

Equal Employment Opportunity Commission

Prohibited Employment Policies/Practices

Under the laws enforced by EEOC, it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

The law forbids discrimination in every aspect of employment.

The laws enforced by EEOC prohibit an [employer or other covered entity](#) from using neutral employment policies and practices that have a disproportionately negative effect on applicants or employees of a particular race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), or national origin, or on an individual with a disability or class of individuals with disabilities, if the policies or practices at issue are not job-related and necessary to the operation of the business. The laws enforced by EEOC also prohibit an employer from using neutral employment policies and practices that have a disproportionately negative impact on applicants or employees age 40 or older, if the policies or practices at issue are not based on a reasonable factor other than age.

Job Advertisements

It is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

For example, a help-wanted ad that seeks "females" or "recent college graduates" may discourage men and people over 40 from applying and may violate the law.

Recruitment

It is also illegal for an employer to recruit new employees in a way that discriminates against them because of their race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

For example, an employer's reliance on word-of-mouth recruitment by its mostly Hispanic work force may violate the law if the result is that almost all new hires are Hispanic.

Application & Hiring

It is illegal for an employer to discriminate against a job applicant because of his or her race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not refuse to give employment applications to people of a certain race.

An employer may not base hiring decisions on stereotypes and assumptions about a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

If an employer requires job applicants to take a test, the test must be necessary and related to the job and the employer may not exclude people of a particular race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, or individuals with disabilities. In addition, the employer may not use a test that excludes applicants age 40 or older if the test is not based on a reasonable factor other than age.

If a job applicant with a disability needs an accommodation (such as a sign language interpreter) to apply for a job, the employer is required to provide the accommodation, so long as the accommodation does not cause the employer significant difficulty or expense.

Job Referrals

It is illegal for an employer, employment agency or union to take into account a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information when making decisions about job referrals.

Job Assignments & Promotions

It is illegal for an employer to make decisions about job assignments and promotions based on an employee's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not give preference to employees of a certain race when making shift assignments and may not segregate employees of a particular national origin from other employees or from customers.

An employer may not base assignment and promotion decisions on stereotypes and assumptions about a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

If an employer requires employees to take a test before making decisions about assignments or promotions, the test may not exclude people of a particular race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), or national origin, or individuals with disabilities, unless the employer can show that the test is necessary and related to the job. In addition, the employer may not use a test that excludes employees age 40 or older if the test is not based on a reasonable factor other than age.

Pay and Benefits

It is illegal for an employer to discriminate against an employee in the payment of wages or employee benefits on the bases of race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. Employee benefits include sick and vacation leave, insurance, access to overtime as well as overtime pay, and retirement programs. For example, an employer may not pay Hispanic workers

less than African-American workers because of their national origin, and men and women in the same workplace must be given equal pay for equal work.

In some situations, an employer may be allowed to reduce some employee benefits for older workers, but only if the cost of providing the reduced benefits is the same as the cost of providing benefits to younger workers.

Discipline & Discharge

An employer may not take into account a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information when making decisions about discipline or discharge. For example, if two employees commit a similar offense, an employer may not discipline them differently because of their race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

When deciding which employees will be laid off, an employer may not choose the oldest workers because of their age.

Employers also may not discriminate when deciding which workers to recall after a layoff.

Employment References

It is illegal for an employer to give a negative or false employment reference (or refuse to give a reference) because of a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

Reasonable Accommodation & Disability

The law requires that an employer provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer.

A reasonable accommodation is any change in the workplace (or in the ways things are usually done) to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment.

Reasonable accommodation might include, for example, providing a ramp for a wheelchair user or providing a reader or interpreter for a blind or deaf employee or applicant.

Reasonable Accommodation & Religion

The law requires an employer to reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause difficulty or expense for the employer. This means an employer may have to make reasonable adjustments at work that will allow the employee to practice his or her religion, such as allowing an employee to voluntarily swap shifts with a co-worker so that he or she can attend religious services.

Training & Apprenticeship Programs

It is illegal for a training or apprenticeship program to discriminate on the bases of race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not deny training opportunities to African-American employees because of their race.

In some situations, an employer may be allowed to set age limits for participation in an apprenticeship program.

Harassment

It is illegal to harass an employee because of race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

It is also illegal to harass someone because they have complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Harassment can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. Sexual harassment (including unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature) is also unlawful. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal if it

is so frequent or severe that it creates a hostile or offensive work environment or if it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Harassment outside of the workplace may also be illegal if there is a link with the workplace. For example, if a supervisor harasses an employee while driving the employee to a meeting.

Terms & Conditions Of Employment

The law makes it illegal for an employer to make any employment decision because of a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. That means an employer may not discriminate when it comes to such things as hiring, firing, promotions, and pay. It also means an employer may not discriminate, for example, when granting breaks, approving leave, assigning work stations, or setting any other term or condition of employment - however small.

Pre-Employment Inquiries (General)

As a general rule, the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; whereas, information regarding race, sex, national origin, age, and religion are irrelevant in such determinations.

Employers are explicitly prohibited from making pre-offer inquiries about disability.

Although state and federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race, color, sex, national origin, religion, or age, such inquiries may be used as evidence of an employer's intent to discriminate unless the questions asked can be justified by some business purpose.

Therefore, inquiries about organizations, clubs, societies, and lodges of which an applicant may be a member or any other questions, which may indicate the applicant's race, sex, national origin, disability status, age, religion, color or ancestry if answered, should generally be avoided.

Similarly, employers should not ask for a photograph of an applicant. If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.

Pre-Employment Inquiries:

- [Race](#)
- [Height & Weight](#)
- [Financial Information](#)
- [Unemployed Status](#)
- [Background Checks](#)
- [Religious Affiliation Or Beliefs](#)
- [Citizenship](#)
- [Marital Status, Number Of Children](#)
- [Gender](#)
- [Disability](#)
- [Medical Questions & Examinations](#)

Dress Code

In general, an employer may establish a dress code which applies to all employees or employees within certain job categories. However, there are a few possible exceptions.

While an employer may require all workers to follow a uniform dress code even if the dress code conflicts with some workers' ethnic beliefs or practices, a dress code must not treat some employees less favorably because of their national origin. For example, a dress code that prohibits certain kinds of ethnic dress, such as traditional African or East Indian attire, but otherwise permits casual dress would treat some employees less favorably because of their national origin.

Moreover, if the dress code conflicts with an employee's religious practices and the employee requests an accommodation, the employer must modify the dress code or permit an exception to the dress code unless doing so would result in undue hardship.

Similarly, if an employee requests an accommodation to the dress code because of his disability, the employer must modify the dress code or permit an exception to the dress code, unless doing so would result in undue hardship.

Constructive Discharge/Forced To Resign

Discriminatory practices under the laws EEOC enforces also include constructive discharge or forcing an employee to resign by making the work environment so intolerable a reasonable person would not be able to stay.

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Retaliation Claims

Tracking the expansion of protections for employees.

BY MICHELLE HOOGENDAM CASH AND FRANK A. KING

Employees are protected from retaliation by a variety of federal and state employment laws as well as statutes relating to consumer protection, health and safety, corporate governance, whistleblower claims, and trade secrets, to name only a few.¹ Unlike other types of employment law claims, retaliation claims have found support at the trial and appellate court levels. What follows is a chart listing examples of the different types of activity that are protected from retaliation. It is by no means exhaustive, however, as the protections from retaliation are numerous and growing.²

STATUTE/CITATION	GENERAL PROVISION
Age Discrimination in Employment Act, 29 U.S.C. § 623(a) and (d)	Prohibits an employer, employment agency, or labor organization from retaliating against an individual because he or she opposed any unlawful practice under the statute, or filed a charge, testified in, or litigated under the act.
Americans with Disabilities Act, 42 U.S.C. § 12101	Prohibits an employer, employment agency, or labor organization from retaliating against an individual because he or she opposed any unlawful practice under the statute, or filed a charge, testified in, or litigated under the act.
Bankruptcy, 11 U.S.C. § 525	Employers cannot retaliate against a person because he or she has sought bankruptcy protection in the past or during employment.
Blacklisting, Texas Labor Code § 52.031	Prohibits a company from preventing an employee from engaging in or securing employment of any kind with any other person (public or private).
Child Support Orders/Garnishment, Texas Family Code § 158.209, 15 U.S.C § 1674	Prohibits retaliation against employees when wages are garnished for various purposes, including child support obligations.
Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140	Prohibits retaliation against a participant or beneficiary for exercising any rights under an employer benefit plan or for testifying in or giving information to an ERISA proceeding.
Employer Polygraph Protection Act, 29 U.S.C. § 2002	Generally, prohibits an employer from retaliating against an applicant or employee who refuses to take a lie detector test based on the results of a polygraph or because a person files a complaint under the statute, testifies in any such proceeding, or exercises any right provided by the statute.
Fair Labor Standards Act and Equal Pay Act, 29 U.S.C. § 215(a)(3)	Prohibits any person from retaliating against any employee because he or she filed a complaint or instituted an FLSA/EPA proceeding, testified, or is about to testify in a proceeding, or served on an industry committee.
False Claims Act (whistleblower protection), 31 U.S.C. § 3730(h)	Protects employees, contractors, or agents from being discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against for reporting a false or fraudulent claim for payment or approval to the U.S. government.
Family and Medical Leave Act, 29 U.S.C. § 261(a) & (b)	Prohibits employers from interfering with, restraining, or denying any right under the FMLA, as well as retaliating against any individual for opposing any unlawful practice under the FMLA. Also, prohibits retaliation against any person because he or she filed a charge or instituted an FMLA proceeding, provided information in connection with any FMLA inquiry or proceeding, or testified in any FMLA proceeding.

STATUTE/CITATION	GENERAL PROVISION
Jury Duty Protection (federal and state), 28 U.S.C. § 1875(a) and Texas Civil Practice & Remedies Code § 122.001	Federal statute prohibits an employer from discharging, threatening to discharge, intimidating, or coercing any employee because of jury service in U.S. courts. Texas statute prohibits a private employer from terminating an employee because of jury service.
National Labor Relations Act, 29 U.S.C. § 158	Prohibits an employer from interfering with, restraining, or coercing employees in their rights under the NLRA, interfering with the formation of a labor organization, discriminating in employment to affect labor organization membership, or retaliating against an employee because he or she files a charge with the National Labor Relations Board. Prohibits labor organizations from retaliation and coercion as well.
Retaliation for Protected Speech, the First Amendment through 42 U.S.C. § 1983	Prohibits retaliation by the government for protected speech. For public employees, the protected speech must relate to a matter of public concern.
Retaliation Against Voter, Texas Election Code § 276.001	Prohibits retaliation against a voter who has voted for or against a candidate or measure or a voter who has refused to reveal how he or she voted.
Sarbanes-Oxley Act, 18 U.S.C. § 1514A	Prohibits specified publicly traded companies from retaliation against an employee because the employee engaged in protected whistleblower activities related to fraud against shareholders.
Subpoenas, Texas Labor Code § 52.051	An employer may not discharge, penalize, or discipline an employee because of his or her compliance with a valid subpoena to appear in a civil, criminal, legislative, or administrative proceeding.
Texas Whistleblower Act, Texas Government Code § 554.002	Prohibits state and local governmental entities from retaliating against a public employee who reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.
Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3(a)	Prohibits an employer, employment agency, or labor organization from retaliating against an individual because he or she opposed any unlawful practice under the statute, or filed a charge, testified in, or litigated under the act.
Union Membership, Texas Labor Code § 101.052	No person may be denied employment because of membership in a labor union.
Worker's Compensation Claims, Texas Labor Code § 451.001	Prohibits retaliation against an employee because he or she filed a worker's compensation claim in good faith, hired a lawyer for such a claim, initiated a worker's compensation proceeding, or testified or is about to testify in a worker's compensation proceeding.

NOTES

1. The number of retaliation claims under all statutes filed with the Equal Employment Opportunity Commission has more than doubled in the past 18 years—from just over 18,000 in 1997 to almost 40,000 in 2015. *Charge Statistics FY 1997 Through FY 2015*, EEOC <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>. Recently, the EEOC updated its compliance manual and guidance on retaliation claims. See *Enforcement Guidance on Retaliation and Related Issues*, EEOC <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>.
2. The Occupational Safety and Health Administration is responsible for investigating claims of whistleblowers under recent statutes, and OSHA has published a chart describing many of those claims. See *Occupational Safety and Health Administration Directorate of Whistleblower Protection Programs Whistleblower Statutes Desk Aid*, https://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf. Examples include the Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2651, the Surface Transportation Assistance Act, 49 U.S.C. § 31105, the Clean Air Act, 42 U.S.C. § 7622, and many others.



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