a reasonable accommodation was denied by a covered entity for a religious observance or practice. A covered entity is required to provide a reasonable accommodation unless it can show that doing so would impose an undue hardship. A covered entity will be able to establish undue hardship if it can show that the accommodation would require more than a *de minimis* burden. *The standard for reasonable accommodation and undue hardship for disability accommodation is different from the standard for religious accommodation.* For more guidance on religious accommodation, refer to [29 C.F.R. § 1605.2](#).

## b. Disability

A charging party may also allege that a reasonable accommodation was denied by a covered entity for the known mental or physical limitations of an otherwise qualified individual with a disability. A covered entity is required to provide a reasonable accommodation unless it can show that doing so would impose an undue hardship. Undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. *The standard for reasonable accommodation and undue hardship for disability accommodation is different from the standard for religious accommodation.* For more guidance on this issue, refer to [Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act](#) (1999) (available at [www.eeoc.gov](http://www.eeoc.gov)).

### 4. Referral Practices

Title VII, the ADEA, and the ADA prohibit discriminatory employment referral practices by any covered entity, including employers, employment agencies, and unions.

### 5. Labor Organization Practices

The EEO statutes prohibit discrimination in labor organization practices, including referrals. In addition, a labor organization is prohibited from refusing to bring a grievance because of an individual's protected status,<sup>(51)</sup> or because the grievance alleges discrimination.<sup>(52)</sup>

### 6. Practices Undertaken by Apprenticeships and Other Training Programs

Title VII, the ADEA, and the ADA prohibit discrimination with respect to admission to or employment in an apprenticeship or other job training program.<sup>(53)</sup> A covered entity may not discriminate with respect to an apprenticeship or other training program, *regardless of whether the program is the product of an employment relationship.*<sup>(54)</sup> Thus, if two individuals are sexually harassed while participating in the respondent's training program but only one of them is the respondent's employee, they can both file a Title VII charge against the respondent. Discrimination in training programs might also constitute discrimination in hiring if participation in the program is required prior to employment, or regularly leads to employment.<sup>(55)</sup>

### 7. Advertising and Recruitment

Title VII, the ADEA, and the ADA prohibit discrimination based on race, color, national origin, sex, religion, age, or disability in advertisements and recruitment related to employment, referral for employment, or apprenticeships or other training.<sup>(56)</sup> Advertisements also may not contain terms or phrases that would deter members of a particular class from applying. For example, a help-wanted advertisement that uses terms such as "young," "college student," or "recent college graduate" may deter individuals 40 or over from applying, and therefore would violate the ADEA.<sup>(57)</sup>

### 8. Medical Inquiries and Examinations

The ADA prohibits a covered entity from conducting a pre-offer medical examination or making pre-offer inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of a disability.<sup>(58)</sup> However, a covered entity may make pre-offer inquiries about an individual's ability to perform the essential functions of the position in question. After it has extended a conditional offer, the entity may ask disability-related questions, or require a medical examination as long as it does so of all entering employees in the same job category, regardless of disability. If the questions or examination screens out the individual based on disability, the entity must show that the reason for doing so is job-related and consistent with business necessity. A covered

entity is also prohibited from requiring a medical examination or making a disability-related inquiry of an employee, unless the examination or inquiry is shown to be job-related and consistent with business necessity. These prohibitions protect an individual regardless of whether s/he is a qualified individual with a disability.<sup>(59)</sup>

### 9. Maintenance and Confidentiality of Medical Records

The ADA requires that medical records be maintained separately and treated as confidential except under narrow circumstances, including informing a supervisor about a necessary restriction or accommodation. These prohibitions protect an individual regardless of whether s/he is a qualified individual with a disability.<sup>(60)</sup>

### 10. Limiting, Segregating, and Classifying

The EEO statutes prohibit limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the individual because of his/her protected status.<sup>(61)</sup> Thus, for example, an employer may not provide segregated or unequal facilities.<sup>(62)</sup> It is also unlawful to have separate job classifications based on a protected category or to "channel" individuals of a certain protected class into particular jobs or career paths. For example, an employer may not have one job category for men and a separate job category for women who are performing the same work;<sup>(63)</sup> nor may an employer channel women, minorities, or individuals with disabilities into lower-paying jobs.<sup>(64)</sup>

### 11. Retaliation: Actions Likely to Deter Protected Activity

As noted above in the discussion of covered bases, the EEO statutes prohibit a covered entity from retaliating against an individual who has engaged in protected activity, which includes both participation in the EEO process and opposition to discrimination. The prohibition against retaliation is very broad and covers more than merely discriminatory treatment with respect to terms, conditions, or privileges of employment. The anti-retaliation provisions prohibit *any* adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. For example, it would be retaliatory to instigate criminal theft and forgery charges against a former employee because she filed an EEOC charge.<sup>(65)</sup> For a more detailed discussion of charges based on retaliation, refer to [Section 8: Retaliation](#), EEOC Compliance Manual, Volume II (1998) (available at [www.eeoc.gov](http://www.eeoc.gov)).

## 2-III COVERED PARTIES

A charge must allege that a covered entity took a discriminatory action against a covered individual.

### A. Covered Individuals<sup>(66)</sup>

#### COVERED INDIVIDUALS

- Employees and applicants for employment
- Former employees
- Applicants to, and participants in, training and apprenticeship programs

A charge must allege that a covered individual was subjected to discrimination. The following sections discuss who is protected by the EEO statutes.

#### 1. Who Is an "Employee"?<sup>(67)</sup>

In most circumstances, an individual is only protected if s/he was an "employee" at the time of the alleged discrimination, rather than an independent contractor, partner, or other non-employee.<sup>(68)</sup> An "employee" is "an individual employed by an employer."<sup>(69)</sup> An individual may have more than one employer.<sup>(70)</sup> The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls

the means and manner of the worker's work performance. This determination requires consideration of all aspects of the worker's relationship with the employer. Factors indicating that a worker is in an employment relationship with an employer include the following: [\(71\)](#)

- The employer has the right to control when, where, and how the worker performs the job.
- The work does not require a high level of skill or expertise.
- The employer furnishes the tools, materials, and equipment.
- The work is performed on the employer's premises.
- There is a continuing relationship between the worker and the employer.
- The employer has the right to assign additional projects to the worker.
- The employer sets the hours of work and the duration of the job.
- The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job.
- The worker does not hire and pay assistants.
- The work performed by the worker is part of the regular business of the employer.
- The employer is in business.
- The worker is not engaged in his/her own distinct occupation or business.
- The employer provides the worker with benefits such as insurance, leave, or workers' compensation.
- The worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes).
- The employer can discharge the worker.
- The worker and the employer believe that they are creating an employer-employee relationship.

*This list is not exhaustive.* Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship.

**Example 1** - CP provides computer consulting services to businesses. The Respondent contracts with CP to produce a computer data base for a flat rate. CP produces the data base at his own place of business, on his own equipment, and delivers the finished product to the Respondent. In these circumstances, CP is an independent contractor.

**Example 2** - A staffing firm hires CP and sends her to perform a long- term accounting project for a client. Her contract with the staffing firm states that she is an independent contractor. CP retains the right to work for others, but spends substantially all of her work time performing services for the client, on the client s premises. The client supervises CP, sets her work schedule, provides the necessary equipment and supplies, and specifies how the work is to be accomplished. CP reports the number of hours she has worked to the staffing firm, which pays her and bills the client. In these circumstances, despite the statement in the contract that CP is an independent contractor, she is an employee of both the staffing firm and the client.

The following sections cover specific situations in which additional considerations may be relevant in determining whether an employer-employee relationship exists.

### a. Welfare Recipients

A welfare recipient participating in work-related activities as a condition for receipt of benefits will likely be an "employee." The fact that an entity does not pay the worker a salary does not preclude the existence of an

employer-employee relationship. The determination of whether there is an employment relationship is based on the same factors outlined above.

## b. Union Stewards

A union steward who does not receive wages from the union may still be an "employee" of the union. For example, the union steward would be a union employee if s/he was reimbursed by the union for time spent performing union duties during work hours, for union dues, or for retirement contributions.<sup>(72)</sup>

## c. Volunteers

Volunteers usually are not protected "employees." However, an individual may be considered an employee of a particular entity if, as a result of volunteer service, s/he receives benefits such as a pension, group life insurance, workers' compensation, and access to professional certification, even if the benefits are provided by a third party.<sup>(73)</sup> The benefits constitute "significant remuneration" rather than merely the "inconsequential incidents of an otherwise gratuitous relationship."<sup>(74)</sup>

**Example** - CP was terminated from her position as a probationary volunteer firefighter after she failed an agility test. She alleges that the test has a disparate impact on women. Respondent claims that CP was not an employee, and, therefore, not protected by Title VII. State X provides volunteer firefighters up to \$400/month in state retirement benefits (after five years of service); death and survivors benefits; group life insurance; disability and rehabilitation benefits; health care benefits; and tuition reimbursement for courses in emergency medical and fire service techniques. These benefits are "significant remuneration" sufficient to create an employment relationship between CP and Respondent.

A volunteer may also be covered by the EEO statutes if the volunteer work is required for regular employment or regularly leads to regular employment with the same entity. In such situations, discrimination by the respondent operates to deny the charging party an employment opportunity.<sup>(75)</sup>

**Example** - CP is a volunteer counselor with the Respondent, a public interest organization, and alleges that she was subjected to sexual harassment by her supervisor and coworkers. Respondent maintains that CP is not its employee, and, therefore, not covered by Title VII. While volunteer service is not a prerequisite to employment, former volunteers are given preferential treatment when competing for vacancies against applicants who have not volunteered with Respondent. Most of Respondent's regular, paid counselors initially performed volunteer work for Respondent. In this case, volunteer service regularly leads to employment with Respondent. Therefore, CP is protected by the EEO statutes.

## d. Partners, Officers, Members of Boards of Directors, and Major Shareholders<sup>(76)</sup>

In most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees.<sup>(77)</sup> An individual's title, however, does not determine whether the individual is a partner, officer, member of a board of directors, or major shareholder, as opposed to an employee. The investigator should determine whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control.<sup>(78)</sup> If the individual is subject to the organization's control, s/he is an employee. The following factors should be considered:

## FACTORS TO BE CONSIDERED WITH REGARD TO COVERAGE OF PARTNERS, OFFICERS, MEMBERS OF BOARDS OF DIRECTORS, AND MAJOR SHAREHOLDERS

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
- Whether and, if so, to what extent the organization supervises the individual's work
- Whether the individual reports to someone higher in the organization
- Whether and, if so, to what extent the individual is able to influence the organization
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
- Whether the individual shares in the profits, losses, and liabilities of the organization

**Example 1** - CP works for an accounting firm and has the title of partner. The firm pays CP a salary, and CP is supervised by an individual at a higher level. CP receives a share of the firm's profits in addition to his salary, but he does not have any input into decisions made by the firm, which are made by higher-level partners. While CP has the title of partner, he is in fact an employee.

**Example 2** - CP is an officer with Respondent, a small corporation. She is the head of one of the corporation's divisions and has no supervisor, although her actions are reviewed by the board of directors. She does not draw a salary, but receives a share of the profits made by Respondent. CP has the right to vote on decisions taken by Respondent, although her vote does not count as much as those of other individuals. CP is not an employee, and therefore is not protected by the EEO statutes.

### 2. Coverage of Former Employees

Former employees are protected by the EEO statutes when they are subjected to discrimination arising from the former employment relationship.<sup>(79)</sup> For example, the EEO statutes would protect an individual who received a discriminatory job referral from a former employer or one whose former employer reduced the level of benefits to persons over the age of 65 in violation of the ADEA.<sup>(80)</sup>

### 3. Coverage of Training Program Applicants and Participants

An applicant to, or a participant in, a training or apprenticeship program is protected against discrimination with respect to admission to, or participation in, the training or apprenticeship program, regardless of whether the individual is an "employee."<sup>(81)</sup> Discrimination against a participant in an apprenticeship or training program that is required prior to employment, or that commonly leads to regular employment, also constitutes discrimination against an applicant for employment, and is prohibited because it has the effect of discriminatorily denying someone an employment opportunity.

**Example** - CP 1, CP 2, and CP 3 were participants in a training program provided by Respondent, and they were each removed from the program for refusing the sexual advances of the program's director. CP 1 is an employee of Respondent, and was required by Respondent to take the training. CP 2 is not an employee of Respondent, but took the training because it is required for a position with Respondent for which CP 2 would like to apply. CP 3 is taking the course because she wants to learn more about the subject matter covered by the training to help her obtain a position with an employer other than Respondent. CP 1, CP 2, and CP 3 are all covered by Title VII.

#### 4. Non-Citizens

Individuals who are employed in the United States<sup>(82)</sup> are protected by the EEO statutes regardless of their citizenship or immigration status.<sup>(83)</sup> The EEO statutes do not protect non-citizens employed outside the United States.

Claims of discrimination based on citizenship status or unfair document practices are covered by the Immigration Reform and Control Act, and are within the jurisdiction of the Office of Special Counsel for Immigration-Related Unfair Employment Practices at the Department of Justice. For detailed information on referral procedures to the Office of Special Counsel, see the [Memorandum of Understanding Between the Equal Employment Opportunity Commission and the Office of Special Counsel for Immigration-Related Unfair Employment Practices](#) (1997) (available at [www.eeoc.gov](http://www.eeoc.gov)).

#### 5. Coverage of Elected Officials and Their Personal Staff, Appointees, and Immediate Advisers<sup>(84)</sup>

- **Elected Officials:** Elected officials are specifically excluded from coverage under Title VII, the ADEA, and the EPA. The ADA does not exclude elected officials from coverage.
- **Personal Staff, Appointees, and Advisers:** Members of an elected official's personal staff, appointees on the policy making level, and immediate advisers on the exercise of constitutional or legal powers of the elected official's office are covered by Title VII, the ADEA, and the ADA; however, charges filed by those individuals are subject to modified enforcement procedures pursuant to section 321 of the Civil Rights Act of 1991.<sup>(85)</sup>

Some indicia that an individual falls under section 321 are the following:

- The elected official has chosen or appointed the individual to be on the official's personal staff and shares an immediate relationship with the individual.<sup>(86)</sup>
- The individual receives direction from the elected official and, in turn, is personally accountable to the official.<sup>(87)</sup>
- The individual is not covered by state or local civil service laws.

Although the personal staff of elected officials are protected under the EEO laws, there are limitations on a private lawsuit against a state under the ADEA. For a discussion of this issue, refer to note 100 and accompanying text, below.

**Example 1** - CP, a deputy sheriff, performed primarily clerical and secretarial duties, including serving subpoenas, typing complaints and reports, handling detectives telephone calls and correspondence, and assigning case files. The position was created and compensation was provided pursuant to state law. CP did not occupy a high place in the chain of command. She was not under the sheriff's personal direction, and promotion requests were brought to the sheriff's subordinate. There was no evidence that CP had a highly confidential and sensitive relationship with the sheriff. Under these circumstances, CP was not a member of the sheriff's personal staff. Therefore, a charge filed by CP would be processed pursuant to the procedures in 29 C.F.R. Part 1601.

**Example 2** - CP files a charge alleging that she was denied the position of Commissioner of the Human Affairs Commission (HAC) of State X on the basis of sex. The Commissioner is exempt from State X's civil service laws, and the individual selected for the position is personally appointed by the Governor. The HAC is an arm of the state's Executive Department, and was created by the legislature to encourage fair treatment of, and to prevent discrimination against, the state's citizens. The HAC has the authority to make rules and regulations, to formulate policies that effectuate the purposes of State X's human affairs laws, and to make recommendations in furtherance of those policies. These are all policymaking functions. As the head of the HAC, the Commissioner plays a major role in formulating policies and having them accepted by

the legislature. Therefore, the individual in the position of Commissioner is an appointee on the policymaking level and is covered under section 321.

## 6. ADEA Exemptions<sup>(88)</sup>

### a. Compulsory Retirement of Bona Fide Executive and High-Level Policymakers<sup>(89)</sup>

Although the ADEA generally prohibits involuntary retirement, it specifically permits the compulsory retirement of any employee in a "bona fide executive or a high policymaking position" who has attained the age of 65.<sup>(90)</sup> The exemption does not apply to federal employees.<sup>(91)</sup> An employer wishing to invoke the exemption must establish that the following elements are met:

#### REQUIREMENTS OF THE EXEMPTION FOR BONA FIDE EXECUTIVES AND HIGH POLICYMAKERS

- The individual held a bona fide executive or high policymaking position for the two-year period prior to retirement; and
- Annual retirement benefit will total at least \$44,000.

An individual who holds two or more positions during the two-year period is still subject to the exemption if both positions are executive or high policymaking positions. However, if an employer transfers an employee from a position that falls within the exemption to another position that does not fall within the exemption, it cannot compel the employee to retire.

#### i. Who Is a Bona Fide Executive or High Policymaker?

##### (a) Bona Fide Executive

The determination of whether an individual is a bona fide executive rests on the functions performed by that employee, regardless of salary. An employer seeking to demonstrate that an individual is a "bona fide executive" must establish the following:<sup>(92)</sup>

#### REQUIREMENTS TO BE A "BONA FIDE EXECUTIVE"

- Manages the organization or a department or subdivision of the organization;
- Directs the work of at least two other employees;
- Has authority to hire or dismiss other employees or his/her suggestions as to personnel decisions are given particular weight;
- Customarily and regularly exercises discretionary powers; and
- No more than 20 percent of his/her work time (or 40 percent if s/he is in a retail or service establishment) is devoted to activities unrelated to those described in requirements 1 through 4 above; this requirement does not apply if the individual is in sole charge of an independent establishment or a physically separated branch establishment, or if s/he owns at least a 20-percent interest in the enterprise by which s/he is employed.

The exemption does not apply to middle-management employees, only to top-level employees who exercise substantial managerial authority over a significant number of employees and a large volume of business. For example, the head of a significant and substantial local or regional operation of a corporation (such as a major production facility), but not the head of a minor branch, would be covered by the term "bona fide executive."<sup>(93)</sup> The heads of major departments associated with corporate headquarters operations, such as finance and legal, would also typically be covered by the term "bona fide executive."

### (b) High Policymaker

The term "high policymaking position" refers to certain top-level employees who are not "bona fide executives," but who nonetheless play a significant role in developing and implementing corporate policy. For example, a chief economist or chief research scientist may have little line authority, but still have a significant impact on policy decisions by making recommendations to top-level executives based upon the evaluation of economic or scientific trends.

**Example 1** - At age 65, CP was required to retire from his position as Executive Vice President for Corporate Affairs of a bank. CP reported directly to the CEO, had direct access to the bank's decisionmakers, and attended weekly meetings of the Senior Officers Group. In addition, he alone was responsible for monitoring state and local federal legislative and regulatory developments, recommending policies to ensure compliance with them, and working closely with state legislators on legislation important to the savings bank industry. He also monitored and coordinated important tax litigation involving the bank, including recommending legal counsel, and coordinated bank policy on interest rates for passbook savings accounts. CP falls within the exemption for high policymakers, and therefore, Respondent may require his retirement at age 65. *Morrissey v. Boston Five Cents Sav. Bank*, 54 F.3d 27, 32-33 (1st Cir. 1995).

**Example 2** - CP files a charge after being required to retire from his position as Chief Labor Counsel of a corporation upon reaching the age of 65. CP was an in-house attorney specializing in labor law, and exercised relatively minor supervisory duties over four other labor law attorneys. He was far removed from the head of the Legal Department, being one of six attorneys who reported to one of eight Assistant General Counsel, who, in turn, reported to the General Counsel. CP also had only a modest impact on policy, had virtually no access to the high policymaking levels of management, and attended meetings of certain committees primarily for the purpose of providing legal advice. Respondent was not permitted to compel CP's retirement because he did not qualify as a bona fide executive or high policymaker. *Whittlesey v. Union Carbide Corp.*, 567 F. Supp.1320, 1321-28 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 724 (2d Cir. 1984).

## ii. Retirement Benefits Computation

In addition to being a bona fide executive or a high policymaker, an employee subject to this exemption must be entitled to retirement benefits of at least \$44,000 yearly. This figure applies regardless of the date of retirement and is not adjusted to account for inflation. The benefits must be "nonforfeitable," meaning that the plan may not provide circumstances under which the benefits would be reduced to less than \$44,000.

The benefits can be provided in any of several forms to satisfy the requirement, including:

- Yearly payments that add up to at least \$44,000 per year; or
- A lump sum payment with which it would be possible to purchase a single life annuity yielding at least \$44,000 per year.

Payment of benefits must begin within 60 days of the effective date of retirement unless the employee elects to

defer receipt of benefits beyond expiration of the 60-day period.

In calculating the value of benefits, only amounts provided by the employer and earnings thereon under the terms of a pension, profit-sharing, savings, or deferred compensation plan are counted. Amounts attributable to Social Security, employee contributions, contributions of prior employers, and rollover contributions are excluded.

For further guidance on calculating the retirement benefit under the exemption for bona fide executives and high policymakers, refer to [29 C.F.R. § 1627.17](#).

## b. Firefighters and Law Enforcement Officers

The ADEA exempts certain hiring and discharge decisions pertaining to firefighters and law enforcement officers that are made pursuant to a state or local law.

- **Law in effect on March 3, 1983, or enacted after September 30, 1996:** Under most circumstances, the local law must have been in effect on March 3, 1983, *or* have been enacted after September 30, 1996. [\(94\)](#)
  - A law in effect on March 3, 1983, or enacted after September 30, 1996, may establish any maximum age for hiring.
  - A law enacted after September 30, 1996, may not establish a retirement age lower than 55. A law in effect on March 3, 1983, may establish any retirement age.
- **Law in effect after March 3, 1983, and enacted before October 1, 1996:** A law that went into effect after March 3, 1983, and was enacted before October 1, 1996, may be no more restrictive than one in place in March 3, 1983.

**Example** - Pursuant to a local ordinance passed in 1990, CP was discharged from her position as a firefighter in March 1999 upon reaching the retirement age of 55. Because the law was not in effect on March 3, 1983, or enacted after September 30, 1996, the discharge decision does not fall under the exemption.

## c. Programs Designed for Individuals with "Special Employment Problems"

The ADEA does not apply to federally funded or state programs designed to enhance employment of individuals with "special employment problems." [\(95\)](#) Such programs include those designed to enhance employment of the long-term unemployed, individuals with disabilities, members of minority groups, older workers, or youth. For additional guidance on this exemption, refer to Policy Statement on *Specific Exemptions from Coverage Pursuant to § 9 of the Age Discrimination in Employment Act*, EEOC Compliance Manual, Volume II (1988).

## B. Covered Entities

### COVERED ENTITIES

- Employers
- Employment agencies
- Labor organizations

The prohibitions under Title VII, the ADEA, and the ADA generally apply to employers, employment agencies, and labor organizations. [\(96\)](#) The EPA applies to employers and labor organizations. The requirements for coverage for each of these entities are discussed below.

## 1. Requirements for Coverage

### a. Employers

#### i. Title VII, the ADEA, and the ADA

"Employers" include private sector and state and local government entities.<sup>(97)</sup> An employer is covered under Title VII or the ADA if it has 15 or more employees for each working day in each of 20 or more calendar weeks in the same calendar year as, or in the calendar year prior to when, the alleged discrimination occurred.<sup>(98)</sup> The requirements for coverage of a private sector employer under the ADEA are the same, except that it must have 20 or more employees. A state or local government employer is covered under the ADEA regardless of its number of employees.<sup>(99)</sup>

Importantly, the Supreme Court has ruled that under the ADEA, private age discrimination suits against states are impermissible unless the state waives its sovereign immunity.<sup>(100)</sup> However, the EEOC's enforcement authority remains unaffected, and the EEOC may continue to sue states to obtain relief for individuals. Therefore, investigators should continue to take charges against states under the ADEA. If a charge is filed against a state under the ADA or the EPA, the investigator should consult the legal unit.

To be covered, an employer must also be engaged in an "industry affecting commerce"; however, this requirement is rarely at issue, and it can be assumed that an employer having the requisite number of employees for the relevant time frame will also meet the commerce requirement.

A covered employer also includes an agent of an employer that meets the requirements under the appropriate statute. Coverage of agents is discussed at § 2-III B.2, below.

Under Title VII, the ADEA, and the ADA, an employer is covered if it has an employment relationship with the requisite number of employees for the relevant number of weeks, *regardless of the daily work schedules of the individual employees*.<sup>(101)</sup> For example, an employee who only works on Mondays and Wednesdays is counted as an employee for the entire week because s/he continues to have an employment relationship with the employer throughout the week. An individual is counted as an employee for each working day after hire and until employment terminates.

#### COUNTING EMPLOYEES

To count employees, determine the number of employees on an employer's payroll; exclude individuals who are not employees, e.g., discharged/former employees or independent contractors. Add to that figure any other individuals who have an employment relationship with the employer, such as temporary or other staffing firm workers. Where a charge is filed during the early part of the calendar year, it may be necessary to wait until later during the same year to assess employer coverage.

In determining whether the 20-week requirement is met, only calendar weeks when the employer had the requisite number of employees for each workday of that week are counted. However, the 20 weeks need not be consecutive. In addition, an employee who started or ended employment during the middle of a calendar week is counted as an employee on the days when s/he had an employment relationship with the employer.<sup>(102)</sup>

The employer is not required to have the statutory number of employees at the time of the alleged violation or before it, as long as the requirement is met by the end of the calendar year in which the discrimination occurred. For example, a newly formed company may have been in operation for only a short period at the time that a disputed action transpired. However, it would be covered if it met the 20-week requirement during the remainder of the same calendar year.<sup>(103)</sup>

**Example** - CP filed a charge alleging that she was not hired because of her sex and age on March 1, 1998. A review of Respondent's personnel records reveals the following:

January 1 - April 1, 1998: 14 employees  
 April 2 - August 1, 1998: 21 employees  
 August 2 - November 1, 1998: 14 employees  
 November 2 - December 31, 1998: 19 employees

The records reveal that Respondent had 15 or more employees for at least 20 calendar weeks during 1998, the year during which the alleged discrimination occurred. Therefore, it is a covered employer under Title VII. However, it is not covered by the ADEA because it did not have 20 or more employees for at least 20 weeks.

## ii. EPA

EPA coverage is extremely broad. The EPA applies to employers "engaged in commerce or in the production of goods for commerce" with an annual gross volume of sales or business done of at least \$500,000.<sup>(104)</sup> Health and educational institutions and government agencies are covered by the EPA, regardless of size. There are a few narrow exemptions for employees in certain professions.<sup>(105)</sup> In the unlikely event that EPA coverage is challenged by the respondent, the investigator should consult the legal unit.

## iii. Special Issues Regarding Multiple Entities<sup>(106)</sup>

### (a) Integrated Enterprises

If an employer does not have the minimum number of employees to meet the statutory requirement, it is still covered if it is part of an "integrated enterprise" that, overall, meets the requirement. An integrated enterprise is one in which the operations of two or more employers are considered so intertwined that they can be considered the single employer of the charging party. The separate entities that form an integrated enterprise are treated as a single employer for purposes of both coverage and liability. If a charge is filed against one of the entities, relief can be obtained from any of the entities that form part of the integrated enterprise.

The factors to be considered in determining whether separate entities should be treated as an integrated enterprise are:

- **The degree of interrelation between the operations**
  - Sharing of management services such as check writing, preparation of mutual policy manuals, contract negotiations, and completion of business licenses
  - Sharing of payroll and insurance programs
  - Sharing of services of managers and personnel
  - Sharing use of office space, equipment, and storage
  - Operating the entities as a single unit
- **The degree to which the entities share common management**
  - Whether the same individuals manage or supervise the different entities
  - Whether the entities have common officers and boards of directors
- **Centralized control of labor relations**
  - Whether there is a centralized source of authority for development of personnel policy

- Whether one entity maintains personnel records and screens and tests applicants for employment
- Whether the entities share a personnel (human resources) department and whether inter-company transfers and promotions of personnel are common
- Whether the same persons make the employment decisions for both entities
- **The degree of common ownership or financial control over the entities**
  - Whether the same person or persons own or control the different entities
  - Whether the same persons serve as officers and/or directors of the different entities
  - Whether one company owns the majority or all of the shares of the other company<sup>(107)</sup>

The purpose of these factors is to establish the degree of control exercised by one entity over the operation of another entity. All of the factors should be considered in assessing whether separate entities constitute an integrated enterprise, but it is not necessary that all factors be present, nor is the presence of any single factor dispositive. The primary focus should be on centralized control of labor relations. It should be noted that while this issue often arises where there is a parent-subsidary relationship, a parent-subsidary relationship is not required for two companies to be considered an integrated enterprise.<sup>(108)</sup>

**Example** - CP applies for a position with ABC Corp., is rejected, and files a charge alleging sex and age discrimination.

ABC Corp. is a computer training center. Jane Smith is its president and sole proprietor. She is also the president and sole proprietor of three other computer training centers, and of Computer Training, Inc. (CTI), which manages ABC Corp. and the three other centers. Smith is personally involved in the management of each of these companies and makes personnel decisions for the training centers in her capacity as president of CTI and as president of the individual centers. CTI pays the bills for each of the training centers, handles payroll, and negotiates contracts for the centers. CTI created a personnel handbook for use by each of the training centers. The profits of the individual training centers are pooled into one bank account in the name of CTI, which maintains a centralized management account allowing the profits of more successful training centers to cover the losses of less successful ones.

Under these circumstances, ABC, CTI, and the other training centers are an integrated enterprise, and should be considered a single employer for purposes of coverage and liability under the EEO statutes.

### **(b) Joint Employers**

The term "joint employer" refers to two or more employers that are unrelated or that are not sufficiently related to qualify as an integrated enterprise, but that each exercise sufficient control of an individual to qualify as his/her employer.<sup>(109)</sup> The "joint employer" issue frequently arises in cases involving temporary staffing agencies. A charge must be filed against each employer to pursue a claim against that employer.

To determine whether a respondent is covered, count the number of individuals employed by the respondent alone *and* the employees jointly employed by the respondent and other entities. If an individual is jointly employed by two or more employers, then s/he is counted for coverage purposes for *each* employer with which s/he has an employment relationship.

If a charge is filed by a contract worker who is jointly employed by a private-sector employer and a federal agency, s/he should be notified that a claim against the federal agency must be filed with the agency's EEO office.

For more guidance on the determination of whether an entity qualifies as a joint employer, refer to the Commission's Enforcement Guidance on *Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, Questions 1-2, N:3319-21 (BNA) (1997) (available at [www.eeoc.gov](http://www.eeoc.gov)) (discussing factors considered in determining whether an entity has sufficient control to qualify as an individual's employer).

**Example 1** - CP files a charge against ABC Corp alleging that she was subjected to religious harassment. ABC Corp. has 13 regular employees and five employees assigned by a temporary agency, who are jointly employed by ABC and the temporary agency. ABC is covered under Title VII because it has 18 employees.

**Example 2** - CP 1 files a charge against ABC Corp under the ADEA. CP 2 files a charge against Smith Corp under Title VII. ABC is the sole employer of 17 employees. ABC also employs 5 employees who are jointly employed by Smith. Smith is the sole employer of 12 employees. Under the circumstances, ABC is covered under the ADEA, and Smith is covered under Title VII.

## b. Employment Agencies

An entity is a covered employment agency if it regularly procures employees for at least one covered employer, whether or not it receives compensation for those services. [\(110\)](#) An employment agency that regularly procures employees for at least one covered employer is covered with respect to all of its employee procurement and referral activities, including its referrals to a non-covered employer. [\(111\)](#) Coverage extends to agents of such an employment agency. For a discussion of agents, refer to [§ 2-III B.2](#), below. An employee of a covered employment agency may file a charge against the agency as his/her employer even if it does not have the requisite number of employees for employer coverage under the relevant EEO statute. [\(112\)](#)

**Example 1** - CP files a charge alleging that she was not referred by Respondent, an employment agency, for a position with ABC Corp., which has 17 employees, because of her age. Respondent also regularly procures employees for XYZ Corp., which has over 50 employees. Although ABC is not a covered employer under the ADEA, Respondent also regularly procures employees for XYZ, which is a covered employer. Therefore, Respondent is a covered employment agency, and is prohibited from discriminating in any of its referral and procurement activities, including those conducted with ABC, a non-covered employer.

**Example 2** - CP 1 files a charge alleging that she was not hired because of her religion by Respondent, an employment agency with 12 employees. CP 2 files a charge alleging that she was not referred by Respondent for a position with Smith Corp., which has 17 employees, because of her race. Respondent regularly procures employees for Smith Corp. Therefore, Respondent is covered with respect to the claim raised by CP 1 and with respect to the claim raised by CP 2.

## c. Labor Organizations

A labor organization is covered under Title VII, the ADEA, and the ADA if it meets one of the following two tests:

- It represents the employees of an employer; [\(113\)](#) and

It has 15 or more members (25 or more under the ADEA) or maintains a hiring hall which procures employees for at least one covered employer. [\(114\)](#)

or

- It is engaged in an industry affecting commerce. [\(115\)](#)

This latter basis for union coverage will generally bring a union representing federal employees under the EEO statutes. [\(116\)](#) A labor organization is covered under the EPA if it represents the employees of at least one covered

employer. [\(117\)](#)

Most labor organizations, including those representing federal employees, are covered under at least one of the above definitions of "labor organization." Where coverage is disputed and cannot be easily assessed, the investigator should contact the legal unit. Agents of labor organizations may also be covered. For a discussion of agents, refer to [§ 2-III B.2](#), below.

It is the EEOC's position that an employee of a covered labor organization may file a charge against it as his/her employer even if it does not have the requisite number of employees for employer coverage under the relevant EEO statute. However, this position has generally been rejected by the courts. [\(118\)](#) Therefore, if a charging party files a charge raising this coverage issue, the investigator should consult the legal unit.

Where the respondent is a non-federal union, the charging party should be advised that s/he may also file a charge with the National Labor Relations Board (NLRB). Where the respondent is a federal union (but not a postal union), the investigator should notify the charging party that s/he can also file an unfair labor practice charge with the Federal Labor Relations Authority. An unfair labor practice charge against a postal union is filed with the NLRB.

**Example** - CP 1 files a charge alleging that she was not hired by the Respondent, a labor organization, because she has a mental disability. CP 2 files a charge alleging that Respondent refused to bring her grievance alleging that she was subjected to age-based harassment. Respondent has only nine employees; however, it is a covered labor organization under both the ADA and the ADEA. Therefore, Respondent is covered with respect to the claims raised by CP 1 and with respect to the claim raised by CP 2.

Title VII, the ADEA, and the ADA prohibit a covered labor organization from engaging in discriminatory membership practices and other discriminatory activities related to its status as a labor organization, e.g., failing to provide a sign language interpreter to a bargaining unit employee with a hearing disability.

The EPA prohibits a labor organization from causing or attempting to cause a covered employer to violate the statute.

## 2. Agents

### a. Liability for Actions Taken by an Agent

A covered entity is as liable for the actions of its agents as it would be for actions taken by itself. An agent is an individual or entity having the authority to act on behalf of, or at the direction of, the covered entity. [\(119\)](#) Examples of agents include:

- Supervisors
- Union officials
- Insurance providers [\(120\)](#) or benefits administrators [\(121\)](#)
- Pension plan administrators [\(122\)](#)

### b. Liability of Agents

An entity that is an agent of a covered entity is liable for the discriminatory actions it takes on behalf of the covered entity. [\(123\)](#) For example, an insurance company that provides discriminatory benefits to the employees of a law firm may be liable under the EEO statutes as the law firm's agent. [\(124\)](#)

Most of the federal appeals courts have held that supervisors may not be held individually liable for discrimination because they do not meet the definition of the term "employer." [\(125\)](#) If a charge is filed against an individual supervisor, the investigator should consult the legal unit. The investigator should also consult with the legal unit regarding potential charges against state officials for injunctive relief. See note 100 and accompanying text, above (discussing charges against states).

Of course, a sole proprietor who employs at least 15 or 20 employees (depending upon the applicable statute) would be liable as a covered "employer."<sup>(126)</sup>

### 3. Specific Issues Related to Coverage of Employers

#### a. Third-Party Interference with Employment Opportunities

##### i. Generally

In addition to prohibiting employers from discriminating against their own employees, Title VII, the ADEA, and the ADA prohibit a covered third-party employer from discriminatorily interfering with an individual's employment opportunities with another employer.<sup>(127)</sup> While the third-party employer might, in some cases, be a joint employer, the principle described here applies even where an employment relationship has never existed between the third-party employer and the individual. This kind of liability is commonly known as "third-party interference." The ADA specifically prohibits interference with rights protected under the statute.<sup>(128)</sup> While Title VII and the ADEA do not include comparable provisions, they prohibit discrimination against "individuals." Therefore, a charging party need not necessarily be an employee of the employer that is accused of discriminatory interference.<sup>(129)</sup>

The EPA only protects individuals who are employed by the respondent employer from sex-based compensation discrimination because it only prohibits discrimination against the respondent's own employees.<sup>(130)</sup>

For the third-party interference theory to be available against an employer, two requirements must be met:

#### REQUIREMENTS OF THIRD-PARTY INTERFERENCE

- Under Title VII and the ADEA, the employer accused of discriminatory interference (respondent) must be a covered employer. Under the ADA, the respondent need not be a covered employer.
  - Entity with which the charging party has or seeks an employment relationship need not be a covered employer.
- Respondent must be accused of interfering with an employment relationship.
  - Interference with an independent contracting or other non-employment relationship is not covered.

A federal agency may not be held liable for discriminating against another party's employees under Title VII or the ADEA because those statutes only prohibit federal agencies from discriminating against "employees" and applicants for employment. A federal agency may be held liable for discriminating against another party's employees *based on disability*, however, because the Rehabilitation Act incorporates section 503 of the ADA, which prohibits interference with any *individual's* rights under the chapter.<sup>(131)</sup>

**Example 1** - Respondent is a hospital that receives emergency room services from ABC Medical Corp. CP is employed by ABC as the director of Respondent's emergency room. CP files a charge alleging that Respondent discriminated against her on the basis of age and sex by asking ABC to replace her with a younger male director. Respondent is a covered employer under Title VII and the ADEA. Under these circumstances, CP has a Title VII and ADEA claim against Respondent for interfering with her employment relationship with ABC. If Respondent exercises sufficient control over CP, it may also be liable as a joint employer.

**Example 2** - Respondent is a contract firm that provides cleaning services for XYZ

Corp. CP, an employee of XYZ Corp., files a charge against Respondent alleging that she was sexually harassed by one of its supervisors. Respondent is a covered employer under Title VII. Under these circumstances, CP has a Title VII claim against Respondent for interfering with her employment relationship with XYZ. Of course, CP may also have a claim against her own employer if, after bringing the harassment to its attention, it failed to take prompt and appropriate corrective action.

**Example 3** - Respondent is an insurance company that provides insurance for the employees of Smith, Inc. CP, an employee of Smith, Inc., files a charge alleging that Respondent violated the ADA by providing a lower level of coverage for AIDS-related illnesses. Under the circumstances, CP has an ADA claim against Respondent for providing discriminatory insurance benefits arising out of his employment relationship with Smith, Inc. Because the charge is filed under the ADA, it is not necessary that Respondent be a covered employer.

For more guidance on the third-party interference theory, refer to Enforcement Guidance on *Control by Third Parties over the Employment Relationship Between an Individual and His/Her Direct Employer*, EEOC Compliance Manual, Volume II, Appendix 605-F.

## ii. Professional/Licensing Boards

The third-party interference theory generally cannot be applied to a state agency that licenses or certifies individuals to work in a particular profession under the EEO statutes where it is exercising its police power in granting and denying licenses. [\(132\)](#) However, a licensing agency could be liable under the third-party interference theory when it exercises a function beyond merely its police powers.

**Example** - A state commission issues licenses to and rents stall space for horse trainers. Under such circumstances, the commission would not be covered as an employer in its capacity as a licensor but might be covered under the third-party interference theory in its capacity as a renter of stall spaces, if it met other requirements for coverage. *Puntolillo v. New Hampshire Racing Comm n*, 375 F. Supp. 1089 (D.N.H. 1974).

If a charge against a licensing agency alleges disability-based discrimination, the charging party should be notified that s/he might have a claim under Title II of the ADA, and referred to the Department of Justice.

Even if a licensing board is not liable under the third-party interference theory, it may still be liable under Title VII or the ADA. Section 707 of Title VII, which is incorporated in the ADA, authorizes the Commission to take enforcement action whenever it has reasonable cause to believe that *any person* or group of *persons* is engaged in a pattern or practice that denies others the rights provided by the statute, and to investigate a charge of such a pattern or practice of discrimination. [\(133\)](#) A pattern or practice of discrimination refers to a repeated routine of discrimination, and not an isolated incident. For example, an allegation of selective enforcement of a licensing requirement against African-Americans or some other protected class would constitute an allegation of pattern or practice discrimination covered by Section 707.

## iii. Correctional Facilities

A prison does not have an employment relationship with its own prisoners. Thus, its supervision of prisoners performing work in the prison is not subject to the EEO statutes, even if the work is being performed for monetary or other compensation. [\(134\)](#) Nonetheless, if a correctional institution is a covered employer, it would be prohibited from discriminatorily interfering with an inmate's employment with an outside employer through a work release

program. [\(135\)](#) For example, Title VII would prohibit a correctional institution with 15 or more employees from using race as a factor in allowing inmates to work with outside employers through a work release program.

## b. Successor Liability

A business that acquires another may be subject to liability under the EEO statutes for discrimination that was committed by the entity that it succeeded, even if the successor is not named in the charge. Whether the successor should be held liable for the discriminatory acts of its predecessors must be determined on a case-by-case basis, and requires a balancing of the interests of the employer and the employee. The following factors should be considered:

- Whether the successor entity had notice of the charge;
- Whether the predecessor can provide relief;
- Whether the same business operations have continuously been in place:
  - Whether the successor used the same plant, workforce, management, and/or equipment and means of production as the predecessor;
  - Whether the same jobs exist under substantially the same working conditions; and
  - Whether the successor produces the same product.

Generally, the successor can only be held liable if it had notice of the charge *and* the predecessor is unable to provide relief. [\(136\)](#) The third factor, continuity of business operations, requires a weighing of the criteria listed above.

**Example 1** - CP alleges that Respondent discharged him from his position as a salesman based on his national origin. Respondent sells its sales operations to ABC Corporation, but remains in business as a manufacturer. CP seeks back pay for the period from his discharge through the date he got another position with XYZ Corporation. Because Respondent is able to provide relief, ABC should not be held liable.

**Example 2** - Same as above except that CP seeks reinstatement. Because only ABC can provide reinstatement, it can be held liable and can be required to provide that remedy as long as it had notice of the charge.

**Example 3** - CP alleges that she was sexually harassed by a supervisory employee of Respondent, an electronics manufacturer. After CP files her charge, Respondent sells its assets and operations to Smith Corp., a competitor, which has notice of the charge at the time of the sale. After the sale, Respondent is declared bankrupt. ABC retains most of the employees who formerly worked for Respondent and continues Respondent's electronics manufacturing business. Under these circumstances, the requirements for successor liability are met, and Smith Corp. can be held liable for the discriminatory acts of Respondent.

## c. Foreign Employers in the United States and American Employers Overseas

For detailed guidance on the issues discussed below, refer to Enforcement Guidance on *Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States* (1993); and Policy Guidance on *Application of the Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Pay Act of 1963 (EPA) to American Firms Overseas, Their Overseas Subsidiaries, and Foreign Firms* (1989).

## i. Foreign Employers in the United States

### (a) Generally

A foreign employer doing business in the United States is generally covered by the EEO statutes to the same extent as an American employer. However, in some cases, such an employer may allege that it is party to a treaty that permits it to prefer its own nationals for certain positions. If this defense is raised, the investigator should determine the following:

#### IS A FOREIGN EMPLOYER PROTECTED BY A TREATY?

- 1) Is the respondent protected by the treaty?
- 2) If so, are the employment practices at issue covered by the treaty; and
- 3) If so, what is the impact of the treaty on the application of the relevant EEO statute?

The investigator should contact the Office of Legal Counsel for assistance.

In determining whether a U.S.-based branch of a foreign employer is covered, employees based abroad should also be counted if the U.S. and foreign branches constitute an integrated enterprise.<sup>(137)</sup> Thus, if a Japanese employer has a U.S.-based branch with only 10 employees, it would still be covered by Title VII if the U.S. employer is integrated with a foreign branch with at least five employees. For a discussion of integrated enterprises, refer to [§ 2-III B.1.a.iii\(a\)](#), above.

### (b) Embassies

The embassy of a foreign state located within the United States is generally immune from United States courts under the Foreign Sovereign Immunities Act (FSIA).<sup>(138)</sup> The EEO statutes apply to personnel of an embassy of a foreign state located within the United States only in limited circumstances:

- **American citizens and third-country nationals:** American citizens and third-country nationals, i.e., citizens of neither the United States nor of the foreign state claiming immunity, are covered by the EEO statutes.<sup>(139)</sup>
- **Citizens of foreign state claiming immunity under FSIA if engaged in commercial activity:** The FSIA provides an exception from immunity for commercial activity.<sup>(140)</sup> Thus, a citizen of the foreign state claiming immunity is covered by the EEO statutes if s/he is engaged in commercial activity.<sup>(141)</sup> The employment of diplomatic, civil service, or military personnel is governmental, whereas the employment of other personnel, e.g., laborers, clerical, or public relations officials, is commercial.<sup>(142)</sup>

## ii. American Employers Overseas

Title VII, the ADEA, and the ADA generally prohibit discrimination against U.S. citizens by American employers operating overseas.<sup>(143)</sup> The EPA does not apply overseas. An employer operating abroad that is incorporated in the United States will generally have sufficient ties to the United States to be deemed an American employer. Where an employer is not incorporated in the United States or it is not incorporated at all, e.g., a law firm, various factors should be considered to determine if the employer has sufficient connections with the United States to make it an American employer. Factors to consider include the following:

- The employer's principal place of business, i.e., the primary place where factories, offices, and other facilities are located
- The nationality of dominant shareholders and/or those holding voting control

- The nationality and location of management

The EEO statutes also prohibit discrimination by a foreign employer that is controlled by an American employer. The determination of whether an American employer controls a foreign employer is based on the following: [\(144\)](#)

#### CONTROL OF A FOREIGN EMPLOYER BY AN AMERICAN EMPLOYER

- Interrelation of operations
- Common management
- Centralized control of labor relations
- Common ownership or financial control of the American employer and the foreign employer

Refer to [§ 2-III B.1.a.iii\(a\)](#) (integrated enterprises), above, for a discussion of how to apply these factors.

#### 4. Exemptions and Exclusions from Coverage

##### a. Entities that Are Exempt from Coverage for Any Employment Decision

###### i. Title VII and ADA Exemption of American Indian Tribes

Title VII and the ADA do not apply to American Indian tribes, which are excluded from the definition of "employer," but may apply to a tribally owned business. The critical factors in determining whether a tribally owned business is exempt are whether it performs essentially governmental functions on the tribe's behalf and whether it is integrated with and controlled by the tribe. [\(145\)](#)

Neither the ADEA nor the EPA excludes American Indian tribes from the definition of "employer." Therefore, those statutes presumptively apply to American Indian tribes [\(146\)](#) unless their application would infringe on treaty rights or tribal sovereignty. [\(147\)](#)

###### ii. Bona Fide Private Membership Clubs [\(148\)](#)

Title VII and the ADA do not apply to a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954. Bona fide private membership clubs are not exempt under the ADEA or EPA.

To fall under the Title VII/ADA exemption, an organization must show both that it is tax-exempt and that it is a bona fide private membership club. An organization is deemed a bona fide private membership club if it meets each of the following requirements:

#### BONA FIDE PRIVATE MEMBERSHIP CLUB REQUIREMENTS

- The organization is a club in the ordinary sense of the word;
- The organization is private; and
- There are meaningful conditions of limited membership.

### (a) Definition of "Club"

A "club" is defined as follows:

an association of persons for social and recreational purposes or for the promotion of some common object (as literature, science, political activity) usually jointly supported and meeting periodically, membership in social clubs usually being conferred by ballot and carrying the privilege of use of the club property. [\(149\)](#)

### (b) Is the Club Private?

In determining whether a club is private, the Commission considers the following:

- The extent to which it limits its facilities and services to club members and their guests
- The extent to which and/or the manner in which it is controlled or owned by its membership
- Whether and, if so, to what extent and in what manner it publicly advertises to solicit members or to promote the use of its facilities or services by the general public

The presence or absence of any one of these factors is not determinative, however, and the question as to whether an organization is private must be addressed on a case-by-case basis.

### (c) Meaningful Conditions of Limited Membership

Finally, in determining whether the requirement of meaningful conditions of limited membership is met, the Commission will consider both the size of the membership, [\(150\)](#) including the existence of any limitations on its size, and membership eligibility requirements.

**Example 1** - Respondent was founded to promote the popularity of golf as a recreational activity. It has 200 members, who provide all operating revenue. It is exempt from taxation under section 501(c) of the Internal Revenue Code. Members have free use of the organization's facilities, including the golf course, health spa, meeting rooms, and cafeteria. Nonmembers may only use the facilities at the request and in the presence of a member. Applicants for membership must be at least 25 years of age, have an undergraduate degree, know at least five current members, and be nominated by a current member, who must explain how s/he knows the nominee and the reason the nominee should be admitted for membership. Respondent has admitted most but not all applicants. Respondent qualifies as a "bona fide private membership club" and would not be covered by Title VII or the ADA.

**Example 2** - Same facts as above, except that nonmembers may use the facilities without a sponsoring member by paying an extra fee. Applicants for membership need only know one current member, and Respondent has admitted all applicants for membership. Respondent has not established that it is private, nor that it has meaningful conditions of limited membership; therefore, it is not a bona fide private membership club.

### iii. Public International Organizations

Public international organizations, such as the World Bank, the International Monetary Fund, and the United Nations are generally not covered by the EEO statutes because of immunity conferred under international and United States law. An organization will be immune if is included on the list of organizations entitled to immunity set out in the International Organizations Immunities Act [\(151\)](#) unless immunity has been waived by the organization or by Presidential Executive Order. If it is unclear whether an organization's immunity has been waived, the charge should be referred to the legal unit for a determination of whether the EEO statutes can be applied to the organization. For more detailed guidance on processing these charges, refer to Enforcement

## b. Partial Exemptions

### i. Exemptions for Discrimination Based on Religion

Title VII does not apply to discrimination by a religious organization on the basis of religion in hiring and discharge. The exemption applies to an organization whose "purpose and character are primarily religious."<sup>(152)</sup> This determination requires a weighing of all significant religious and secular characteristics.<sup>(153)</sup>

The exemption applies to all positions; however, discrimination is not permitted on any basis other than religion.<sup>(154)</sup> In addition, the exemption only applies to hiring and discharge, and does not apply to terms, conditions, or privileges of employment, such as wages or benefits.<sup>(155)</sup>

A separate "ministerial" exception based on the First Amendment prevents interference between a religious institution and its ordained clergy, an individual effectively acting in that capacity, or an individual intimately involved in religious indoctrination.<sup>(156)</sup> Thus, the EEO statutes do not apply to an employment decision regarding an individual who falls within the exception.<sup>(157)</sup> For a detailed discussion of the ministerial exemption and other constitutional limitations on regulating religious organizations, refer to *Religious Organizations that Pay Women Less Than Men in Accordance with Religious Beliefs* (1990) (religious organization may not pay women less than men even if policy is in accordance with its religious beliefs).

### ii. Business on or near an American Indian Reservation

An entity on or near an American Indian reservation may grant preferential treatment to a Native American living on or near the reservation with respect to a publicly announced employment practice. "Near" is defined as being located within reasonable commuting distance. Employment practices in which preferential treatment may be granted include hiring, promotion, transfer, reinstatement, and reduction in force. The exemption permits employers to prefer Native Americans over non-Native Americans, but not to prefer members of one tribe over members of another tribe.<sup>(158)</sup> The preference extends to former reservations in Oklahoma and Native Alaska land held under provisions of the Alaska Native Claims Settlement Act.<sup>(159)</sup> To satisfy the public announcement requirement, an entity must disclose that preferential treatment will be given with respect to a particular employment practice.<sup>(160)</sup> For example, if an employer wishes to grant preferential treatment to Native Americans applying for a certain vacancy, then it must state that it is doing so in the same notice that announces the vacancy.

### iii. Veterans' Preference

Title VII does not apply to a decision taken because of a veterans' preference created by a federal, state, or local law.<sup>(161)</sup> Thus, even though a veterans' preference may, for example, disproportionately exclude women, it does not violate Title VII if it is a legislatively enacted preference.<sup>(162)</sup> In contrast, a veterans' preference that is *voluntarily* provided by an employer may violate EEO laws, including Title VII, if it has the purpose or effect of discriminating on a prohibited basis.<sup>(163)</sup>

The ADA, the ADEA, and the EPA do not exempt employment actions that are taken based on a veterans' preference.<sup>(164)</sup>

### iv. National Security

Title VII does not prohibit termination, or refusal to hire or refer for jobs where an individual does not meet the requirements for a position that are imposed in the interest of national security under any security program in effect under statute or Executive Order. [\(165\)](#) The respondent must affirmatively establish that the security clearance is required for the position under a national security program pursuant to statute or Executive Order.

If the respondent establishes that such a security clearance is required, Commission review is limited. The Commission can review whether the grant, denial, or revocation of a security clearance was conducted in a discriminatory manner. Thus, the Commission can review whether procedural requirements in making security clearance determinations were followed without regard to an individual's protected status. For instance, the Commission could review a claim that the respondent followed certain procedural requirements when revoking the clearances of white individuals but failed to follow those procedures when revoking the clearances of Asian individuals. [\(166\)](#) However, the Commission is precluded from reviewing the substance of the security clearance determination or the security requirement under *any* of the EEO statutes. [\(167\)](#)

For more guidance on making these determinations, refer to Policy Guidance on the *Use of the National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as amended (1989)*.

## 2-IV TIMELINESS

Ordinarily, a charge must be filed within the statutory limitations period. The filing deadline can occasionally be extended when equitable considerations demand or when the parties agree to waive the deadline.

### A. Charge Filing [\(168\)](#)

#### WHAT IS THE TIME LIMIT FOR FILING A CHARGE WITH THE EEOC?

- Title VII, ADEA, ADA
  - 300 days for jurisdictions with a fair employment practices agency (FEPA).
  - 180 days for jurisdictions without a FEPA.
  - EEOC charge is a prerequisite to a federal civil action.
- EPA
  - Two years. Three years if the violation was willful.
  - Can go directly to court without first filing EEOC charge.

#### 1. Title VII, the ADEA, and the ADA

Under Title VII, the ADEA, and the ADA, [\(169\)](#) a charging party must file a charge with the EEOC within either 180 or 300 days of the alleged unlawful employment practice, depending upon whether the alleged violation occurred in a jurisdiction that has a state or local fair employment practices agency (FEPA) with the authority to grant or seek relief. [\(170\)](#) If the deadline falls on a weekend or holiday, it is extended until the next business day. [\(171\)](#)

- **Jurisdiction without a FEPA:** Where the alleged violation arose in a state or locality that does not have a FEPA with the authority to grant relief, a charge must be filed with the EEOC *within 180 days* of the violation.
- **Jurisdiction with a FEPA:** Where the alleged violation arose in a state or locality that *does have a FEPA*, a charge must be filed with the EEOC or a FEPA *within 300 days* of the violation. [\(172\)](#)

Because most jurisdictions have FEPAs, the limitations period will usually be 300 days. However, an investigator should check with the legal unit to determine the applicable period when uncertain.



**Example** - On January 1, 1998, CP was notified that she was being discharged from her position with Respondent in State X. Two hundred days later, CP filed a charge with the EEOC alleging that Respondent discharged her based on her age (45) and sex. State X has an FEP law prohibiting sex discrimination; however, neither State X nor the local jurisdiction where CP was employed has an FEP law prohibiting age discrimination. Therefore, CP's charge was timely with respect to her sex discrimination claim but untimely for preserving her private suit rights with respect to her age discrimination claim.

## 2. EPA

An individual alleging a violation of the EPA may go directly to court and is not required to file an EEOC charge beforehand. The time limit for filing an EPA charge with the EEOC and the time limit for going to court are the same: within two years of the alleged unlawful compensation practice or, in the case of a willful violation, within three years.<sup>(173)</sup> This means, of course, that the EEOC should complete its investigation well before the time limit expires, so that the charging party and/or the EEOC will be able to bring a timely lawsuit with the benefit of a completed investigation.

### B. Filing Civil Actions

While the time frame for filing a private civil action is not a threshold issue in the processing of an EEOC charge, an investigator should notify the charging party about the time frame and requirements for filing in federal court. *It is especially important that the investigator notify the charging party of the filing period for an EPA civil action because the filing of an EPA charge does not toll the time frame for going to court.*

#### 1. Title VII, the ADEA, and the ADA

Under Title VII or the ADA, a private suit must be brought within 90 days of receiving the notice of right to sue (NRTS). The NRTS will be issued when the Commission has dismissed the charge or failed to enter into a conciliation agreement. An individual can request an NRTS 180 days after the filing of a charge. The EEOC's regulations provide that an individual may request an NRTS before the expiration of the 180-day period if the Commission determines that it is unlikely that it will complete its administrative processing of the charge within 180 days of the filing date.<sup>(174)</sup> Courts in some jurisdictions, however, have determined that the 180-day waiting period is mandatory and may not be waived by the EEOC.<sup>(175)</sup> Even in those jurisdictions, a respondent could waive the 180-day period. Therefore, before issuing an NRTS prior to expiration of the 180-day period, an investigator should determine whether courts in that jurisdiction have recognized that the EEOC has authority to do so. If not, an alternative would be to ask the respondent to waive the 180-day period.

Similarly, under the ADEA, an aggrieved person must sue within 90 days of receipt of the EEOC's notice that the charge is dismissed or that the Commission proceedings are otherwise terminated. However, receipt of a notice of right to sue is not a condition for bringing a private suit under the ADEA. An aggrieved person may bring an ADEA suit anytime after 60 days have elapsed from the filing of a timely charge or earlier if EEOC has attempted and failed to conciliate the matter.<sup>(176)</sup>

If the charging party has filed an ADEA charge against a state, the investigator should advise him/her that s/he does not have the right to file a private suit against the state. *Investigators should be aware, however, that the Commission can file an ADEA suit against the state.* Moreover, a charging party may be able to pursue an injunctive claim against a state official acting in his/her official capacity. If such a case arises, the investigator should consult the legal unit.<sup>(177)</sup> The investigator should also notify the charging party, that s/he may wish to consult a state or local fair employment practices agency regarding the availability of state remedies.

## 2. EPA

Because a charge need not be filed with the EEOC before a lawsuit is filed in court, an individual may file an EPA lawsuit anytime within two years after the alleged unlawful compensation practice or, in the case of a willful violation, within three years. The filing of an EPA charge does not toll the time frame for going to court.

### C. When Can a Discriminatory Act Be Challenged?

## 1. Generally

A charging party is generally required to file a charge within 180/300 days after the alleged unlawful employment practice occurred. [\(178\)](#) A federal sector complainant must initiate the EEO process within 45 days. [\(179\)](#) In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court ruled that the timeliness of a charge depends upon whether it involves a discrete act or a hostile work environment claim. [\(180\)](#)

### a. Discrete Acts

A discrete act, such as failure to hire or promote, termination, or denial of transfer, is independently actionable if it is the subject of a timely charge. [\(181\)](#) Such acts must be challenged within 180/300 days of the date that the charging party received unequivocal written or oral notification of the action, regardless of the action's effective date. [\(182\)](#) A mere warning or proposal that an action might be taken does not trigger the start of the limitations period for challenging the completed final action.

**Example 1** - On March 1, 2002, CP received written notification that he would be discharged effective April 30, 2002. Accordingly, CP must file a charge within 180/300 days of March 1, 2002.

**Example 2** - On January 1, 2002, CP was notified that his demotion was being proposed. On February 1, 2002, CP was notified that his demotion would be effective on March 1, 2002. Accordingly, CP must file a charge within 180/300 days of February 1, 2002.

**Example 3** - On January 1, 2002, CP was injured on the job, and she remained unable to work for many months. In September, her doctor released her to return to work. When CP reported to work on September 15, 2002, she was notified that her employment had been terminated on August 1, 2002, and that there was no position available for her. Accordingly, CP must file a charge within 180/300 days of September 15, 2002.

Repeated occurrences of the same discriminatory employment action can be challenged as long as one discriminatory act occurred within the charge filing period. [\(183\)](#) Similarly, because an employer has an ongoing obligation to provide a reasonable accommodation, failure to provide such accommodation constitutes a violation each time the employee needs it. [\(184\)](#) A timely charge also may challenge related incidents that occur *after* the charge is filed [\(185\)](#)

**Example 4** - Robert, a hearing-impaired federal employee, requests a sign language interpreter for each weekly office planning session. The request was denied on March 1, 2001. Robert continues to attend the meetings without an interpreter, but on July 1, 2001, Robert's supervisor comments that Robert doesn't seem to be keeping up with the office's priority planning. Robert immediately contacts an EEO Counselor about the denial of accommodation. Robert has initiated the EEO process in a timely manner.

Individual discrete acts that occurred before the filing period will generally be untimely – and therefore not actionable – even if they are arguably related to acts that occurred within the filing period. [\(186\)](#) Nonetheless, these untimely discrete discriminatory acts may be considered as background evidence if they are relevant to the determination of whether acts taken inside the filing period were discriminatory. [\(187\)](#) There is *no* time limit on relevant evidence.

**Example 5** - CP applied for promotion to a supervisory position on four occasions over a three-year period. Two months after the most recent denial, he filed a charge alleging that he was denied a promotion each time because of his national origin. The investigator notes that, while the promotion decisions were each made by the same manager and were for positions in the same department, only the last promotion decision occurred within the filing period. Because denial of promotion is a discrete act, only the final promotion decision is timely. However, the investigator may use the untimely promotion decisions as background evidence in evaluating whether the timely decision was discriminatory.

## b. Hostile Work Environment Claims

Because the incidents that make up a hostile work environment claim "collectively constitute one 'unlawful employment practice,'" [\(188\)](#) the entire claim is actionable, as long as at least one incident that is part of the claim occurred within the filing period. [\(189\)](#) This includes incidents that occurred outside the filing period that the charging party knew or should have known were actionable at the time of their occurrence. [\(190\)](#)

**Example 1** - CP files a charge on September 3, 2002, alleging that he was subjected to derogatory age-based comments by his supervisor and coworkers over two and a half years. The last incident occurred on July 15, 2002. The investigation reveals that the incidents are related and constitute a single hostile work environment claim and that at least one of the incidents occurred within the filing period. All of the incidents that make up the hostile work environment should be considered in determining liability and damages related to the claim.

Whether a particular incident is part of a hostile work environment claim is a fact-specific determination. An incident may be part of a hostile work environment even if it is also a discrete act. [\(191\)](#) However, a discrete act of discrimination may be part of a hostile work environment only if it is related to abusive conduct or language, i.e., a pattern of discriminatory intimidation, ridicule, and insult. [\(192\)](#) A discrete act that is unrelated to abusive conduct or language ordinarily would not support a hostile work environment claim. [\(193\)](#)

If a discrete act that occurred before the filing period is part of a timely hostile work environment claim, the charging party may only challenge the act as part of the hostile work environment claim. For example, if a pre-filing period demotion is related to a pattern of abusive conduct or language that continued into the filing period, then the demotion may be considered in assessing whether the employee was subjected to a hostile work environment and determining the appropriate remedy for that violation. However, because no timely challenge was made to the demotion, it is not independently actionable, and the charging party would not be entitled to relief, such as back pay or reinstatement, for the demotion itself. [\(194\)](#)

**Example 2** - On March 15, 2002, CP files a charge alleging that his supervisor subjected him to discriminatory, race-based conduct between CP's date of hire, January 1, 2000, and January 15, 2002, when CP received a transfer. Specifically, CP alleges that he was subjected to a hostile work environment and that he was discriminatorily denied two bonuses, one in December 2000 and another in December 2001.

The investigator determines that both bonus decisions were related to a pattern of harassment that continued into the 300-day filing period. Therefore, both bonus decisions are part of CP's hostile work environment claim and may be considered in determining whether the harassing conduct was sufficiently severe or pervasive to create a hostile work environment, and if so, what relief is appropriate.

In addition, because a bonus decision is a discrete act, CP could recover back pay for the second bonus decision. CP could not, however, recover back pay for the first bonus

decision because it occurred before the filing period and is, therefore, not separately actionable. However, that first decision may be relevant background evidence for determining whether the second bonus decision was discriminatory.

**Example 3** - May 15, 2002, CP files a charge alleging that, beginning early in 2001, her supervisor, John, subjected her to a pattern of sexual innuendo that created a hostile work environment and that the conduct continued until she filed her charge. She also alleged that she was denied a promotion in March 2001 because of her sex.

Because the denial of promotion occurred outside the filing period, it is not actionable as a discrete act. However, CP alleges that it was part of the pattern of harassment. The investigation shows that John liked CP and thought that he was engaged in an "innocent flirtation" with her, that he had engaged in similar inappropriate conduct with several other women whom he promoted, that there were twenty applicants for the promotion, and that the selection decision was not made by John alone, but by a five-member panel of which he was the junior member. The investigator concludes that the promotion denial was not part of the pattern of harassment.

## 2. Pattern-or-Practice Claims

Discriminatory acts that are part of a pattern or practice of discrimination can be challenged as a single claim. If the discriminatory pattern or practice continues into the filing period, all of the component acts of the pattern or practice will be timely, and relief can be recovered for any of those acts. [\(195\)](#)

**Example** - In March 2003, CP files a charge alleging that Respondent discriminates against African-American applicants to its apprenticeship program. According to CP, he has applied for the apprenticeship program repeatedly since its initiation in September 2000 but has never been selected. The investigation reveals that African-American applicants for the apprenticeship program have been selected at a much lower rate than similarly qualified white applicants. Because Respondent's systematic discrimination against African-American applicants to the apprenticeship program constitutes a pattern or practice of discrimination, all discriminatory selection decisions under the program are timely.

## 3. Seniority Systems

An aggrieved individual can challenge a discriminatory seniority system under Title VII, the ADA, or the ADEA even if the system is facially neutral and was adopted before the applicable 180/300-day limitations period. If a Title VII or ADA charge alleges that a seniority system was adopted for an intentionally discriminatory purpose, the filing period begins when any one of the following three events occurs: 1) the seniority system was adopted; 2) the person aggrieved became subject to the seniority system; or 3) the person aggrieved was injured by the application of the system. [\(196\)](#) The ADEA provides that a discriminatory seniority system or employee benefit plan must comply with the statute regardless of the date that the system or plan was adopted. [\(197\)](#) Thus, even if a discriminatory seniority system or employee benefit plan was adopted before the applicable 180/300-day limitations period, an individual can file a timely ADEA charge pertaining to the system or plan once that individual becomes subject to the system or plan or once the system or plan is applied to the individual.

## 4. Compensation Discrimination

An aggrieved individual can bring a charge up to 180/300 days after receiving compensation that is affected by a discriminatory compensation decision or other discriminatory practice, regardless of when the discrimination began. If a charge alleges compensation discrimination under Title VII, the ADA, the Rehabilitation Act, or the ADEA, [\(198\)](#) the filing period begins when any of the following occurs: 1) the employer adopts a discriminatory compensation decision or other discriminatory practice affecting compensation; 2) the charging party becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or 3) the charging

party's compensation is affected by application of a discriminatory compensation decision or other discriminatory practice, including each time wages, benefits, or other compensation is paid, resulting in whole or part from such discriminatory decision or practice. [\(199\)](#)

Payment of compensation is actionable if it is affected by either a discriminatory compensation decision or some other discriminatory practice. For example, a charging party may challenge within 180/300 days any paycheck that is lower than it otherwise would be because of the discriminatory denial of a career ladder promotion. In a career ladder promotion, an individual is promoted to a higher pay and/or grade level based on whether that individual meets certain predetermined performance, time-in-grade, or other criteria.

**Example** - After working for the Respondent for nearly 10 years as a production supervisor, CP learns she is being paid less than the other four production supervisors in her department, who are all men. Immediately after learning about the pay discrepancy, CP files an EEOC charge alleging sex-based wage discrimination in violation of Title VII. The investigation shows that CP generally received lower pay raises than her male counterparts as the result of lower performance ratings, which CP alleges to have been discriminatory. Although these performance ratings and related pay raises all occurred more than 300 days before CP filed her charge, they affected her pay within the filing period. Therefore, CP's pay discrimination charge is timely.

These time frames apply to all forms of compensation, including the payment of pension benefits. However, because the congressional findings state that "[n]othing in [the Lilly Ledbetter Fair Pay Act] is intended to change current law treatment of when pension distributions are considered paid," [\(200\)](#) it may be determined that pension benefits are considered paid "upon entering retirement and not upon issuance of each annuity check." [\(201\)](#) Therefore, to avoid potential timeliness issues, an individual who is considering challenging his or her pension benefits is strongly encouraged to file a charge within 180/300 days after retirement.

#### D. Extending the Time Frame for Filing

##### WHEN CAN THE FILING PERIOD BE EXTENDED?

- **Equitable tolling:** Did the charging party's excusable lack of knowledge about the EEO process or the alleged violation cause the delay in filing?
- **Equitable estoppel:** Did the respondent's misconduct inappropriately induce the charging party to delay filing?
- **Waiver:** Did the parties agree to waive the filing period?

Although the EEO statutes provide that a charge must be filed within 180/300 days of the date of the alleged violation, the limitations period is subject to equitable tolling, equitable estoppel, and waiver. Thus, there are circumstances under which the charge should be accepted as timely even though the alleged violation transpired outside the limitations period.

##### 1. Equitable Tolling

The statutory time limits may be extended, or "tolled," for equitable reasons where the charging party was understandably unaware of the EEO process or of important facts that should have led him or her to suspect discrimination. Grounds for equitable tolling include the following:

##### GROUND FORS FOR EQUITABLE TOLLING

- No reason to suspect discrimination at the time of the disputed event

- Mental incapacity
- Misleading information or mishandling of charge by the EEOC or FEPA
- Timely filing in the wrong forum

Individuals who are represented by counsel during the relevant time frame will have difficulty establishing a right to tolling.

When equitable tolling is warranted, the limitations period does not automatically begin anew. Instead, the extension is for a "reasonable" period of time.<sup>(202)</sup> While this will vary from case to case, the charging party should have the opportunity to consult with an attorney and evaluate whether to file a charge. If the charging party waited longer than would ordinarily seem reasonable, then s/he will be responsible for showing that special circumstances justified the delay.<sup>(203)</sup>

**Example** - On March 1, 1997, CP was told that Respondent would not hire her as an accountant. In May, she learned that Respondent had hired only male accountants for the past three years. She then suspected discrimination. The alleged discrimination took place in a jurisdiction with a 300-day filing period. CP filed a charge on February 1, 1998, more than 300 days after being notified that she would not be hired, but less than 300 days after she first reasonably suspected discrimination. Absent other facts, the time frame would not be tolled. CP had more than a reasonable period of time between May 1997 and December 26, 1997, the end of the original limitations period, during which to file a charge.

#### a. Reasonable Suspicion of Discrimination

Sometimes, a charging party will be unaware of a possible EEO claim at the time of the alleged violation. Under such circumstances, the filing period should be tolled until the individual has, or should have, enough information to support a reasonable suspicion of discrimination.<sup>(204)</sup>

**Example 1** - On March 15, 1997, CP, an African-American man, was notified by Respondent that he was not hired for an entry-level accountant position. In February 1998, more than 300 days later, CP learned that the selectee, a white woman, was substantially less qualified for the position than CP. CP filed a charge of race and sex discrimination on March 15, 1998. The charge would be treated as timely because he filed promptly after acquiring information that led him to suspect discrimination.

**Example 2** - On March 1, 1997, CP, a 55-year-old woman, learned that she was denied a promotion in the Office of Research and Development, and that the position was awarded to a 50-year-old man with similar qualifications. She subsequently applied for another promotion opportunity in the same office, and was notified in January 1998 that the position was awarded to a 35-year-old woman with similar qualifications. The second rejection prompted CP to suspect that she was being discriminated against because she was an older woman, and she filed a charge five weeks later, in February 1998. Tolling should apply, and she can challenge both promotion denials.

Because an individual's ignorance must be excusable, the failure to act with "due diligence" in attempting to obtain vital information will preclude equitable tolling.<sup>(205)</sup> The filing period is tolled until the individual has enough information to reasonably suspect that s/he has a valid EEO claim. In other words, the filing period begins to run when the individual realizes that s/he may have a claim even if s/he is not certain about the claim.

**Example** - CP was discharged by Respondent on February 1, 1997. He suspected that the discharge was based on his age because he had heard his supervisor make comments about his, CP's, age and had even complained to management about such comments. Nonetheless, he did not file a charge until January 1998, after learning that Respondent was being investigated for engaging in systemic age discrimination. The limitations period should not be tolled. CP suspected that his discharge was discriminatory and should have sought more information and/or filed a charge within 180/300 days of the termination.

## b. Mental Incapacity

Under exceptional circumstances, mental incapacity can be grounds for equitably tolling the filing period. A charging party must show that his/her mental state prevented him or her from pursuing legal remedies during the filing period. [\(206\)](#)

**Example** - CP was subjected to frequent incidents of sexual harassment leading to her resignation in January 1997. As a result of the harassment and resignation, CP suffered from depression, and she required psychiatric treatment. For a period of about one year following her resignation, CP was unable work or to care for her children or home, and she spent most of her time sleeping. In January 1998, CP's psychiatrist saw some improvement in CP's condition and referred CP to a lawyer. CP promptly consulted the lawyer and filed a charge. Under these circumstances, the time frame should be tolled because mental incapacity prevented CP from exercising her legal rights. *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369 (W.D.N.C. 1988).

## c. Misleading Information or Mishandling of Charge by the EEOC or FEPA

Equitable tolling may be appropriate if a charge is untimely because the EEOC or a FEPA made misleading statements to the charging party or mishandled the processing of the charge. For example, tolling would be warranted if an individual relied on an erroneous filing deadline presented by the EEOC or a FEPA [\(207\)](#) or if the EEOC or a FEPA refused to accept a charge because of a mistaken interpretation of the law. [\(208\)](#)

Tolling is not available, however, merely because the charging party was not represented by counsel or was unfamiliar with his/her EEO rights.

## d. Timely Filing in the Wrong Forum [\(209\)](#)

The filing of a charge in a forum lacking the authority to provide appropriate relief for the alleged discrimination, such as a federal or state agency without jurisdiction to hear discrimination claims, will be grounds for equitable tolling as long as the charging party was diligently attempting to assert his/her rights. [\(210\)](#) A charge filed with the wrong EEOC office within the limitations period should be accepted as timely and promptly transferred to the appropriate office.

Merely utilizing an alternative forum, such as mediation, a negotiated grievance process, or an internal complaint procedure, does not extend the period for filing a charge.

**Example 1** - CP was discharged on December 15, 1997, from her position with Respondent. CP wrote a letter to the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) alleging that her discharge was unlawful. OFCCP contacted CP in June 1998 asking that her allegation be clarified. One week later, CP

sent OFCCP a letter clarifying her claim and alleging that she was discharged by Respondent because of her sex. This letter, which constituted a formal charge under Title VII, was received by OFCCP on the last day of the filing period. OFCCP determined that it did not have jurisdiction and notified CP that she should file a charge with the EEOC. CP mailed her charge to the EEOC, where it was received after the expiration of the filing period. At the time of CP's discharge, Respondent was not a federal contractor covered by Executive Order 11246, so CP filed a charge with the wrong agency. However, CP exhibited diligence by promptly responding to a request for clarification. Therefore, the filing period should be tolled.

**Example 2** - CP was demoted on January 15, 1998, and filed a grievance alleging that the demotion violated Respondent's internal procedures and that it was in retaliation for a prior EEOC charge filed by CP. CP received a final grievance determination on November 15, 1998, that was unfavorable. On December 15, 1998, CP filed a charge with the EEOC. The filing period should not be tolled because CP elected to file a grievance, and she had the opportunity to have her claim heard in that forum.

## 2. Equitable Estoppel

The filing period can also be extended when the charging party's delayed filing is attributable to active misconduct by the respondent intended to prevent timely filing, or actions that an employer should have known would cause a delay in filing. The equitable estoppel doctrine generally presupposes that the charging party was aware of the facts that gave rise to the cause of action and might have filed earlier but for the respondent's misconduct. [\(211\)](#) Where equitable estoppel applies, the filing period begins to run when the charging party knew or should have discovered the misconduct. [\(212\)](#)

Situations in which equitable estoppel might be available include the following:

- **Promise not to raise:** The respondent promised not to raise the limitations period as a defense. [\(213\)](#)
- **Threat of retaliation:** The respondent threatened the charging party with retaliation for asserting his/her EEO rights. [\(214\)](#)
  - A generalized fear of retaliation that is not based on specific threats by the respondent does not justify an extension of the filing period.
- **Concealment or misrepresentation:** The respondent concealed or misrepresented facts that would support a charge of discrimination. [\(215\)](#)
  - The mere failure by respondent to admit wrongdoing does not justify equitable tolling.
- **Assurances of relief:** The respondent lulled the charging party into not filing a charge by giving assurances that relief would be provided through internal procedures. [\(216\)](#)
  - Merely entering into settlement negotiations, however, would not be sufficient to extend the filing period.
- **Failure to post notices:** The employer failed to post notices explaining the EEO process and the time frames for filing a charge, and the charging party was not otherwise aware of his/her rights. [\(217\)](#) Under such circumstances, the 180/300-day filing period begins when the individual learns of his/her rights or retains an attorney. [\(218\)](#)

**Example** - CP was sexually harassed by her supervisor, leading to her resignation on March 1, 1997. CP contacted Respondent's human resources department regarding the alleged violations, and was told that Respondent would conduct an internal review. Respondent said that appropriate relief would be provided after the completion of the investigation and told CP that she did not have to file an EEOC charge until the internal investigation was complete. On February 1, 1998, Respondent notified CP that the investigation was complete and that it had concluded that CP was not sexually harassed. CP was dissatisfied with the results of the investigation and filed a charge on

March 1, 1998. Under these circumstances, the time frame should be extended, and CP's charge accepted as timely.

### 3. Waiver

The time requirements for filing a charge may be waived by the parties by mutual agreement, thereby allowing a charging party to file a charge beyond the 180/300-day statutory time limit. For example, the parties may agree to waive the limitations period so that they can engage in private negotiations.<sup>(219)</sup> If the negotiations do not result in a resolution satisfactory to the charging party, then s/he would be required to file a charge within a reasonable period of time after the termination of negotiations.

## 2-V STANDING<sup>(220)</sup>

Standing to file a charge under the EEO statutes is very broad. A charge must allege that an adverse employment action was taken because of an individual's membership in one or more protected classes. Such a charge may be brought by an aggrieved person, a person filing on behalf of an aggrieved person, or an EEOC Commissioner.

### WHO HAS STANDING TO FILE A CHARGE

- Aggrieved persons:
  - Individuals who were subjected to alleged discrimination
  - Persons (both individuals and organizations) who were harmed by alleged discrimination against others
- Persons bringing a charge "on behalf of" an aggrieved person or persons
- EEOC Commissioners

## A. Charges Brought by Aggrieved Persons

### 1. Charges Brought by Individuals Subjected to Alleged Discrimination

A typical charge alleges that an individual was subjected to prohibited discrimination because of his/her protected status. For example, a woman might file a charge alleging that her employer paid her less than her male coworkers, or a man with a hearing impairment might allege that he was not provided a reasonable accommodation for his disability.

A charge may be filed by a "tester," an individual who applies for employment to test for discriminatory hiring practices, but does not intend to accept such employment, even if offered. For a fuller discussion of tester standing, refer to [Enforcement Guidance on "Testers" & Employment Discrimination Claims](#) (1996) (available at [www.eeoc.gov](http://www.eeoc.gov)).

### 2. Charges Brought by Aggrieved Persons Who Were Personally Harmed by Discrimination Against Others

A charge may also be filed under Title VII, the ADEA, the ADA, or the EPA by an individual who was not subjected to prohibited discrimination but was harmed by prohibited discrimination against others.<sup>(221)</sup> For instance, a white employee has standing to allege that she was denied the benefits of interracial associations as the result of discrimination against minorities,<sup>(222)</sup> and individuals who are under 40 would have standing to file a charge if they were laid off because a particular plant was closed as the result of discrimination against individuals 40 or over.<sup>(223)</sup> A charge of this type must include a description of how the charging party was harmed by the respondent's discriminatory actions.

**Example** - CP, a Native American woman who works for Respondent, alleges that she

was harmed by the Respondent's practice of discarding resumes from applicants residing in predominantly African-American neighborhoods because she was denied the benefit of associating with African-Americans. CP 2, a White man, alleges that he was not considered for employment by Respondent because he resides in a predominantly African-American neighborhood, and his resume was discarded. Both CP 1 and CP 2 were harmed by Respondent's discriminatory policy, and therefore, they both have standing.

Under some circumstances, an organization has standing to file a charge as an "aggrieved person." For example, the organization may be aggrieved because it has lost members, bargaining power, or financial support because its members or potential members have been subjected to discrimination. [\(224\)](#) Alternatively, an organization may be aggrieved if it depletes its resources by sponsoring testers as a means of uncovering discriminatory hiring practices. [\(225\)](#)

## B. Charges Brought "on Behalf of" an Aggrieved Person

A charge can also be filed under any of the EEO statutes by an individual, agency, or organization "on behalf of" an aggrieved person or aggrieved persons. For example, a union, a civil rights organization, or an advocacy organization may file a charge on behalf of one of its constituents. An "on behalf of" charge permits the aggrieved individual to remain anonymous while the charge is being processed by the Commission. [\(226\)](#) For more information on the processing of "on behalf of" charges, consult EEOC Compliance Manual, Volume I, Section 2: *Intake of Charges and Complaints*.

## C. Commissioner Charges

An EEOC Commissioner may file a charge with the Commission under Title VII or the ADA. The ADEA and the EPA do not specifically refer to Commissioner charges; however, the Commission can conduct directed investigations and litigation on its own initiative under those statutes, either concurrently with the processing of a charge or as a separate matter. For more information on Commissioner charges and directed investigations, consult EEOC Compliance Manual, Volume I, Section 8: *Intake of Commission Initiated Actions*.

## 2-VI PRECLUSION BASED ON A PRIOR STATE OR FEDERAL COURT DECISION

### WHEN DOES PRECLUSION APPLY?

- Has a federal or state lawsuit been filed raising the same claim or the same issues?
- If suit has been filed, has a decision been issued?
- If a decision has been issued, the investigator should consult with the legal unit to determine whether claim or issue preclusion would apply.

## A. The Two Major Types of Preclusion: Claim Preclusion and Issue Preclusion [\(227\)](#)

There are two major types of preclusion:

### TYPES OF PRECLUSION

- Claim Preclusion
- Issue Preclusion

Pursuant to the doctrines of claim and issue preclusion, an individual may not relitigate a particular claim or issue

in federal court that has been decided by a prior federal or state *court* decision. A state or federal *agency* decision that has not been reviewed by a court is not preclusive. Likewise, an unreviewed decision by an arbitrator or an unreviewed grievance decision is not preclusive. However, the charging party may be bound by a *voluntary, post-dispute* agreement to arbitrate<sup>(228)</sup>. The charging party may also be bound by a settlement.

If a claim or issue cannot be litigated in federal court, then it serves little purpose for the EEOC to investigate the claim or issue on the merits. Thus, the Commission usually applies preclusion principles in the same manner as a federal court.

A court decision has the potential of having a preclusive effect if it involved some of the same facts, or raised some of the same issues, in the EEOC charge.

### 1. Claim Preclusion

Pursuant to the doctrine of claim preclusion, or "res judicata," a federal court will dismiss a claim that was raised *or could have been raised* in a prior proceeding in a state or federal court. A claim is the set of facts, and the alleged EEO violation arising from those facts, upon which a charge is based. For example, a charge might include the claim that the respondent violated Title VII by removing the charging party in retaliation for testifying on behalf of someone else who filed a charge. If a prior court addressed the circumstances under which the charging party was removed and the charging party either raised or could have raised her Title VII retaliation claim, then claim preclusion might apply.<sup>(229)</sup>

If a claimant failed to raise a claim in a prior court proceeding, the determination of whether claim preclusion applies usually depends upon whether the claimant could have raised the claim in the court proceeding. The ADEA and the EPA specifically provide for concurrent state and federal court jurisdiction.<sup>(230)</sup> State and federal courts also have concurrent jurisdiction over Title VII and ADA claims.<sup>(231)</sup> Thus, a state court generally has jurisdiction to address a claim under any of the EEO statutes. However, in some instances, a state court's jurisdiction might be restricted, preventing it from addressing a claim under the relevant EEO statute even if the claim reviewed by the court raises the same facts as in the EEOC charge.<sup>(232)</sup> Even where claim preclusion does not bar an entire claim, issue preclusion may preclude particular issues that are raised by the claim. See [§ 2-VI A.2](#), below.

**Example 1** - After being discharged by Respondent, CP filed a claim with the state unemployment compensation board. The board denied the claim, finding that Respondent had sufficient cause to discharge CP. CP appealed to state court, which upheld the board's decision based on an arbitrary and capricious standard, under which CP was prevented from raising any new claims. CP then filed a charge with the EEOC alleging that his discharge was based on race. Under the circumstances, CP's claim that he was discharged based on his race would not be precluded. The claim was not decided in state court, nor could it have been because the court's review did not permit CP to raise any new claims.

**Example 2** - Same as above, except that the state court review was de novo so the court had jurisdiction to consider the race discrimination claim, and CP still failed to raise his discrimination claim. Under these circumstances, CP would be precluded from bringing a discrimination charge because the claim could have been decided by the state court.

Sometimes, a claim raised in a charge filed with the Commission will not be precluded by an earlier proceeding because the earlier proceeding ended before the Commission completed its processing and the statutory waiting period under the relevant EEO statute had not expired. For example, unless the Commission completes its processing of a charge prior to the expiration of the 180-day period, a Title VII claimant generally may not file a civil action until 180 days after filing the charge. Therefore, if the court issued a decision before the waiting period expired or the charging party was otherwise unable to amend the action in a timely manner to include the claim raised in the EEOC charge, then the court proceeding would not preclude the claim raised in the EEOC charge.<sup>(233)</sup>

**Example** - CP filed a charge in State X with the unemployment commission after his

employment with Respondent ended. He also filed a charge with the EEOC alleging that he was subjected to racial harassment by Respondent resulting in his constructive discharge. The state unemployment commission denied the claim for unemployment compensation, finding that CP had insufficient grounds to quit. CP appealed to state court, and less than 180 days after CP filed his EEOC charge, the court affirmed the denial of unemployment compensation. Claim preclusion does not bar CP's claim of constructive discharge in his EEOC charge because the state court decision was issued before the expiration of the 180-day waiting period. However, as discussed below in the section on "Issue Preclusion," the state court decision may bar reconsideration of certain issues.

## 2. Issue Preclusion

Issue preclusion, also known as "collateral estoppel," applies to an issue that was actually litigated in a prior state or federal court proceeding, and prevents litigation of the same issue in a subsequent proceeding. For instance, if it was determined by an unemployment compensation board that there was "cause" for termination, and that determination was reviewed by a state court, then that issue cannot be relitigated. However, a claimant can produce evidence of a mixed motive in the subsequent proceeding. [\(234\)](#)

**Example** - CP was discharged by Respondent, and appealed his removal to a state personnel board. The board found that the removal was justified for unsatisfactory performance. The board's decision was upheld by a state court, which lacked jurisdiction to consider new issues. CP filed an EEOC charge alleging that his discharge was based on race. CP would be precluded from relitigating whether his discharge was based on satisfactory performance; however, he could still try to establish, under a mixed-motive analysis, that his discharge was also based on unlawful discrimination.

A charging party can also make "offensive" use of issue preclusion. That is, a respondent may be precluded from relitigating an issue that was decided in a prior state or federal court case. For example, a respondent may be precluded from asserting legitimate nondiscriminatory reasons for an employment action where prior litigation filed by another plaintiff challenging the same employment action has resolved the issue. [\(235\)](#)

## B. Requirements for Claim or Issue Preclusion

The requirements for claim or issue preclusion to apply depend upon the court that issued the prior decision. If the prior decision was issued by a state court, then preclusion depends upon the law of the state that issued the decision. If the prior decision was issued by a federal court, then preclusion depends upon federal case law.

### 1. Prior State Court Decision

Preclusion by a prior state court decision has two requirements:

#### PRECLUSION BY A PRIOR STATE COURT DECISION

- Claim or issue would be precluded in other courts of the state that issued the prior decision; and
- Due process requirements were met in the state proceedings.

#### a. Typical Requirements for Preclusion

In order to be preclusive in federal court, a state court decision must be preclusive in other courts of the state that issued the decision. For example, a decision by a Texas state court would only be preclusive in federal court if it was also preclusive in Texas courts pursuant to Texas law. *Any* such state court decision is preclusive, assuming that due process requirements are met. Thus, a state court decision may preclude an action in federal court even if the state court merely reviewed a state agency decision under an arbitrary and capricious standard, or the appeal to state court was instituted by the respondent and reversed a favorable agency decision, as long as such decision would be preclusive in other courts of the state that issued the decision. [\(236\)](#)

While the requirements for preclusion vary from state to state, states usually have the following requirements for claim preclusion:

- The claims must be the same, as defined by state law;
- The parties must be the same;
- The initial court decision must have been a final one on the merits; *and*
- The court that issued the first decision must have had jurisdiction to consider the case under the law invoked in the second action.

Issue preclusion applies to an issue that was actually litigated in the first action if certain requirements are met. Most states require the following: [\(237\)](#)

- Issues in the decisions must be the same;
- Decision in the first action must have been a final one on the merits;
- Issue must have been necessary to the judgment in the first action; *and*
- Party against whom preclusion is asserted must have been a party in the prior action.

*The investigator should seek assistance from the legal unit in determining the applicable preclusion requirements and whether those requirements are met.*

## b. Due Process

In addition to satisfying the claim or issue preclusion requirements of a particular state, as discussed above, the prior state proceedings, at the administrative and/or judicial level, must also meet due process requirements under the Fourteenth Amendment. Even if the charging party alleges that the final judgment was erroneous, it would be preclusive if it met such due process requirements. [\(238\)](#)

**Example:** CP filed a claim with her state's human rights commission (HRC) alleging that she was removed because of her sex in violation of the state human rights act. CP received a public hearing regarding her claim that included the following rights:

- Full opportunity for claimants to present evidence, under oath if requested, including exhibits and testimony of witnesses
- Opportunity for claimants to rebut opposing evidence;
- Opportunity to be assisted by counsel;
- FEPA's power to issue subpoenas at a claimant's request

CP also had the right to judicial review of all administrative determinations to protect against procedural inadequacies and arbitrary and capricious administrative decisions. Under these circumstances, the state proceeding satisfied due process requirements. *Kremer v. Chemical Constr. Corp.*, 456U.S. 461 (1981).

## c. Applying Preclusion Principles

**Example 1** - Under the FEP law of State X, a claimant can file a charge with the FEPA or proceed directly to state court. CP files suit directly in state court, alleging that Respondent discriminated against her on the basis of race. She also files a charge with the EEOC. The state court finds no discrimination. The investigator should consult with the Regional Attorney and dismiss the charge if the state court decision would be entitled to preclusive effect under state law and due process requirements were met. The fact that there was no state agency decision does not affect whether preclusion would apply.

**Example 2** - CP files charges with a state agency in State Y and with the EEOC, alleging that Respondent discriminated against her on the basis of age. The agency finds no reasonable cause to believe that Respondent discriminated against CP, and CP appeals to state court. The court dismisses the case for failure to prosecute. While a dismissal for failure to prosecute might not be preclusive in most states because it would not be considered a decision on the merits, the investigator should consult with the Regional Attorney to determine whether the state court dismissal for failure to prosecute would be given preclusive effect under the law of State Y and whether due process requirements were met.

**Example 3** - CP files charges with a state agency in State Z and with the EEOC, alleging that Respondent discriminated against her on the basis of sex in the payment of wages. After investigating the case, the state agency finds reasonable cause to believe that Respondent discriminated against CP. Respondent appeals to state court and obtains a reversal of the state agency decision. The investigator and the Regional Attorney determine that under the laws of State Z, the state court decision in the action brought by Respondent would preclude CP from relitigating the claim in state court and the due process requirements were met. Therefore, CP's charge should be dismissed.

**Example 4** - Same facts as above, except that the law of State Z distinguishes between a state court action brought by Respondent and one brought by CP and would only give preclusive effect to the latter. Under such circumstances, the investigator should proceed with investigating CP's charge.

## 2. Prior Federal Court Decision

Preclusion based on a prior federal court decision is controlled by federal case law. <sup>(239)</sup> Essential elements of claim preclusion under federal case law are: 1) final judgment on the merits in the earlier action rendered by a court of competent jurisdiction; 2) same claim in the earlier and later suits; and 3) same parties in both suits. Essential elements for issue preclusion under federal case law are: 1) identical issues in the earlier and later suits; 2) the issue was actually litigated in the earlier suit; 3) same parties in the earlier and later suits; 4) determination of the issue in the earlier suit was necessary and essential to the resulting judgment; and 5) final judgment on the merits in the earlier court action.

**Example 1** - CP was discharged by Respondent. CP filed a charge alleging that she was discharged by Respondent because she requested an accommodation for a physical disability. CP also filed a lawsuit in federal court alleging that Respondent violated ERISA (Employee Retirement Income Security Act) because it discharged her to deprive her of medical insurance. Ten months after CP filed her charge, the court issued a decision finding no ERISA violation. In this case, CP could have alleged an ADA violation in her lawsuit because it addressed the circumstances of her discharge, and the statutory waiting period had lapsed. In addition, the parties were the same, and the court issued a final decision on the merits on the ERISA claim. Therefore, CP's ADA claim is precluded by the prior ERISA proceeding.

**Example 2** - CP filed a charge alleging that he was fired because of his race. Three months before being fired, CP filed a lawsuit alleging that he was suspended because of

his race. Eight months after CP filed his charge, the court issued a decision finding that CP was suspended because he had engaged in misconduct. Here, CP's charge primarily raises the issue of discharge while the prior proceeding addressed the suspension, and therefore, claim preclusion does not apply. Nonetheless, issue preclusion would bar the determination of issues that were decided in the prior proceeding and were necessary to the judgment, such as whether CP engaged in misconduct.

## APPENDIX - Superseded Documents

Section 605: *Jurisdiction*, EEOC Compliance Manual, Volume II

Enforcement Guidance on the *Bona Fide Private Membership Club Exception*, EEOC Compliance Manual, Volume II, Appendix 605-A

Enforcement Guidance on *Sheriffs' Deputies*, EEOC Compliance Manual, Volume II, Appendix 605-C

Enforcement Guidance on *Work Release Programs*, EEOC Compliance Manual, Volume II, Appendix 605-D

Enforcement Guidance on *Partners, Officers, Members of Boards of Directors, and Major Shareholders*, EEOC Compliance Manual, Volume II, Appendix 605-E

Enforcement Guidance on *Integrated Enterprises and Joint Employers*, EEOC Compliance Manual, Volume II, Appendix 605-G

Enforcement Guidance on *Independent Contractors and Independent Businesses*, EEOC Compliance Manual, Volume II, Appendix 605-H

Enforcement Guidance on *Counting Employees to Determine Title VII Jurisdiction* (1997)

Policy Guidance on *Whether Part-time Employees Are Employees Within the Meaning of § 701(b) of Title VII and § 11(b) of the ADEA* (1990)

Policy Statement on *Effect of 1986 Amendments to ADEA on Commission's Enforcement Activities* (1988)

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1. This Section supersedes Section 605: *Jurisdiction*, EEOC Compliance Manual, Volume II. Numerous other Commission policy documents are also being superseded by various subsections of this Section in order to simplify and streamline the Commission's guidance. The supersession of these documents is noted at appropriate points in this Section and does not indicate a change in Commission policy. A list of superseded documents is also included as an appendix to this Section.

2. A new charge is categorized as a Category A, B, or C charge pursuant to the EEOC's Priority Charge Handling Procedures (rev. 6/20/95). Those procedures are not discussed in this Section.

3. The analysis in this Section also generally applies to federal sector complaints arising under section 501 of the Rehabilitation Act of 1973.

4. These statutes are referred to collectively in this Section as the "EEO statutes."

5. The investigator should not refuse to accept a charge that does not meet threshold requirements; however, the charge should be dismissed and need not be processed on the merits. The investigator should issue a notice of right to sue after dismissing the charge so that the charging party may file in federal court, if desired.

6. See, e.g., [§ 2-III B.3.a](#) (third-party interference); [§ 2-III B.4.a.i](#) (coverage of American Indian tribes by ADEA).

7. Issues that arise only under specific bases, such as reasonable accommodation, accent discrimination, and pregnancy discrimination, are discussed below.

8. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

9. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

10. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (concluding that discrimination against

African-American females could exist even in the absence of discrimination against white females or African-American males, *citing Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980)).

11. The EEOC's procedural regulations recognize that dual-statute situations may not be readily identified when charges are filed and so provide for amendment of charges to add another statute. See [29 C.F.R. § 1626.19\(c\)](#).

12. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989).

13. The Commission has entered into a revised memorandum of understanding (MOU) with the Department of Labor, Office of Federal Contract Compliance Programs, which enforces Executive Order 11246, as amended, and other contract-based EEO laws. The MOU sets out procedures for processing complaints raising claims under both Title VII and Executive Order 11246 which are intended to increase efficiency and avoid duplication and inconsistency. See [EEOC-OFCCP Memorandum of Understanding Governing the Processing of Charges Under Title VII and Executive Order 11246](#) (1999) (available at [www.eeoc.gov](http://www.eeoc.gov)).

14. *E.g., Felix v. Marquez*, No. 78-2314, 1980 WL 242 (D.D.C. Sept. 11, 1980) (color usually mixed with claim of race discrimination).

15. Race/color discrimination may also overlap with national origin discrimination. See [§ 2-II A.1.b](#), below.

16. See *Motley v. Tractor Supply Co.*, 32 F. Supp. 2d 1026, 1056 (S.D. Ind. 1998) (Title VII prohibits discrimination based on coloring, physical characteristics, and other intra-racial differences).

17. *Walker v. Secretary of the Treasury*, 713 F. Supp. 403, 405-08 (N.D. Ga. 1989).

18. See, *e.g., Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999).

19. See *Perkins v. Lake County Dep't of Utils.*, 860 F. Supp. 1262, 1273 n.7 (N.D. Ohio 1994) (noting that courts have analyzed discrimination against Native Americans in terms of both national origin and race discrimination). In addition, both race and national origin discrimination include discrimination on the basis of physical characteristics. See [§ 2-II A.1.a](#), above.

20. See, *e.g., Carino v. University of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (foreign accent that does not interfere with ability to perform position in question is not legitimate basis for adverse treatment).

21. 29 C.F.R. § 1606.7. For a detailed discussion of this issue, refer to Section 623: *Speak-English-Only Rules and Other Language Policies*, EEOC Compliance Manual, Volume II.

22. Non-citizens are only covered if employed in the United States. However, a U.S. citizen working abroad is covered if s/he works for an American employer. See [§ 2-III B.3.c.ii](#), below (coverage of American employers overseas). Non-citizens are barred from most federal employment.

23. [Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws](#) (1999) (available at [www.eeoc.gov](http://www.eeoc.gov)).

24. If a charging party alleges citizenship discrimination, the investigator should notify him/her of a possible claim under the Immigration Reform and Control Act of 1986. IRCA prohibits employers with four or more employees from discriminating because of citizenship status against citizens and non-citizens authorized to work. 8 U.S.C. § 1324b(a)(1)(B). IRCA's nondiscrimination requirements are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, at the Department of Justice. IRCA also prohibits national origin discrimination by employers with between four and fourteen employees. For detailed information on referral procedures for charges that may be within the jurisdiction of the Office of Special Counsel, see the [Memorandum of Understanding Between the Equal Employment Opportunity Commission and the Office of Special Counsel for Immigration-Related Unfair Employment Practices](#) (1997) (available at [www.eeoc.gov](http://www.eeoc.gov)).

25. 29 C.F.R. § 1605.1.

26. *E.g., Shapolia v. Los Alamos Nat'l Lab.*, 773 F. Supp. 304, 305 (D.N.M. 1991), *aff'd*, *Shapolia v. Church of Jesus Christ of Latter-Day Saints*, 13 F.3d 406 (10th Cir. 1993) (unpublished).

27. The standard for reasonable accommodation and undue hardship for religious accommodation is different from the standard for disability accommodation. See [§ 2-II B.3](#), below.

28. See [29 C.F.R. § 1604.11](#) (defining what behavior constitutes unlawful "sexual harassment").

29. The Commission has entered into a revised memorandum of understanding (MOU) with the Department of Labor, Employment Standards Administration, intended to enhance the enforcement of prohibitions against compensation discrimination and prevent duplication of effort. The MOU provides for cross-training, referrals, and the sharing of appropriate information, as authorized by law. See [Memorandum of Understanding Between the Employment Standards Administration and the Equal Employment Opportunity Commission](#) (1999) (available at [www.eeoc.gov](http://www.eeoc.gov)).

30. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996); see also [Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp.](#) (1996) (available at [www.eeoc.gov](http://www.eeoc.gov)).

The Commission disagrees with the decision in *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999), finding that the ADEA does not prohibit an employer practice that has a disparate impact on employees 55 or older but not on the protected class as a whole. The Commission notes that the Supreme Court's decision in *O'Connor* recognized that the ADEA prohibits discrimination against one member of the protected group in favor of a younger member of the protected group. Thus, an employer practice violates the ADEA if it discriminates against some members of the protected class even if it does not discriminate against other members. In addition, the Commission disagrees with the Eighth Circuit's statement that if claims are not limited to the entire class, an employer will be forced to achieve parity among the virtually infinite number of age subgroups in its work force. This is not correct because a prima facie case of disparate impact requires a showing that a challenged practice has a *significantly* disparate impact on an identified group. *Bradley v. Pizzaco of Neb., Inc.*, 939 F.2d 610, 612 (8th Cir. 1991), *cert. denied*, 502 U.S. 1057 (1992).

31. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) (employment decision motivated by factor correlated with age but analytically distinct from age is not age-based).

32. Courts are divided on whether the disparate impact theory is available after *Hazen Paper*. Compare *Ellis v. United Air Lines, Inc.*, 73 F.3d 999, 1008 (10th Cir.) (stating that Supreme Court indicated in dicta in *Hazen Paper* that ADEA only prohibits intentional discrimination), *cert. denied*, 517 U.S. 1245 (1996), with *EEOC v. Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 648 n.2 (9th Cir. 1993) (stating that disparate impact claims under ADEA remain cognizable after *Hazen Paper*). The Commission agrees with courts that have found that *Hazen Paper* does not affect the availability of the disparate impact theory under the ADEA because *Hazen Paper* is a disparate treatment case, and the Court specifically declined to address the availability of the disparate impact theory under the ADEA. The Commission has long taken the position that the ADEA prohibits disparate impact discrimination. 29 C.F.R. § 1625.7(d). Moreover, the disparate impact theory plays an important role in preventing the use of facially neutral criteria as a basis for unlawful discrimination.

33. Circumstances in which the ADA protects someone who is not a qualified individual with a disability are presented at §§ 2-II A.4.b and 2-II A.5, below.

34. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

35. For instance, a medication may alleviate an impairment, yet also have harmful side effects. For more information on this issue, refer to the Commission's "[Instructions to EEOC Field Offices on Analyzing ADA Charges After Supreme Court Decisions Addressing 'Disability' and 'Qualified'](#)" (1999) (available at [www.eeoc.gov](http://www.eeoc.gov)).

36. 42 U.S.C. § 12112(b)(6).

37. The standard for reasonable accommodation and undue hardship for disability accommodation is different from the standard for religious accommodation. See [§ 2-II B.3](#), below.

38. *E.g.*, *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997).

39. *Cossette v. Minnesota Power & Light*, 188 F.3d 964, 969-70 (8th Cir. 1999).

40. Although the applicable anti-retaliation provision under the EPA does not include an "opposition" clause, courts have recognized that the statute prohibits retaliation for opposition to allegedly unlawful practices. *E.g.*, *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 989-990 (6th Cir. 1992). *Contra Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994). Investigators in the Second Circuit should consult the legal unit.

41. The Commission disagrees with the decision in *Clover v. Total System Services, Inc.*, 176 F.3d 1346 (11th Cir. 1999). The court found that an individual who participated in an investigation of a sexual harassment claim filed by *another* employee was only protected under the opposition clause if s/he had an objectively reasonable belief

that s/he was opposing unlawful discrimination. In the Commission's view, when an employer initiates an internal investigation of alleged discrimination in the workplace, an employee who is invited (or required) to cooperate with the inquiry has an objectively reasonable belief that, by providing relevant information to the designated investigators, s/he is opposing a practice made unlawful by Title VII. Because encouraging employers to discover and prevent discriminatory practices in the workplace is a primary objective of Title VII, an employee who assists his/her employer in this endeavor is, by definition, opposing practices made unlawful by Title VII. The very fact that the employer has initiated an investigation of alleged discrimination is sufficient to demonstrate the "objective reasonableness" of the employee's belief that, by providing information relevant to the inquiry, s/he is opposing an employment practice made unlawful by Title VII.

42. *Anderson v. Phillips Petroleum*, 722 F. Supp. 668, 671-72 (D. Kan. 1989).

43. *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 502 (3d Cir. 1997).

44. See, e.g., *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 544 (6th Cir. 1993) (plaintiff's allegation of reprisal for coworker's protected activities states claim under Title VII). For further discussion of this issue, refer to [Section 8: Retaliation](#), EEOC Compliance Manual, Volume II (BNA) §§ 8-II B.3.c, 8-II C.3, 614:0003, 0004 (1998).

45. 42 U.S.C. § 12203(a); see also [Section 8: Retaliation, EEOC Compliance Manual](#), Volume II (BNA) § 8-II B.1, 614:0002 (1998).

46. For a detailed discussion of this issue, refer to Section 613: *Terms, Conditions and Privileges of Employment*, EEOC Compliance Manual, Volume II.

47. See §§ [2-II A.1](#) (protected Title VII bases), [2-II A.4](#) (disability), and [2-II A.5](#) (retaliation), above, discussing prohibition against discrimination based on an individual's relationship with a protected individual.

48. The EPA only prohibits discrimination within a single "establishment." 29 C.F.R. § 1620.9.

49. The standards for harassment apply to harassment based on any of the protected bases. 29 C.F.R. § 1604.11 n.1; see also *Hafford v. Seidner*, 183 F.3d 506 (6th Cir. 1999) (applying standards for employer liability for sexual harassment by supervisors to harassment based on religion and race); *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151 (8th Cir. 1999) (applying standards for employer liability for sexual harassment by supervisors to harassment based on age). These standards also apply even if the target of the harassment and the alleged harasser are of the same protected class. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

50. E.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998); see also *Oncale*, 523 U.S. at 80-81 (noting that Title VII is not a "general civility code," and only prohibits sexual harassment that is "so objectively offensive as to alter the 'conditions' of the victim's employment").

51. E.g., *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 674 (9th Cir. 1988) (union's failure to process employee's grievance was legitimate and nondiscriminatory where based on longstanding interpretation of collective bargaining agreement, and union showed it processed grievances without regard to race or national origin).

52. E.g., *Woods v. Graphic Communications*, 925 F.2d 1195, 1200 (9th Cir. 1991) (union may be liable under Title VII for intentionally failing to bring grievances concerning racially hostile work environment); *EEOC v. Foster Wheeler Constructors, Inc.*, No. 98C 1601, 1999 WL 507191 (N.D. Ill. July 6, 1999) (union would be liable for Title VII violation if union steward ignored responsibility to remedy racially hostile work environment).

53. 42 U.S.C. § 2000e-2(d) (Title VII); 42 U.S.C. § 12112(a) (ADA); 29 C.F.R. § 1625.21 (ADEA). The Commission's legislative regulation providing for coverage of apprenticeship programs under the ADEA was issued in 1996, rescinding a prior interpretive regulation to the contrary. See 61 Fed. Reg. 15,374-78 (1996) (preamble to final rule).

54. Compare the EEO statutory coverage of federal workers, which is limited to employees or applicants for employment.

55. For discussion of a related issue, see [§ 2-III A.1.c](#), below (coverage of volunteers).

56. For a detailed discussion of this issue, refer to Section 632: *Violations Involving Advertising, Recordkeeping or Posting of Notice*, EEOC Compliance Manual, Volume II (BNA) at § 632.2, "Employment Opportunity Advertising."

57. 29 C.F.R. § 1625.4(a).

58. For a detailed discussion of these issues, see [Enforcement Guidance on Preemployment Disability-Related Inquiries and Medical Examinations](#) (1995) (available at [www.eeoc.gov](http://www.eeoc.gov)).

59. *E.g.*, *Griffin v. Steeltek, Inc.*, 160 F.3d 591 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1455 (1999).

60. 42 U.S.C. §§ 12112(d)(3)(B)-(C), 12112(d)(4)(C). For a detailed discussion of this issue, see [29 C.F.R. §§ 1630.14\(b\)-\(d\)](#), and [Enforcement Guidance on Preemployment Disability-Related Inquiries and Medical Examinations](#), "Confidentiality," N:2324-25 (BNA) (1995) (available at [www.eeoc.gov](http://www.eeoc.gov)).

61. For a detailed discussion of this issue, refer to Section 618: *Segregating, Limiting and Classifying Employees*, EEOC Compliance Manual, Volume II.

62. *See, e.g.*, *Robinson v. City of Fairfield*, 750 F.2d 1507, 1509 n.1 (11th Cir. 1985) (per curiam) (among city's unlawful discriminatory practices were segregated dressing and lounge facilities).

63. EEOC Dec. No. 71-796, ¶ 6189 (CCH) (1970).

64. *See, e.g.*, *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608 (5th Cir. 1983) (university would be liable under Title VII for systematically assigning women and African-Americans to stereotyped lower-paying positions and depriving them of opportunity to be employed in or promoted to higher-level positions).

65. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996).

66. The principles discussed in this subsection apply to both American citizens and non-citizens. *See* [§ 2-III A.4](#) (coverage of non-citizens), below.

These principles also apply to both minors and individuals who have reached the legal age of majority in the relevant state. However, if applicable state law does not permit minors to enter into legal contracts like settlement and conciliation agreements, then the minor's parent or legal guardian should be present during conciliation. In addition, any settlement or conciliation agreement should be signed by the parent or legal guardian, as well as the charging party.

67. This Section supersedes the Enforcement Guidance on *Independent Contractors and Independent Businesses*, EEOC Compliance Manual, Volume II, Appendix 605-H.

68. An "employee" is protected even if the respondent is not his/her employer. *See* [§ 2-III B.3.a](#), below (third-party interference doctrine).

Circumstances in which non-employees are covered are discussed at [§ 2-II A.5](#) (retaliation), above, and [§§ 2-III A.2](#) (former employees) and [III.A.3](#) (training and apprenticeship programs), below.

69. 42 U.S.C. § 2000e(f) (Title VII); 29 U.S.C. § 630(f) (ADEA); 42 U.S.C. § 12111(4) (ADA); 29 U.S.C. § 203(e)(1) (EPA).

70. *See* [§ 2-III B.1.a.iii.\(b\)](#), below (joint employers).

71. The factors presented below are taken from *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992). In *Darden*, the Court adopted the "common law test" for determining who qualifies as an "employee" under the Employee Retirement Income Security Act of 1974 (ERISA). The *Darden* rationale applies under the EEO statutes because the ERISA definition of "employee" is identical to that in Title VII, the ADEA, and the ADA. This test is used to determine whether an individual is an independent contractor or an employee, and whether an individual is employed by a particular entity.

The test for determining who qualifies as an "employee" under the EPA is the "economic realities test." Under that test, an employee is someone who, as a matter of economic reality, is dependent upon the business to which s/he renders service. *See* [29 C.F.R. § 1620.8](#).

For more information on how to determine whether someone qualifies as an "employee," refer to the Commission's [Enforcement Guidance on Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms](#), Questions 1-2, N:3319-21 (BNA) (1997) (available at [www.eeoc.gov](http://www.eeoc.gov)).

72. *Daggitt v. United Food & Commercial Workers Int'l Union Local 304A*, 59 F. Supp. 2d 980 (D.S.D. 1999).

73. *E.g.*, *Pietras v. Board of Fire Comm'rs*, 180 F.3d 468, 473 (2d Cir. 1999). Benefits may be provided by a third party, such as a state agency, as long as they are provided as a consequence of the volunteer service.

74. *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 222 (4th Cir. 1993).

75. *See Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198 n.4 (3d Cir.) (Title VII reaches discrimination by any covered employer that has "the ability to directly affect a plaintiff's employment opportunities"), *cert. denied*, 513 U.S. 1022 (1994).

76. This Section supersedes the Enforcement Guidance on *Partners, Officers, Members of Boards of Directors, and Major Shareholders*, EEOC Compliance Manual, Volume II, Appendix 605-E.

77. Even if someone in a particular position is not covered, consideration by an employer of its own employees for such positions may constitute a term, condition, or privilege of employment. Thus, even if a partner is not protected, an employee who is denied partner status may have a claim covered by the EEO statutes. *See Hishon v. King & Spalding*, 467 U.S. 69 (1984) (discriminatory denial of partner status to associate is covered by Title VII where partnership consideration was part of contractual relationship with law firm).

78. *See, e.g., Serapion v. Martinez*, 119 F.3d 982, 989-90 (1st Cir. 1997) (factors in determining whether individual is a partner or an employee include whether s/he is involved in management of the entity and shares in ownership of assets and in liability for debts and obligations), *cert. denied*, 522 U.S. 1047 (1998); *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 81-82 (8th Cir. 1996) (shareholder-directors were not "employees" where they participated in management decisions, made capital contributions, and were compensated based on firm's profits), *cert. denied*, 520 U.S. 1211 (1997).

79. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (former employees covered under Title VII); *Passer v. American Chem. Soc'y*, 935 F.2d 322, 330 (D.C. Cir. 1991) (former employees covered under ADEA); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 607 (3d Cir. 1998) (former employees covered under ADA), *cert. denied*, 525 U.S. 1093 (1999).

80. *McKeever v. Ironworker's Dist. Council*, No. CIV. A. 96-5858, 1997 WL 109569 (E.D. Pa. Mar. 7, 1997).

81. 42 U.S.C. § 2000e-2(d) (Title VII); *id.* § 12112(a) (ADA); 29 C.F.R. § 1625.21 (ADEA).

82. Employment in the United States includes employment in any territory or possession of the United States, including Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands.

For a discussion of the coverage of Americans employed overseas, refer to [§ 2-III B.3.c.ii](#).

83. Although employees are covered whether or not they are citizens or have work authorization, the relief available to undocumented non-citizens is limited where the remedy would conflict with immigration law. *See Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (1999) (available at [www.eeoc.gov](http://www.eeoc.gov)).

In *Egbuna v. Time Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998), *cert. denied*, 525 U.S. 1142 (1999), the court found that an applicant who is unauthorized to work has no cause of action under Title VII for an allegedly discriminatory refusal to hire. The Commission disagrees with this decision, but investigators in the Fourth Circuit should consult with the legal unit if a charge pertaining to a failure to hire is filed by an undocumented worker.

84. This Section supersedes the Enforcement Guidance on *Sheriffs' Deputies*, EEOC Compliance Manual, Volume II, Appendix 605-C.

85. 2 U.S.C. § 1220. Implementing regulations have been promulgated at 29 C.F.R. Part 1603. EEOC field offices handle charge receipt and the optional pre-hearing mediation and investigation functions set out in Subpart A of Part 1603 for new complaints. The Office of Federal Operations administers Administrative Law Judge hearings and appeals processes (including appeals of dismissals by field offices), as set out in Subparts B and C.

86. *See, e.g., Cromer v. Brown*, 88 F.3d 1315, 1323-24 (4th Cir. 1996) (individual who did not report directly to elected official and work under official's supervision was not on official's personal staff).

87. *See, e.g., Owens v. Rush*, 654 F.2d 1370, 1376 (10th Cir. 1981) (member of personal staff must be highly accountable to one person, the elected official). On the other hand, the mere fact that the official possesses such authority does not mean that the position is so tied to the official that it *necessarily* falls under section 321.

88. This Section supersedes the Policy Statement on *Effect of 1986 Amendments to ADEA on Commission's Enforcement Activities* (1988).

89. For more detailed guidance on how to apply this exemption, refer to Policy Statement on *Section 12(c) of the Age Discrimination in Employment Act of 1967 (ADEA)-Exemption for Executive and High Policymaking Employees (1986)*.

90. 29 U.S.C. § 631(c)(1).

91. 29 C.F.R. § 1625.12(g).

92. *Id.* § 1625.12(d)(1).

93. *Id.* § 1625.12(d)(2) (quoting H.R. Rep. No. 95-950, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 528, 531).

94. If no such law is in effect, a discharge or hiring decision based on a maximum age is unlawful unless age is a bona fide occupational qualification.

95. 29 C.F.R. § 1627.16.

96. Title VII, the ADEA, and the ADA also prohibit a joint labor-management committee from discriminating in admission to or employment in any apprenticeship or other training program. 42 U.S.C. § 2000e-2(d) (Title VII); *id.* § 12111(2) (ADA); 29 C.F.R. § 1625.21 (ADEA).

97. Federal agencies are excluded from the definition of the term "employer." 42 U.S.C. § 2000e(b) (Title VII); 29 U.S.C. § 630(b) (ADEA); 42 U.S.C. § 12111(5) (ADA). Federal agencies are covered under separate sections of Title VII, the ADEA, and the Rehabilitation Act, regardless of the number of employees they have. 42 U.S.C. § 2000e-16(a) (Title VII); 29 U.S.C. § 633a(a) (ADEA); *id.* § 791 (Rehabilitation Act). For an enumeration of the federal agencies covered by the EEO statutes, see [29 C.F.R. § 1614.103\(b\)](#). The Smithsonian Institution, including the Kennedy Center, is covered under this section. Employees of the federal judiciary are protected if in the competitive service, except under the Rehabilitation Act. 29 C.F.R. § 1614.103(b)(4). Complaints against federal agencies are processed under the procedures set forth in 29 C.F.R. Part 1614. An individual wishing to initiate a complaint against a federal agency should contact the EEO office of the federal agency that engaged in the alleged discrimination.

The Federal Reserve Banks are covered under the EEO statutes as private sector employers. Enforcement Guidance on *Coverage of Federal Banks* (1993).

98. If a charging party alleges national origin discrimination by an employer with fewer than 15 employees, the investigator should notify him/her of a possible claim under the Immigration Reform and Control Act of 1986 (IRCA). IRCA prohibits discrimination on the basis of national origin against U.S. citizens and nationals and non-citizens with work authorization by employers with between four and fourteen employees. 8 U.S.C. § 1324b(a)(1). IRCA's nondiscrimination requirements are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, at the Department of Justice. For detailed information on referral procedures for charges that may be within the jurisdiction of the Office of Special Counsel, see the [Memorandum of Understanding Between the Equal Employment Opportunity Commission and the Office of Special Counsel for Immigration-Related Unfair Employment Practices](#) (1997) (available at [www.eeoc.gov](http://www.eeoc.gov)).

99. See 29 U.S.C. § 630(b)(2) (defining "employer" as any "State or a political subdivision of a State" without limiting coverage to those with a minimum number of employees). Some courts have rejected this view and found that a local or state government employer is only covered under the ADEA if it has at least 20 employees. See, e.g., *EEOC v. Monclova Township*, 920 F.2d 360 (6th Cir. 1990) (legislative history indicates that Congress intended to treat private and public employees alike, and therefore, 20-employee requirement applies to public employers). Because such requirements are not imposed by the statutory language of the ADEA, the EEOC disagrees with these decisions.

100. *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (finding that Congress did not have authority to abrogate state immunity under Eleventh Amendment to private suits alleging age discrimination under ADEA). States have immunity from suit under federal law under the Eleventh Amendment in both federal and state court. *Alden v. Maine*, 119 S. Ct. 2240 (1999). Because the Eleventh Amendment does not apply to local governments, however, *Kimel* does not preclude private suits against them. In addition, private individuals may be able to sue state officials for injunctive relief.

The right of private individuals to sue states under Title VII has been upheld by the Supreme Court. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

The Supreme Court has agreed to decide whether Congress validly abrogated state sovereign immunity under the

ADA. *Garrett v. University of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214 (11th Cir. 1999) (finding that Congress had authority to abrogate state sovereign immunity under ADA), *cert. granted in part*, 2000 WL 122158 (U.S. Apr. 17, 2000).

Courts have generally held that individuals have the right to sue states under the EPA. *E.g.*, *O'Sullivan v. State of Minn.*, 191 F.3d 965 (8th Cir. 1999); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997). However, the Supreme Court recently vacated and remanded two decisions addressing this issue after the ruling in *Kimel*. *Anderson v. State Univ. of N.Y.*, 169 F.3d 117 (2d Cir. 1999), *cert. granted, judgment vacated*, 120 S. Ct. 929 (2000); *Varner v. Illinois State Univ.*, 150 F.3d 706 (7th Cir. 1998), *cert. granted, judgment vacated*, 120 S. Ct. 928 (2000).

101. *Walters v. Metropolitan Educ. Enter., Inc.*, 519 U.S. 202, 206 (1997). This Section supersedes the Commission's Enforcement Guidance on *Counting Employees to Determine Title VII Jurisdiction* (1997); and the Policy Guidance on *Whether Part-time Employees Are Employees Within the Meaning of § 701(b) of Title VII and § 11(b) of the ADEA* (1990).

102. For example, a company had 14 employees plus employee A from Sunday through Wednesday of a particular week, and then 14 employees plus employee B from Thursday through Saturday. Because the employer had 15 or more employees for each working day of that calendar week, the week can be counted toward the 20-week requirement.

103. EEOC Dec. 88-2, ¶ 6871 (CCH) (1988).

104. 29 U.S.C. § 203(s).

105. 29 U.S.C. § 213(a). Exemptions include individuals employed by an amusement or recreational establishment and switchboard operators.

106. This Section supersedes the Enforcement Guidance on *Integrated Enterprises and Joint Employers*, EEOC Compliance Manual, Volume II, Appendix 605-G.

107. *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977), was the first case to apply the four-factor test to the EEO statutes. The test has subsequently been widely adopted. *E.g.*, *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir. 1999) (en banc); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1069 (10th Cir. 1998); *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240-41 (2d Cir. 1995); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 450 (5th Cir. 1994).

In *Papa v. Katy Industries, Inc.*, however, the Seventh Circuit rejected the four-factor test and determined that the standard for applying the integrated enterprise theory should focus on the purpose of sparing small employers the "potentially crushing expense" of compliance with antidiscrimination laws. 166 F.3d 937, 940 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 526 (1999). The court identified three situations where covering small employers would not be inconsistent with this purpose: where the traditional conditions are present for "piercing the veil"; where a company splits itself up to avoid liability under the EEO laws; or where the parent corporation directed the allegedly discriminatory action of the subsidiary.

The Commission disagrees with the Seventh Circuit's decision in *Papa*, which disregards twenty years of precedent reflecting wide acceptance of the four-factor test. Indeed, Congress effectively adopted the four-factor test as the criteria for determining whether a foreign corporation is controlled by an American corporation. 42 U.S.C. § 2000e-1(c)(3) (Title VII); 29 U.S.C. § 623(h)(3) (ADEA); 42 U.S.C. § 12112(c)(2)(C) (ADA). Moreover, the Seventh Circuit's reliance on the exemption for small employers is unpersuasive because in an integrated enterprise the expense of complying with the EEO statutes is borne by the entire enterprise.

When this issue arises in a charge filed with an EEOC office in the Seventh Circuit, the investigator should consult the legal unit on how to proceed.

108. *E.g.*, *EEOC v. State of Ill.*, 69 F.3d 167, 171 (7th Cir. 1995).

109. See [§ 2-III A.1](#), above (discussing criteria used in assessing whether employment relationship exists).

110. For further information on coverage of employment agencies, refer to Policy Guidance on *What Constitutes an Employment Agency Under Title VII, How Should Charges Against Employment Agencies Be Investigated, and What Remedies Can Be Obtained for Employment Agency Violations of the Act?* (1991).

111. See Enforcement Guidance on *Title VII Coverage Where Employment Agency or Union Deals with Uncovered*

*Employment*, EEOC Compliance Manual, Volume II, Appendix 605-N.

112. *But see Greenlees v. Eidenmuller Enters., Inc.*, 32 F.3d 197, 200 (5th Cir. 1994) (employment agency only covered under Title VII in its capacity as employer if it has 15 employees). Investigators in the Fifth Circuit should consult the legal unit on this issue.

113. The statutes list five ways in which a labor organization can meet this requirement. 42 U.S.C. § 2000e(e) (Title VII); 29 U.S.C. § 630(e) (ADEA); 42 U.S.C. § 12111(7) (ADA-incorporating Title VII definition of "labor organization").

114. If a labor organization has a relationship with a covered employer, then the labor organization is covered with respect to its relationship with both covered and uncovered employers. See Enforcement Guidance on *Title VII Coverage Where Employment Agency or Union Deals with Uncovered Employment*, EEOC Compliance Manual, Volume II, Appendix 605-N.

115. 42 U.S.C. § 2000e(d) (Title VII); 29 U.S.C. § 630(d) (ADEA); 42 U.S.C. § 12111(7) (ADA-incorporating Title VII definition of "labor organization").

116. *Jones v. American Postal Workers Union*, 192 F.3d 417 (4th Cir. 1999) (citing EEOC *amicus* brief).

Although discrimination claims against federal agencies are covered by the Rehabilitation Act, claims against federal unions are covered by the ADA. Federal unions are covered by Title VII and the ADA because the definition of "labor organization" in section 701(d) of Title VII, which is incorporated in the ADA, broadly covers labor organizations of all kinds. *Id.* Because section 11(d) of the ADEA includes the same definition of "labor organization," the ADEA also covers federal unions.

117. 29 U.S.C. § 206(d)(2).

118. *E.g.*, *Kern v. City of Rochester*, 93 F.3d 38, 46 (2d Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Herman v. United Bhd. of Carpenters & Joiners*, 60 F.3d 1375, 1384 (9th Cir. 1995).

119. *See, e.g.*, *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 17 (1st Cir. 1994) (trade association and trust were agents of employer because they acted on its behalf in providing and administering employee health benefits).

120. *Graf v. K-Mart Corp.*, 50 Fair Empl. Prac. Cas. (BNA) 1370, 1373 (W.D. Pa. 1989) (insurance carrier was agent of employer with respect to provision of employee benefits because of its "significant control" over the employer's disability benefits plan). *But see Peters v. Wayne State Univ.*, 691 F.2d 235, 238 (6th Cir. 1982) (employer did not exercise sufficient control for insurer to be its agent), *rev'd and remanded on other grounds*, 463 U.S. 1223 (1983).

121. *Carparts*, 37 F.3d at 17.

122. *United States v. State of Ill.*, 3 AD Cases 1157, 1160-61 (E.D. Ill. 1994); *cf. Lee v. California Butchers' Pension Trust Fund*, 154 F.3d 1075, 1078-79 (9th Cir. 1998) (pension trust fund established by employers and unions could be held liable as employer).

123. *E.g.*, *Carparts*, 37 F.3d at 17; *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated and remanded sub nom. Long Island Univ. v. Spirt*, 463 U.S. 1223 (1983), *reinstated on remand*, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984). *But see Nearhood v. Freestate Health Plan*, 6 AD Cases 737, 1997 WL 151545 (D. Md. 1997) (insurance company could not be held liable under ADA as employer's agent).

124. The insurance company may also be liable for interfering with the employment opportunities of the law firm's employees. See [§ 2-III B.3.a](#) (third-party interference).

125. Section 503(a) of the ADA, however, makes it unlawful for a "person" to retaliate against an individual for engaging in protected activity. Therefore, an ADA retaliation charge may be filed against an individual supervisor. *Ostrach v. Regents of Univ. of Cal.*, 957 F. Supp. 196 (E.D. Cal. 1997).

126. *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1280 n.2 (7th Cir. 1995).

127. The third-party employer may also be liable as an agent of the direct employer. See [§ 2-III B.2](#), above.

128. 42 U.S.C. § 12203(b).

129. *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (noting that "nowhere are there words of limitation that restrict references in the Act to 'any individual' as comprehending only an employee of an employer"); *EEOC v. Foster Wheeler Constructors, Inc.*, No. 98 C 1601, 1999 WL 515524 (N.D. Ill. July 14, 1999) (general contractor can be liable to employees of subcontractor subjected to discriminatory work environment if it controlled working conditions at job site).

A few courts have rejected or limited the third-party interference theory. *E.g.*, *Bloom v. Bexar County*, 130 F.3d 722, 724-25 (5th Cir. 1997) (ADA requires employment relationship between plaintiff and defendant); *EEOC v. State of Ill.*, 69 F.3d 167, 169 (7th Cir. 1995) (third party must at least be indirect employer in order to be liable under ADEA). The Commission disagrees with these courts. The statutory language reflects congressional intent to cover an employer that meets the statutory requirements and is in the position to interfere with an individual's employment with another employer. It is especially inappropriate to impose additional requirements when doing so undermines the general remedial purpose of the EEO statutes. Investigators in affected jurisdictions should consult the legal unit.

130. 29 U.S.C. § 206(d)(1).

131. 29 U.S.C. § 791(g) (incorporating 42 U.S.C. § 12203(b)).

132. *See, e.g.*, *Darks v. City of Cincinnati*, 745 F.2d 1040, 1042 (6th Cir. 1984) (city could not be subject to liability under Title VII for denying license to operate dance hall).

133. EEOC Dec. 87-2, ¶ 6869 (CCH) (1987).

134. *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991) (primary purpose of association between prison and inmate is incarceration, not employment, and work relationship flows from incarceration (citing EEOC Dec. 86-7 (1986))).

135. This Section supersedes the Commission's Enforcement Guidance on *Work Release Programs*, EEOC Compliance Manual, Volume II, Appendix 605-D.

136. *See, e.g.*, *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 750 (5th Cir. 1996) (first two factors are critical).

137. *Morelli v. Cedel*, 141 F.3d 39, 44-45 (2d Cir. 1998).

138. 28 U.S.C. § 1604.

139. *Elliott v. British Tourist Auth.*, 986 F. Supp. 189, 194 (S.D.N.Y. 1997), *aff'd*, 172 F.3d 37 (2d Cir. 1999) (unpublished).

140. 28 U.S.C. § 1605(a)(2).

141. *Elliott v. British Tourist Auth.*, 172 F.3d 37 (unpublished), 1999 WL 38836 at \*1 (2d Cir. 1999).

142. *Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997).

143. Non-citizens are not protected against discrimination overseas.

144. 42 U.S.C. § 2000e-1(c)(3) (Title VII); 29 U.S.C. § 623(h)(3) (ADEA); 42 U.S.C. § 12112(c)(2)(C) (ADA). This is the same test used by courts in determining whether two or more employers constitute an integrated enterprise.

145. EEOC Dec. 96-1, ¶ 6877 (CCH) (1996) (tribally owned cement company not exempt from Title VII coverage because cement manufacture is not essentially governmental function performed on tribe's behalf, nor was company integrated with and controlled by tribe, as indicated by location of company 50 to 60 miles from reservation, management by non-American Indians, and employment of almost no American Indians).

146. *But see EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993) (ADEA does not apply to American Indian tribes because it would interfere with tribal sovereignty); *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (ADEA does not apply to American Indian tribe if it would interfere with treaty rights). Investigators in these circuits should contact the legal unit for guidance on how to proceed.

147. *See, e.g.*, *Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126 (11th Cir. 1999) (application of Title III of ADA to restaurant and entertainment facility owned by tribe would not interfere with self-governance); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) (application of Occupational Safety and Health Act to construction company wholly owned and operated by American Indian tribe

would not infringe upon "exclusive rights of self-governance in purely intramural matters").

148. This Section supersedes the Enforcement Guidance on the *Bona Fide Private Membership Club Exception*, EEOC Compliance Manual, Volume II, Appendix 605-A.

149. *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131 (5th Cir. 1980) (quoting Webster's Third International Dictionary of the English Language (1976)).

150. *But see EEOC v. Chicago Club*, 86 F.3d 1423, 1435 (7th Cir. 1996) (size by itself is not indicator of whether entity is exempt). The Commission disagrees with the decision in *Chicago Club*. A large membership suggests that an organization should not fall within the exemption because large membership inhibits intimacy in association, prevents full participation by all members, and suggests that a club is not exclusive. If this issue is raised in a charge filed in the Seventh Circuit, the investigator should consult the legal unit.

151. 22 U.S.C. § 288 *et seq.*

152. *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

153. *Id.* at 619 (finding that exemption did not apply to manufacturer of mining equipment that operated for profit and was not affiliated or supported by a church, even though the company enclosed Gospel tracts in outgoing mail, printed Bible verses on its commercial documents, financially supported religious organizations, and conducted a weekly devotional service); *see also Killinger v. Samford Univ.*, 113 F.3d 196, 199-200 (11th Cir. 1997) (exemption applied to educational institution that was founded as theological institution, received seven percent of its annual budget from Baptist convention, and was recognized by Internal Revenue Service and Department of Education as religious educational institution); *EEOC v. Kamehameha Sch.*, 990 F.2d 458, 461-63 (9th Cir.) (significant characteristics of ownership and affiliation, purpose, faculty, student body, student activities, and curriculum reflected primarily secular orientation of schools), *cert. denied*, 510 U.S. 963 (1993).

154. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (application of exemption to nonprofit, secular activities does not violate Establishment Clause).

155. *See* Enforcement Guidance on the *Religious Organization Exemption*, EEOC Compliance Manual, Volume II, Appendix 605-I.

156. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); *see also Guinan v. Roman Catholic Archdiocese*, 42 F. Supp. 2d 849, 853 (S.D. Ind. 1998) (ministerial exception has generally been reserved for ordained ministers or those positions that are close to being exclusively religious-based, such as a chaplain or pastor's assistant).

157. There may be some employment situations involving an ordained minister or similar position that would fall outside the ministerial exemption. *See, e.g., Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 947-48 (9th Cir. 1999) (application of Title VII to sexual harassment and constructive discharge claim by novice training to be priest would not interfere with constitutionally protected relationship between church and its clergy).

158. *Dawavendewa v. Salt River Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1121-24 (9th Cir. 1998), *cert. denied*, 120 S. Ct. 843 (2000).

159. The term "reservation" should be interpreted flexibly to include such lands because the exemption is intended to promote the social and economic welfare of American Indian tribes and their members, and a broad reading of the term "reservation" is consistent with the purpose. *See* Policy Statement on *Indian Preference Under Title VII*, N:3422-26 (BNA) (1988).

160. EEOC Dec. No. 74-26, ¶ 6398 (CCH) (1973).

161. For more information on this exemption, refer to Policy Guidance on *Veterans' Preference Under Title VII* (1990).

162. *E.g., Bannerman v. Department of Youth Auth.*, 436 F. Supp. 1273, 1279-80 (N.D. Cal. 1977) (42 U.S.C. § 2000e-11 precluded female plaintiffs from bringing Title VII claim challenging disparate impact arising from veterans' preference), *aff'd*, 615 F.2d 847 (9th Cir. 1980).

163. *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 730-31 (9th Cir. 1984) (finding that 42 U.S.C. § 2000e-11 did not apply to veterans' preference granted by private organization even though it was encouraged by a federal government agency), *cert. denied*, 469 U.S. 1108 (1985).

164. For possible defenses based on a veterans' preference under the ADEA or the EPA, refer to Policy Guidance on *Veterans' Preference Under Title VII*, N:3358 n.14 (BNA) (1990).

165. *E.g.*, *Molerio v. F.B.I.*, 749 F.2d 815 (D.C. Cir. 1984) (upholding FBI's refusal to hire plaintiff for position requiring "top secret" security clearance because he had relative living in Cuba).

166. The legislative history supports this conclusion. Senator Humphrey stated that an employer could not "prefer one employee or applicant over another by seeking security clearance for him while refusing to request clearance for another, if such preference is based on discriminatory considerations." 110 Cong. Rec. 14,239 (1964); *see also McDermott v. Rubin*, EEOC Request No. 05960146, 1996 WL 350895 (June 20, 1996) (allegation that manner in which security clearance was suspended was discriminatory, including failure to provide reasons for the suspension and appeal to deciding official, covered by EEO statutes).

167. *See Department of Navy v. Egan*, 484 U.S. 518 (1988) (Merit Systems Protection Board did not have authority to review substance of security clearance determination in course of reviewing adverse action).

168. The filing periods discussed in this section apply to private sector and local/state government charges. Time limits and procedures for federal sector complaints are much shorter and are set forth at 29 C.F.R. Part 1614. If an individual alleges discrimination by a federal employer, the investigator should advise the individual that claims against a federal agency must be filed with the agency's EEO office.

169. If an individual files an untimely charge alleging disability-based discrimination against a state or local government under Title I of the ADA, the investigator should notify the individual that s/he might be able to bring suit in court under Title II of the ADA. Pursuant to Department of Justice regulations, disability-based employment discrimination by a state or local government is also prohibited under Title II of the ADA. 28 C.F.R. § 35.140. *But see Zimmerman v. State of Or. Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999) (Title II does not apply to employment), *pet. for cert. filed* (Aug. 10, 1999).

For further information, the individual should be referred to DOJ's Title II Technical Assistance Manual.

170. A lawsuit cannot be filed under Title VII or the ADA unless a timely charge by a private individual or an EEOC Commissioner was first filed with the EEOC. Under the ADEA, a private individual may only sue with respect to a matter raised in a timely charge. However, the EEOC may conduct a directed investigation under the ADEA and file a lawsuit if conciliation attempts are unsuccessful.

171. *Clark v. Resistoflex Co.*, 854 F.2d 762, 765 n.3 (5th Cir. 1988); 29 Am. Jur. *Trials* § 19 (1982) (citing *Downie v. Electric Boat Div.*, 504 F. Supp. 1082 (D. Conn. 1980)).

172. The Commission has entered into worksharing agreements with every designated FEPA. Those agreements provide that a charge filed with the FEPA or the EEOC within 300 days of the alleged violation will be timely for purposes of EEOC's charge filing requirements. The Supreme Court upheld this procedure in *EEOC v. Commercial Office Products*, 486 U.S. 107, 125 (1988). The Commission can process the charge even if it is untimely under state law. *Id.* at 123.

173. A respondent's violation of the EPA is "willful" if the respondent either knew or showed reckless disregard for the matter of whether its conduct was unlawful under the statute. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988); *Pollis v. New Sch. for Social Research*, 132 F.3d 115, 119 (2d Cir. 1997).

174. 29 C.F.R. § 1601.28(a)(2); *e.g.*, *Sims v. Trus Joist MacMillan*, 22 F.3d 1059 (11th Cir. 1994) (upholding regulation); *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729 (9th Cir. 1984) (same), *cert. denied*, 469 U.S. 1108 (1985); *Woelbling v. R.C. Wilson Co.*, 966 F. Supp. 858, 862-63 (E.D. Mo. 1997) (same); *Figueria v. Black Entertainment Television, Inc.*, 944 F. Supp. 299, 304-05 (S.D.N.Y. 1996) (same); *Martinez v. Labelmaster*, No. 96 C 4189, 1996 WL 580893, at \*2 (N.D. Ill. 1996) (same).

175. *E.g.*, *Martini v. Federal National Mortgage Ass'n*, 178 F.3d 1336 (D.C. Cir. 1999), *cert. dismissed*, 120 S. Ct. 1155 (2000); *Montoya v. Valencia County*, 872 F. Supp. 904 (D.N.M. 1994); *Henschke v. New York Hosp.-Cornell Med. Ctr.*, 821 F. Supp. 166, 170-71 (S.D.N.Y. 1993).

176. 29 C.F.R. § 1626.12.

177. *See* note 100 and accompanying text, above (discussing limitations on private suits against states).

178. The time for filing a charge will be extended under some circumstances. *See* § 2-IV D, below.

179. 29 C.F.R. § 1614.105(a)(1) (an aggrieved individual is required to initiate contact with an EEO Counselor within 45 days of the date of the alleged discriminatory employment practice).

180. 536 U.S. 101 (2002).

181. *Id.* at 114.

182. However, in the federal sector, the time frame for challenging personnel actions runs from the effective date of the action rather than the date of notice of the action. 29 C.F.R. § 1614.105(a)(1).

183. See § 2-IV C.4, *infra* (discussing timeliness of pay discrimination claims).

184. *But see Elmenayer v. ABF Freight Sys. Inc.*, 318 F.3d 130 (2d Cir. 2003) (employer's denial of a proposed religious accommodation that would allow a worker to attend Friday prayer service was a discrete act even though the worker experienced a recurring weekly conflict between his religious duty and his employment requirements).

185. This is consistent with the position taken by courts before the decision in *Morgan*. See, e.g., *Butts v. City of New York Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1402-03 (2d Cir. 1993) (recognizing several situations where claims not raised in an EEOC charge are sufficiently related to the allegations in a charge to permit those unraised claims to be included in a civil action); *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992) (retaliation claim for filing prior EEOC charge may be raised for the first time in federal court); *Anderson v. Block*, 807 F.2d 145, 148 (8th Cir. 1986) (court action could encompass termination if it was sufficiently related to suspensions challenged in timely EEOC charge). It is the Commission's view that *Morgan* does not affect these decisions. *But see Martinez v. Potter*, 347 F.3d 1208, 1210-11 (10th Cir. 2003) (finding that under *Morgan*, discrete acts that occurred after a charge is filed must be raised in a new charge, even if related to acts included in the pending charge); *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272 n.5 (11th Cir. 2002) (court stated that because the issue of post-charge discrimination had not been presented squarely, it would not address it, but noted that a charge may not encompass events that occur after it is filed because Title VII requires a charge to be filed after the unlawful employment practice occurred). The Commission disagrees with this view. Nothing in *Morgan* suggests that a new charge must be filed when a charge challenging related acts already exists. Thus, *Morgan* does not affect existing case law that permits subsequent related acts to be addressed in an ongoing proceeding. See *Delisle v. Brimfield Township Police Dep't*, No. 02-3050, 2004 WL 445181 (6th Cir. Mar. 8, 2004) (unpublished) (*Morgan* does not affect ability to raise retaliatory acts for the first time in district court if those acts are related to claims that were raised before the EEOC).

186. *Morgan*, 536 U.S. at 113 (discrete discriminatory acts are not actionable if time-barred even if related to acts alleged in timely charges).

187. *Id.* (Title VII does not "bar an employee from using the prior acts as background evidence in support of a timely claim"). See generally *Lyons v. England*, 307 F.3d 1092, 1110-12 (9th Cir. 2002) (discussing use of background evidence). See also *Baker v. John Morrell & Co.*, 220 F. Supp. 2d 1000, 1014 (N.D. Iowa 2002) (permitting the plaintiff to introduce evidence of pre-filing period acts to show that acts within the filing period were discriminatory).

188. *Morgan*, 501 U.S. at 117 (quoting 42 U.S.C. § 2000e-5(e)(1)); see also *id.* at 115 ("[The] very nature of [hostile work environment claims] involves repeated conduct. . . . The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. . . . Such claims are based on the cumulative effect of individual acts.") (citations omitted).

189. *Id.* at 117 ("Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.").

190. *Id.* at 117-18 & n.11 (because a hostile work environment constitutes a single unlawful employment practice, a plaintiff is not precluded from basing a suit on incidents outside the filing period even if he or she knew or should have known that such incidents were actionable before the statute of limitations expired on the conduct).

191. See *Singleton v. District of Columbia*, 351 F.3d 519, 527 (D.C. Cir. 2003) (plaintiff's hostile work environment claim included allegation that he was denied a promotion to a supervisory position). *But see Porter v. California Dep't of Corr.*, 383 F.3d 1018, 1027 (9th Cir. 2004) (stating in dicta that an actionable hostile work environment claim may comprise only timely non-discrete acts because including discrete and non-discrete acts as different parts of the same unlawful employment practice would "blur to the point of oblivion the dichotomy between discrete acts and a hostile environment"). The Commission disagrees with the Porter court's interpretation of

*Morgan*. Artificially carving out all discrete acts from hostile work environment claims is contrary to the Supreme Court's repeated admonitions that courts consider "all the circumstances" in determining whether a hostile work environment exists. See, e.g., *Morgan*, 536 U.S. at 116 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)) (emphasis added). Moreover, this approach would unnecessarily embroil courts in endless disputes over whether particular incidents were discrete acts, interjecting timeliness questions with the kind of ambiguity that the Court sought to eliminate in *Morgan*.

192. See *Morgan*, 536 U.S. at 116 (Title VII is violated where workplace is "permeated with 'discriminatory intimidation, ridicule, and insult'" that is sufficiently severe or pervasive to create an abusive working environment); *id.* at 120 (in course of affirming the Ninth Circuit's determination that *Morgan*'s hostile work environment claim could include incidents that occurred outside the filing period, the Court noted evidence of racial jokes, negative comments about black supervisors, and racial epithets).

193. Compare *Felton v. Polles*, 315 F.3d 470, 485 (5th Cir. 2002) (relying on *Morgan* and other Title VII case law in this section 1981 case, the court held that discrete acts, including promotion denials, were not part of a hostile work environment claim where the employee had not alleged discriminatory "intimidation, ridicule, or insults"), with *McFarland v. Henderson*, 307 F.3d 402, 408-09 (6th Cir. 2002) (where hostile work environment claim included a four-month pattern of sexual comments and an attempted kiss, claim also could include untimely discrete acts such as denying her the opportunity to earn extra pay).

194. See *Madison v. IBP, Inc.*, 330 F.3d 1051, 1061 n.6 (8th Cir. 2003) (noting that "[u]nder *Morgan*, an individual act of discriminatory termination or denial of tuition remission occurring outside the filing period may not be time barred if there is evidence the act is connected to a series of separate acts which make up a hostile work environment"). The court stressed that recovery for the discrete act is unavailable for the act in and of itself but is available for the act as part of the hostile work environment. *Id.* at 1061.

195. *Morgan* did not alter the existing law on the application of the continuing violations doctrine to pattern-or-practice claims. 536 U.S. at 115 n.9 ("We have no occasion here to consider the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants as none are at issue here."); *Lyons*, 307 F.3d at 1107 & n.8 (noting that where a plaintiff brings separate claims on each discrete act, "his assertion that this series of discrete acts flows from a company-wide, or systematic, discriminatory practice will not succeed in establishing the employer's liability for acts occurring outside the limitations period"; however, *Morgan* did not address "the question of how Title VII's filing deadlines should be applied to pattern-or-practice claims based on a series of discriminatory acts, some of which occurred outside the limitations period"); see also *Reeb v. Ohio Dep't of Rehab. & Corr.*, 221 F.R.D. 464, 471-72 (S.D. Ohio 2004) (plaintiffs representing a class of female corrections officers harmed by a long-standing policy of sex discrimination could challenge all actions taken pursuant to the policy, including those that occurred outside the filing period).

196. 42 U.S.C. § 2000e-5(e)(2) (Title VII); *id.* § 12117(a) (ADA—incorporating Title VII provision). This provision, which was part of the Civil Rights Act of 1991 (CRA), overrules the Supreme Court's decision in *Lorance v. AT & T Technologies*, 490 U.S. 900 (1989).

197. 29 U.S.C. § 623(k); see also S. Rep. No. 263, 101st Cong., 2d Sess. 29, reprinted in 1990 U.S.C.C.A.N. 1509, 1534 (1990) (those who have been discriminating longest—those with discriminatory benefit plans pre-dating the ADEA—should not be permitted to discriminate).

198. CP also may have a claim of sex-based wage discrimination under the EPA. The time frame for EPA charges is discussed in § 2-IV A.2.

199. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009). Signed into law on January 29, 2009, the Lilly Ledbetter Fair Pay Act has a retroactive effective date of May 28, 2007, and applies to claims of compensation discrimination pending on or after the effective date.

200. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5 (2009).

201. H.R. REP. NO. 110-237, at 18 (2007) (section-by-section analysis) ("Paychecks are payments for a prior term of work. For example, an employee works for a week, then the salary structure is applied and the paycheck is issued. Pension checks, however, are based on a pension structure that is applied only once, when the employee retires, and the pension checks merely flow from that single application." (quoting *Maki v. Allette, Inc.*, 383 F.3d 740, 744 (8th Cir. 2004))).

202. E.g., *Oshiver v. Levin, Fishbein, Sedran, & Berman*, 38 F.3d 1380, 1390 (3d Cir. 1994).

203. *E.g.*, *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 268 (7th Cir. 1995) (complainant failed to show that 10-month delay in filing after acquiring necessary information was reasonable).
204. *E.g.*, *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990) (where terminated older worker had no reason to suspect discrimination until younger worker replaced him, he could be given reasonable period of time to file charge), *cert. denied*, 501 U.S. 1261 (1991).
205. *See, e.g.*, *Washburn v. Sauer-Sundstrand, Inc.*, 909 F. Supp. 554, 559 (N.D. Ill. 1995) (plaintiff alleged that he had not known that he had a claim until learning that he had been discharged, rather than merely suspended, upon receiving an arbitration decision; the court found that plaintiff failed to exercise due diligence because he could have obtained this information from union representatives who brought his grievance).
206. *Hood v. Sears Roebuck & Co.*, 168 F.3d 231, 233 (5th Cir. 1999) (mental incapacity did not prevent plaintiff from pursuing her legal rights where she retained counsel before expiration of filing period).
207. *E.g.*, *Bracey v. Helene Curtis, Inc.*, 780 F. Supp. 568, 570 (N.D. Ill. 1992).
208. *See, e.g.*, *Anderson v. Unisys Corp.*, 47 F.3d 302, 307 (8th Cir.) (misleading letter from Minnesota Department of Human Resources justified equitable tolling), *cert. denied*, 516 U.S. 913 (1995); *Sarsha v. Sears, Roebuck & Co.*, 747 F. Supp. 454, 456 (N.D. Ill. 1990) (tolling appropriate where state agency improperly rejected charge on jurisdictional grounds).
209. The EEOC has entered into memoranda of understanding with some federal agencies having overlapping jurisdiction over certain EEO matters, such as immigration-related employment discrimination, providing that the time of filing with either agency will constitute the date of initial filing under the relevant statutes. Detailed implementing instructions are presented in Volume I of the EEOC Compliance Manual, §§ 91-95.
210. *E.g.*, *Oshiver*, 38 F.3d at 1387.
211. *E.g.*, *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1329 (8th Cir. 1995).
212. *See, e.g.*, *Oshiver*, 38 F.3d at 1390 (automatic extension by length of tolling period is justified where employer's deceptive conduct caused untimeliness); *Felty v. Graves-Humphreys Co.*, 785 F.2d 516, 520 (4th Cir. 1986) (limitations period extended by such time as employer's misconduct effectively operates to delay employee's effort to enforce his/her rights).
213. *E.g.*, *Cada*, 920 F.2d 450-51.
214. *E.g.*, *Felty*, 785 F.2d at 519-20 (individual was cautioned that he would be subject to "instant dismissal" and loss of "generous severance package" if he discussed his pending termination with anyone).
215. *E.g.*, *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 880-81 (5th Cir. 1991) (time frame should be extended under equitable estoppel theory where employer misrepresented facts relating to discharge by indicating that employee was being terminated due to reduction in force and would consider rehiring him, and failed to disclose that it was replacing him with younger individual at lower salary), *cert. denied*, 502 U.S. 868 (1991).
216. *See, e.g.*, *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1368 (D.C. Cir. 1998) ("an employer's affirmatively misleading statements that a grievance will be resolved *in the employee's favor* can establish an equitable estoppel" (emphasis in original)).
217. *E.g.*, *EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086, 1096 (6th Cir.) (where employer failed to post required EEO notices and employee was unaware of his rights, ADEA filing period may be extended), *cert. denied*, 519 U.S. 963 (1996).
218. Although the failure to post notices does not generally involve active misconduct, courts have allowed an extension equal to the full length of the filing period, rather than merely for a reasonable period of time. *See id.* (filing period begins to run when charging party retains lawyer or obtains actual knowledge of his ADEA rights).
219. *Leake v. University of Cincinnati*, 605 F.2d 255, 259 (6th Cir. 1979) (filing period should be extended because plaintiff and defendant agreed not to use time spent to investigate complaint to prejudice complainant with respect to time limitations).

An employer could also be deemed to have waived the defense if it does not raise it in a timely manner. However, this issue would only arise in court. *E.g.*, *Venters v. City of Delphi*, 123 F.3d 956, 962-65 (7th Cir. 1997) (once availability of timeliness defense is reasonably apparent, it must be raised promptly or it will be deemed to have

been waived).

220. This section addresses who has standing to file a charge. It does not address standing to file a lawsuit.

221. *See, e.g., Anjelino v. New York Times Co.*, 200 F.3d 73, 92 (3d Cir. 1999) (male employees had standing to allege discrimination against women because they were numbered on priority list among women and suffered pecuniary injury).

222. *Stewart v. Hannon*, 675 F.2d 846, 850 (7th Cir. 1982); *cf. Clayton v. White Hall Sch. Dist.*, 875 F.2d 676, 679-80 (8th Cir. 1989) (white individual's interest in environment free from discrimination against minorities is within zone of interests protected by Title VII).

223. *Allen v. American Home Foods, Inc.*, 644 F. Supp. 1553, 1557-58 (N.D. Ind. 1986), *supplemented by* 658 F. Supp. 451 (N.D. Ind. 1987).

The Commission believes that Congress intended to extend standing under the EEO statutes to the full extent permitted by Article III of the Constitution, embracing any kind of injury in fact that satisfies constitutional requirements. *Anjelino*, 200 F.3d at 88-92; *Stewart*, 675 F.2d at 848-50; *EEOC v. Bailey Co., Inc.*, 563 F.2d 439, 452-54 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978). *But see Patee v. Pacific Northwest Bell Tel. Co.*, 803 F.2d 476, 478-79 (9th Cir. 1986); *Clayton v. White Hall Sch. Dist.*, 778 F.2d 457, 460 (8th Cir. 1985).

224. *E.g., EEOC v. Nevada Resort Ass'n*, 792 F.2d 882, 885 (9th Cir. 1986) (citing *NAACP v. Alabama*, 357 U.S. 449, 458-60 (1958)); *Lulac Councils 4433 & 4436 v. City of Galveston*, 942 F. Supp. 342, 346 (S.D. Tex. 1996).

225. *Fair Employment Council v. BMC Marketing Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994).

226. 42 U.S.C. § 2000e-5(b) (Title VII); *id.* § 12117(a) (ADA--incorporating Title VII provisions); 29 C.F.R. § 1626.3 (ADEA); EEOC Compliance Manual, Volume I, § 2.1 (stating that "on behalf of" charge may be filed under EPA).

227. For further guidance on preclusion, refer to Enforcement Guidance on *Kremer v. Chemical Constr. Co.* (Parts I and II) (1986), Appendices 605-J, 605-K.

228. *See* Policy Statement on *Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (BNA) § VI, N:3106 (1997) (available at [www.eeoc.gov](http://www.eeoc.gov)).

229. *See* [§ 2-VI B](#), below (explaining requirements for claim or issue preclusion to apply).

230. 29 U.S.C. § 216(b) (EPA-Fair Labor Standards Act); *id.* § 626(b) (ADEA-incorporating FLSA enforcement provisions).

231. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990) (state courts have concurrent jurisdiction with federal courts to hear Title VII claims); 42 U.S.C. § 12117(a) (ADA-incorporating Title VII enforcement provisions).

232. *E.g., Tolefree v. City of Kansas City, Mo.*, 980 F.2d 1171, 1175 (8th Cir. 1992) (administrative board did not consider discrimination or retaliation issue because it was limited to reviewing whether the dismissal was justified, and on appeal to state court, claimant was not permitted to raise any new issues), *cert. denied*, 510 U.S. 905 (1993).

233. *E.g., Whitfield v. City of Knoxville*, 756 F.2d 455, 463 (6th Cir. 1985) (claim preclusion did not bar ADEA action in federal court where plaintiff could not have raised ADEA claim in state court proceedings due to statutory waiting period for filing ADEA claim).

234. *E.g., Thomas v. Contoocook Valley Sch. Dist.*, 150 F.3d 31, 41-42 (1st Cir. 1998) (state court finding that claimant was dismissed with "sufficient cause" does not preclude claim that termination was also motivated by disability discrimination).

235. *E.g., Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 894 (10th Cir. 1994).

236. *Gonsalves v. Alpine Country Club*, 727 F.2d 27 (1st Cir. 1984). However, if state law would draw a distinction between a case brought by a claimant and one brought by a respondent and deny preclusive effect to a decision in an action that was brought by a respondent, then a federal court would do the same because a federal court would only grant preclusive effect where a state court would do so. *Trujillo v. County of Santa Clara*, 775 F.2d 1359, 1365 (9th Cir. 1985); *Hickman v. Electronic Keyboarding, Inc.*, 741 F.2d 230, 232 n.3 (8th Cir. 1984).

237. *E.g.*, *Dici v. Commonwealth of Pa.*, 91 F.3d 542, 548 (3d Cir. 1996).

238. *Heyliger v. State Univ. & Community College Sys.*, 126 F.3d 849, 853 (6th Cir. 1997), *cert. denied*, 522 U.S. 1117 (1998).

239. *E.g.*, *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Lee v. Kroger Co.*, 901 F. Supp. 1218, 1222 (S.D. Tex. 1995).

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