### PART A. CATEGORIES OF DISCRIMINATION

#### CHAPTER 1. INTRODUCTION

#### I. IN GENERAL

§ 1:1 Introduction

#### II. OVERVIEW OF THE TREATISE

§ 1:2 Generally

#### III. ORGANIZATION OF TREATISE

§ 1:3 Generally

### IV. SOCIAL AND LEGISLATIVE HISTORY OF TITLE VII

§ 1:4 Generally

#### V. THE SOCIAL HISTORY OF OLDER AMERICANS, PEOPLE WITH DISABILITIES, AND IMMIGRANT WORKERS

§ 1:5 Older workers, people with disabilities, lawful immigrants—Generally

# CHAPTER 2. PRINCIPAL CATEGORIES OF DISCRIMINATION: DISPARATE TREATMENT AND DISPARATE IMPACT

#### I. IN GENERAL

§ 2:1 Introduction

#### II. DISPARATE TREATMENT—IN GENERAL

- § 2:2 Generally
- § 2:3 Allocation of burdens
- § 2:4 Prima facie case

#### EMPLOYMENT DISCRIMINATION LAW AND LITIGATION

§ 2:5	Membership in a protected class
§ 2:6	Adverse employment action
§ 2:7	Defendant's challenge to prima facie case— Qualifications
§ 2:8	Defendant's challenge to the fourth prong of the prima facie case—Showing replacement outside the protected class
§ 2:9	Comparators similarly situated in discharge and pay cases—Fourth prong of the prima facie case
§ 2:10	Rule 52(c) motion for judgment on partial findings at trial after prima facie case
§ 2:11	Prima facie presumption created
§ 2:12	Defendant's articulation of a legitimate, nondiscriminatory reason
§ 2:13	Plaintiff's opportunity to prove pretext
\$ 2:14	Jury instructions on pretext
§ 2:15	Probative value of comparative qualifications to pretext analysis
§ 2:16	"Honest belief" or objective truth in pretext analysis
§ 2:17	Types of proof to meet the plaintiff's burden on the prima facie and pretext case
§ 2:18	—Comparative evidence
\$ 2:19	—Statistical evidence
§ 2:20	Pattern-or-practice method of proof is not available to nonclass private plaintiffs
§ 2:21	Types of proof to meet the plaintiff's burden on the prima facie and pretext case—Direct evidence of discrimination
§ 2:22	Types of proof—Intentional discrimination may be established through evidence of unthinking stereotypes, implicit, or unconscious bias
§ 2:23	Stray remarks of animus might be relevant to proof of discrimination
§ 2:24	Who is a "decisionmaker" for purposes of discrimination actions brought under Title VII and the ADEA
§ 2:25	"Cat's paw" theory—Discriminatory animus of nondecisionmaker imputed to decisionmaker
§ 2:26	"Same actor/short time" inferences
§ 2:27	—The strength of the inference
\$ 2:28	—"Strong inference" cases
\$ 2:29	—Cases rejecting a "strong inference" rule
§ 2:30	—Cases not articulating a clear standard
§ 2:31	—How short must the period of time be?
§ 2:31	—Is the decisionmaker really the same?
§ 2.32 § 2:33	—Plaintiffs' offensive use of the "same actor" inference
§ 2.33 § 2:34	Mixed motive cases—Alterations in the <i>McDonnell</i> -
y 4.04	Douglas Burdine structure

- § 2:35 Post-Desert Palace and Nassar lower courts' application
- § 2:36 Disparate treatment pattern and practice class actions
- § 2:37 The bona fide occupational defense in disparate treatment cases

#### III. DISPARATE IMPACT—IN GENERAL

§ 2:38 Generally

#### IV. ORDER AND ALLOCATION OF PROOF

- § 2:39 Generally
- § 2:40 EEOC technical assistance guidance on the use of advanced technology tools, including artificial intelligence focusing on whether an employer's "selection procedures" have a disparate impact

#### V. LEGISLATIVE HISTORY OF THE DISPARATE IMPACT PROVISION OF THE CIVIL RIGHTS ACT OF 1991

§ 2:41 Generally

# VI. THE JOB-RELATED AND BUSINESS NECESSITY STANDARDS DEFINED BY GRIGGS AND ITS PROGENY—A HISTORICAL PERSPECTIVE

- § 2:42 Generally
- § 2:43 Lower courts' application of job related and business necessity standard based on job performance
- § 2:44 Employment practices invalidated that excluded qualified protected group members when practices did not predict, measure, or ensure successful job performance
- § 2:45 Employment practices upheld when employers show that the practices are significantly related to successful job performance

#### VII. BOTTOM-LINE CONCEPT REJECTED

§ 2:46 Generally

#### VIII. WATSON APPLIED THE DISPARATE IMPACT ANALYSIS TO SUBJECTIVE CRITERIA

§ 2:47 Generally

#### IX. WARDS COVE—THE COURT TURNED GRIGGS ON ITS HEAD SETTING THE STAGE FOR CONGRESSIONAL REVERSAL

- § 2:48 Generally
- § 2:49 Business justification stage
- § 2:50 Pretext stage

#### X. CRITICAL DISTINCTIONS BETWEEN DISPARATE TREATMENT AND IMPACT ANALYSES

- § 2:51 Congressional intent
- § 2:52 Evidentiary distinctions
- § 2:53 Public policy

## XI. EMPLOYER'S DEFENSE TO AVOID DISPARATE TREATMENT LIABILITY—RICCI v. DESTEFANO

 $\$  2:54 Defense to avoid disparate treatment liability— $Ricci\ v.$  Destefano

### XII. STATUTORY EXCEPTIONS TO DISPARATE IMPACT DISCRIMINATION

§ 2:55 Generally

### XIII. RULE 52 AND REVIEW OF DISTRICT COURT'S FINDINGS OF FACT

§ 2:56 Generally

#### XIV. APPLICATION OF THE CIVIL RIGHTS ACT OF 1991 TO "EXISTING CLAIMS"

§ 2:57 Generally

#### CHAPTER 3. OTHER CATEGORIES OF DISCRIMINATION: RELIGION AND THE EMPLOYER'S DUTY TO ACCOMMODATE

#### I. RELIGIOUS DISCRIMINATION

§ 3:1 Religious discrimination—In general

### II. THE DUTY TO ACCOMMODATE RELIGIOUS PRACTICES—SECTION 701(j)

§ 3:2 Accommodate religious practices—In general and

determining whether this is an undue burden on the employer

## III. PLAINTIFF'S PRIMA FACIE CASE—WHEN AN EMPLOYER'S DUTY TO ACCOMMODATE ARISES

§ 3:3 Prima facie case—Religious discrimination

### IV. THE EXTENT OF THE EMPLOYER'S DUTY TO REASONABLY ACCOMMODATE

- § 3:4 Employer's duty to reasonably accommodate
- § 3:5 Reasonable accommodation
- § 3:6 Accommodating religious garb or dress and grooming
- § 3:7 Accommodations based on refusal to be vaccinated
- § 3:8 Accommodation and union security provisions
- § 3:9 Undue hardship

#### V. THE CONSTITUTIONALITY OF SECTION 701(J)

§ 3:10 Constitutionality of § 701(j)

#### VI. SECTION 702—PERMISSIBLE RELIGIOUS DISCRIMINATION BY RELIGIOUS INSTITUTIONS

- § 3:11 Permissible religious discriminations
- § 3:12 Constitutionality of Section 702
- § 3:13 Inner-church employment matters

#### VII. DISPARATE TREATMENT

§ 3:14 Disparate treatment—Generally

#### VIII. U.S. CONSTITUTION CONCERNING RELIGION UNDER THE FIRST AMENDMENT

- § 3:15 Application of the First Amendment to Title VII other than religion and the ADEA—"Ministerial exception"
- § 3:16 The Smith decision
- § 3:17 Challenging public employers on First Amendment establishment and Free Exercise Clauses grounds under 42 U.S.C.A. § 1983
- § 3:18 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission—Limited guidance for employers and employees
- § 3:19 Application of state fair employment law against religious institutions challenged as a violation of the First Amendment

#### IX. RELIGIOUS FREEDOM RESTORATION ACT

§ 3:20 Application of Religious Freedom Restoration Act

### PART B. THE EMPLOYMENT PROCESS

### CHAPTER 4. INITIAL ENTRY INTO THE WORK FORCE

I. THE	EMPI	OYMENT	PROCESS

§ 4:1 Introduction

#### II. INITIAL ENTRY—IN GENERAL

§ 4:2 Generally

#### III. OBTAINING PROSPECTIVE EMPLOYEES— CREATING AN APPLICANT POOL

	CREATING AN APPLICANT POOL	
§ 4:3	Generally	
§ 4:4	Word-of-mouth and family relations practices	

- § 4:5 Direct or walk-in applications
   § 4:6 Internet and related technologies—Recruitment, selection and use of on-line screening
- § 4:7 Discouragement of applicants
- § 4:8 Applicant interest—Use of social science and historical experts
- § 4:9 —Historical testimony
- § 4:10 —Survey testimony and methodology

#### IV. SELECTING EMPLOYEES

- § 4:11 Selecting employees—Generally
- § 4:12 Pre-employment inquiries
- § 4:13 EEOC's enforcement guidance on consideration of arrest and conviction records
- § 4:14 Credit checks prior to employment
- § 4:15 Subjective criteria

#### V. INITIAL ASSIGNMENT UPON HIRE

§ 4:16 Generally

#### CHAPTER 5. WORK ENVIRONMENT— SEXUAL AND RACIAL HARASSMENT AND OTHER PROTECTED CATEGORIES OF HARASSMENT

### I. SEXUAL, AND RACIAL, AND OTHER FORMS OF HARASSMENT ON THE JOB—IN GENERAL

§ 5:1 Sexual, and racial, and other forms of harassment, such as religious and LGBTQIA+—Generally

#### II. SEXUAL HARASSMENT DEFINED

§ 5:2 Definition of sexual harassment

#### III. EXTENT OF SEXUAL HARASSMENT

§ 5:3 Extent of sexual harassment—Generally

### IV. SEXUALLY CHARGED LITIGATION ATMOSPHERE

§ 5:4 Generally

# V. SEXUAL HARASSMENT BASED ON THREATS THAT ARE CARRIED OUT—QUID PRO QUO DISCRIMINATION WHEN A TANGIBLE EMPLOYMENT ACTION IS TAKEN

§ 5:5 Generally

#### VI. EMPLOYER LIABILITY FOR SUPERVISOR CONDUCT CONSTITUTING SEXUAL HARASSMENT WHEN A TANGIBLE ADVERSE EMPLOYMENT ACTION IS TAKEN

- § 5:6 Generally
- § 5:7 What constitutes tangible employment action?
- § 5:8 Who is a supervisor?
- § 5:9 Who is the employer's "alter-ego?"

#### VII. HOSTILE WORK ENVIRONMENT

- § 5:10 Generally
- § 5:11 Prima facie case
- § 5:12 Defining the "reasonable person"
- § 5:13 —Decisions applying the *Harris* "reasonable person" standard
- § 5:14 —Pre-*Harris* decisions—"Reasonable person" and "reasonable women"

- § 5:15 What conduct is sufficiently severe or pervasive?
- § 5:16 False rumors of sexual activity may constitute sexual harassment

### VIII. EMPLOYER LIABILITY FOR HOSTILE WORK ENVIRONMENT

§ 5:17	Generally
§ 5:18	Employer is vicariously liable for hostile environment created by supervisor, subject to an affirmative defense
§ 5:19	—Affirmative defense when no tangible employment action is taken—Two elements
§ 5:20	—Who decides whether the employer meets the affirmative defense: Court or jury?
§ 5:21	First prong of affirmative defense: Preventing or correcting harassment—Employer's obligation to maintain effective policies, train, investigate and take reasonable measures to stop harassment
§ 5:22	—Written policies—Best practices and EEOC guidance
§ 5:23	Develop and monitor written non-retaliation plan— Proactive efforts to address fear of complaining
$\S 5:24$	Mandatory reporters and management accountability
§ 5:25	Accused is CEO, COO, or CFO equivalent authority, or "high value" person—Retention of independent neutral investigator
§ 5:26	First prong of affirmative defense: Preventing or correcting harassment—Adequacy of employer's policy—Courts' application of the defense
§ 5:27	— — Written policies, distribution and training
§ 5:28	— —Avenues of complaint other than the employer's harassment policy
5:29	— —Employer's response to the complaint
§ 5:30	—Training and educational programs
§ 5:31	—Investigation
§ 5:32	——Perception of fairness
§ 5:33	——Choice of investigator
§ 5:34	— —Effective investigatory methodology
§ 5:35	—Investigation by lawyers—Future representation and waiver of privileges
§ 5:36	Investigation to maintain privilege and provide proper notice to employees
§ 5:37	First prong of affirmative defense: Preventing or correcting harassment—Employer's remedial action obligations
§ 5:38	——Plaintiff not worse off
§ 5:39	— — Challenge of employer's action
§ 5:40	Second prong of the affirmative defense: Unreasonable

		failure to take advantage of the employer's complaint mechanism
§	5:41	Employer liability for a hostile environment created by coworkers
ξ	5:42	—Prima facie case
	5:43	—When notice to supervisor constitutes notice to employer
8	5:44	Employer liability for off-site harassment
	5:45	Harassment by nonemployees
-	5:46	Sexually provocative dress requirements
	5:47	Harassment directed at both women and men
•	5:48	Same-sex harassment
-	5:49	Individual liability
_	5:50	Standing to sue—Plaintiff not target of harassment
2	0.00	but which she knew about
§	5:51	Hostile environment claim established—Gender-
2	F.F0	specific language not directed at plaintiff
	5:52 5:53	Romantically motivated favoritism
		Continuing violations
	5:54 5:55	Union liability
	5:56	Class actions State tort actions—Courts are split whether they are
8	5:56	barred by workers' compensation statutes
2	5:57	Sanctions by state boards against professionals
8	5.57	Sanctions by state boards against professionals
L	X. I	PROOF—EVIDENTIARY AND DISCOVERY
		SSUES
§	5:58	Evidentiary and discovery issues—Generally
§	5:59	Employer's inquiry into the prior sexual conduct of the plaintiff
§	5:60	Privacy
§	5:61	Plaintiff's inquiry into harassment of other female employees
§	5:62	Employer seeking order to conduct a mental examination of the plaintiff
§	5:63	Employer seeks to examine the victim's psychotherapist
§	5:64	Plaintiff's expert testimony
	5:65	—Mental health professional—Claims of mental or
•		emotional injury
§	5:66	—Psychologist and sociologist—Sexual stereotyping testimony
§	5:67	—Counselors or other professionals—Common patterns and responses to sexual harassment
§	5:68	—Adequacy of the employer's policy, training, and
		investigation of complaints to prevent and stop harassment—Employment practices expert

#### X. REMEDIES AND AVAILABILITY OF JURY TRIALS—FEDERAL AND PENDENT STATE **ACTIONS**

§ 5:69 Generally

#### XI. RACIAL HARASSMENT

§ 5:70	Generally
§ 5:71	Standard to determine sufficiency of harassment
§ 5:72	Employer liability for racial harassment—Harassment by supervisors
§ 5:73	Cumulative and by-stander harassment
§ 5:74	Employer liability for racial harassment—Harassment by coworkers
§ 5:75	—Harassment by non-employees
§ 5:76	White employees' standing to sue because of hostility targeted at African-American employees
§ 5:77	White employees claims of a hostile work environment because of mandatory diversity, equity, and inclusion training and state laws banning DEI training
§ 5:78	Harassment and discrimination—Interracial or biracial relationships
§ 5:79	Proof—Evidentiary and discovery issues

#### CHAPTER 6. COMPENSATION

#### I. COMPENSATION—IN GENERAL

§ 6:1 Compensation

#### II. DISCRIMINATION IN PENSIONS BASED UPON SEX-MEANING OF "TO DISCRIMINATE"

§ 6:2 Discrimination in pensions based upon sex

#### III. PERPETUATING PRE-ACT WAGE DISCRIMINATION: BAZEMORE v. FRIDAY

- § 6:3 Pre-Act wage discrimination
- Reversal of Supreme Court's Ledbetter decision—Restart § 6:4 of statute of limitations
- Post-Ledbetter Act court decisions—Retroactivity § 6:5
- § 6:6 —Application of Ledbetter Fair Pay Act

#### IV. RELATIONSHIP OF TITLE VII TO THE EQUAL PAY ACT—THE BENNETT AMENDMENT

§ 6:7 Title VII and the Equal Pay Act—Bennett Amendment

#### V. "HEAD-OF-HOUSEHOLD" FRINGE BENEFIT DIFFERENTIALS—IMPACT ANALYSIS AND THE BENNETT AMENDMENT

§ 6:8 "Head-of-household" benefit

#### VI. COMPARABLE WORTH

§ 6:9 Theory of comparable worth

#### **CHAPTER 7. PROMOTIONS**

#### I. PROMOTIONS—IN GENERAL

§ 7:1 Generally

### II. NOTICE OF OPENING AND DISCOURAGEMENT OF APPLICANTS

§ 7:2 Generally

#### III. SUBJECTIVE CRITERIA

§ 7:3 Generally

### IV. EFFECT OF SENIORITY SYSTEM ON EXPERIENCE REQUIREMENTS

§ 7:4 Generally

#### CHAPTER 8. GENDER DISCRIMINATION— PREGNANCY, CHILDBIRTH, GENDER NONCONFORMITY, AND SEX PLUS

#### I. HISTORICAL DEVELOPMENT—FROM EXCLUSION TO THE PREGNANCY DISCRIMINATION ACT OF 1978

- § 8:1 Gender discrimination—Generally
- § 8:2 Pregnancy Workers Fairness Act (PWFA)
- § 8:3 EEOC Enforcement Guidance on pregnancy discrimination and related issues

### II. PREGNANCY AND CHILD-BEARING—IN GENERAL

§ 8:4 Generally

### III. ADVERSE ACTIONS IN RESPONSE TO PREGNANCY

§ 8:5 Adverse actions in response to pregnancy—Generally

§ 8:6 Sex-based harassment under Title VII includes pregnancy, childbirth, or related medical conditions

#### IV. DISCHARGE

- § 8:7 Discharge—Generally
- § 8:8 Class-based claims of pregnancy discrimination

#### V. MATERNITY LEAVE

- § 8:9 Mandatory leaves
- § 8:10 Right to voluntary leave
- § 8:11 Leave and reinstatement policies required by state law—California Federal Savings and Loan Ass'n v. Guerra

#### VI. BENEFITS

- § 8:12 Generally
- § 8:13 Benefits to pregnant employees
- § 8:14 Benefits to dependents—Newport News v. EEOC
- § 8:15 State disability insurance
- § 8:16 State unemployment insurance
- § 8:17 Employer disability plans
- § 8:18 Employer pension plans impacted by pre-PDA accrual rules

#### VII. BREASTFEEDING IN THE WORKPLACE

- § 8:19 Adverse action—Lactation or breast-pumping under Title VII and the Providing Urgent Maternal Protections for Nursing Mothers Act
- § 8:20 Providing Urgent Maternal Protections for Nursing Mothers Act
- § 8:21 Discriminating against an employee because she is lactating or expressing milk is sex discrimination under Title VII and Title IX

#### VIII. EXCLUSION OF PREGNANT EMPLOYEES OR WOMEN OF CHILDBEARING AGE FROM HAZARDOUS WORK AREAS

§ 8:22 Exclusion of pregnant employees or women of childbearing age from hazardous work areas—In general

#### IX. SEX PLUS DISCRIMINATION

- § 8:23 Sex plus discrimination—In general
- § 8:24 Sex plus marriage

§ 8:25 Sex plus grooming and appearance standards
 § 8:26 Grooming cases and statues addressing racial discrimination
 § 8:27 Sex plus stereotyping—false rumors of sexual activity
 § 8:28 Sex plus age claims
 § 8:29 Sex plus caregiving

### X. SEX STEREOTYPING BASED ON GENDER NONCONFORMING BEHAVIOR

§ 8:30 Sex stereotyping based on gender nonconforming behavior—Generally

### XI. STATE "PROTECTIVE" LAWS—HISTORICAL DEVELOPMENT

§ 8:31 Historical development of state "protective" laws

### XII. STATE PROTECTIVE LAWS AFTER THE ENACTMENT OF TITLE VII

§ 8:32 Impact of enactment of Title VII on state protective laws

#### CHAPTER 9. DISCHARGE

#### I. DISCHARGE—IN GENERAL

§ 9:1 Generally

#### II. MCDONNELL/BURDINE ORDER AND ALLOCATION OF PROOF IN DISPARATE TREATMENT DISCHARGE CASES

§ 9:2 Generally

#### III. THE DISCHARGED EMPLOYEE'S CASE-IN-CHIEF: PRIMA FACIE AND PRETEXT

§ 9:3 Generally

### IV. COMPARATIVE EVIDENCE CASE STUDY: BARNES v. YELLOW FREIGHT SYSTEMS, INC.

§ 9:4 Generally
 § 9:5 Barnes's work history
 § 9:6 Company's evaluation system changed
 § 9:7 Comparative work histories of Maury Nixon and other supervisors, including statistics
 § 9:8 The company's articulation of the legitimate nondiscriminatory reason for discharging barnes

- $\S~9:9$  Barnes and Yellow Freight's proposed conclusions of law
- § 9:10 Conclusions of law

#### V. CONSTRUCTIVE DISCHARGE

§ 9:11 Generally

#### VI. TENURE DENIAL AS A FORM OF DISCHARGE

- § 9:12 Generally
- § 9:13 Choice of forum
- § 9:14 Proving the case—Discovery
- § 9:15 Tactical considerations and common pitfalls
- § 9:16 Tenure as a remedy

#### CHAPTER 10. RETALIATION

#### I. RETALIATION—IN GENERAL

§ 10:1 Retaliation—Generally

### II. PROVING RETALIATION—THE ELEMENTS OF THE CAUSE OF ACTION

- § 10:2 Proving Retaliation—Generally
- § 10:3 Plaintiff must prove employer knew of the protected conduct
- § 10:4 Passage of time is a factor in proving or defending a claim
- § 10:5 Managers rule
- § 10:6 Other evidence to proving or defending a claim
- § 10:7 Mixed-motive cases
- § 10:8 What constitutes adverse action
- § 10:9 Cat's paw liability theory applied to retaliation claims

#### III. THE PARTICIPATION CLAUSE

§ 10:10 Generally

#### IV. THE OPPOSITION CLAUSE

- § 10:11 Generally
- § 10:12 The opposition must be in good faith and the employee must reasonably believe that the practice opposed was unlawful
- § 10:13 Retaliation claims under statues other than Title VII
- § 10:14 ADA accommodation requests

#### V. WEIGHING DISLOYALTY OR DISRUPTION

§ 10:15 Generally

#### VI. EEOC'S ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES

§ 10:16 Enforcement guidance on retaliation and related issues—Generally § 10:17 What is retaliation? § 10:18 What is protected activity? What is a materially adverse action? § 10:19 § 10:20 What is causation? § 10:21 Related issues—Requests for accommodation § 10:22 Guidance for employers § 10:23 Best practice in preventing retaliation

### VII. PROCEDURAL ISSUES—SEEKING IMMEDIATE JUDICIAL RELIEF

§ 10:24 Generally
 § 10:25 The standards for preliminary relief—In general
 § 10:26 Demonstrating the factors for obtaining preliminary relief
 § 10:27 Interim relief during exhaustion of administrative requirements

# VIII. RETALIATION ACTIONABLE UNDER TITLE IX OF EDUCATION AMENDMENTS BECAUSE INDIVIDUAL REPORTED SEX DISCRIMINATION

§ 10:28 Generally

#### PART C. LITIGATION

### CHAPTER 11. PRE-LITIGATION PROCEDURAL REQUIREMENTS

#### I. LITIGATION

§ 11:1 Introduction

#### II. PROCEDURAL REQUIREMENTS—IN GENERAL

§ 11:2 Procedural requirements

#### III. THE CHARGE OF DISCRIMINATION

- § 11:3 Charge of discrimination
- § 11:4 Federal court complaint allegations "like or related" issues raised in EEOC charge
- § 11:5 Retaliation—Do new charges need to be filed?
- § 11:6 Defendants named in charge

#### IV. WHERE TO FILE THE CHARGE

§ 11:7 Filing the charge

#### V. FILING A TIMELY CHARGE—IN GENERAL

- § 11:8 Generally
- § 11:9 Time period for filing charges in "deferral" and nondeferral states
- § 11:10 When a violation occurs—Disparate treatment
- § 11:11 —Disparate impact and treatment pattern or practice
- § 11:12 —Continuing violations
- § 11:13 Tolling of filing periods

### VI. TIMELY FILING OF FEDERAL COURT COMPLAINT—IN GENERAL

- § 11:14 Generally
- § 11:15 When a charging party may obtain a right-to-sue letter or notice of dismissal
- § 11:16 Laches affirmative defense
- § 11:17 Commencing the 90-day period to file suit

- § 11:18 Ending the 90-day period to file suit
- § 11:19 Tolling the 90-day period for filing suit

### VII. THE EEOC ADMINISTRATIVE PROCESS—IN GENERAL

- § 11:20 EEOC administrative process—Generally
- § 11:21 Priority charge handling procedures and strategic enforcement plans
- § 11:22 Form EEO-1 data available through EEOC Explore— Interactive tool to examine demographic data
- § 11:23 EEOC procedures—Submission and release of position statements and obtaining responses
- § 11:24 Negotiated settlement procedures conciliation agreements, and mediation program
- § 11:25 Obtaining documents from the EEOC through the Freedom of Information Act including charge files after investigation completion
- § 11:26 EEOC's subpoena power
- § 11:27 EEOC's judicial enforcement of Title VII
- § 11:28 —Suits under both §§ 706 and 707
- § 11:29 —Validity of EEOC charge
- § 11:30 —Notice requirement
- § 11:31 —Timeliness of ten-day notice requirement
- § 11:32 —Adequacy of investigation and conciliation efforts
- § 11:33 —Time period for commencing suit in federal court
- § 11:34 —Scope of federal court complaint

#### VIII. PRE-LITIGATION REQUIREMENTS IN SUITS AGAINST THE FEDERAL GOVERNMENT UNDER SECTION 717 OF TITLE VII, SECTION 15 OF THE ADEA AND OTHER STATUTES—IN GENERAL

- § 11:35 Pre-litigation requirements under § 717
- § 11:36 Initiating a complaint of discrimination
- § 11:37 Investigation of the complaint
- § 11:38 Hearing
- § 11:39 Final agency decision
- § 11:40 Appeal to the EEOC's Office of Federal Operations (OFO)

### IX. TIMELY FILING OF SECTION 717 CIVIL SUITS AFTER "FINAL" AGENCY ACTION

§ 11:41 Timely filing of § 717 civil suits

### X. CLASS ACTIONS IN SECTION 717 SUITS AND ADMINISTRATIVE PROCEEDINGS

§ 11:42 Class actions under § 717

#### XI. MIXED CASES—PERSONNEL ACTIONS SUBJECT TO BOTH MSPB AND EEO JURISDICTION

§ 11:43 Mixed cases—Personnel actions subject to both MSPB and EEO jurisdiction—Generally

# XII. RELATIONSHIP OF AGENCY DISCRIMINATION PROCEDURES AND NEGOTIATED GRIEVANCE PROCEDURES

§ 11:44 Agency discrimination procedures and negotiated grievances procedures

#### XIII. RETALIATION

§ 11:45 Retaliation—In general

### CHAPTER 12. THE FEDERAL COURT COMPLAINT

#### I. DRAFTING THE COMPLAINT

§ 12:1 Drafting the complaint—Generally

### II. SCOPE OF THE FEDERAL SUIT AS DEFINED BY EEOC CHARGE

§ 12:2 Generally

#### III. PLAINTIFFS WITH STANDING

- § 12:3 Generally
- § 12:4 "Testers" as "persons aggrieved"
- § 12:5 —Tester standing in employment discrimination cases
- § 12:6 —Tester standing in housing discrimination cases
- § 12:7 —EEOC's comparison of Title VII to Title VIII
- § 12:8 Plaintiff seeks to proceed anonymously

#### IV. PROPER DEFENDANTS

- § 12:9 Generally
- § 12:10 Extraterritorial application of Title VII, the ADA, and the ADEA
- § 12:11 Application of state fair employment laws— Employees residing in another state from location of employer
- § 12:12 The employment relation
- § 12:13 Statutory employers
- § 12:14 "Agents of employers"

- Employment agencies § 12:15 Labor unions and joint apprenticeship committees § 12:16 § 12:17 Interference with employment opportunities by third parties Federal employers § 12:18 § 12:19 State and local government employers § 12:20 Suing defendants not technically named in the EEOC —Successors of charging parties § 12:21
- -Federal Rule 19-Suing noncharged defendants § 12:22
- —Agency relationship § 12:23

#### V. COVERAGE LIMITATIONS OF TITLE VII

§ 12:24 Coverage limitations of Title VII—Generally

#### VI. FOREIGN EMPLOYERS

§ 12:25 Foreign employers—Generally

#### COMPLIANCE WITH THE EEOC PROCESS VII.

§ 12:26 Compliance with the EEOC process—Generally

#### VIII. VENUE

§ 12:27 Venue—Generally

#### IX. CLASS ACTION

- § 12:28 Class action—Generally
- § 12:29 The Supreme Court's Rodriguez and Falcon Decisions
- § 12:30 Wal-Mart Stores v. Dukes—Certification for class treatment under Rule 23(b)(2) and commonality requirement under Rule 23(a)
- —Failure to meet commonality requirement under § 12:31 Rule 23(a)
- —Rejection of certification of claims for back pay § 12:32 under Rule 23(b)(2)
- § 12:33 —Criticism in deciding case under Rule 23(a)
- § 12:34 -Setting the bar
- § 12:35 Standing issues
- § 12:36 The structure and requirements of Rule 23
- § 12:37 Requirements of Rule 23(a)
- § 12:38 -Numerosity
- § 12:39 —Commonality
- —Typicality § 12:40
- —Adequacy of representation § 12:41
- § 12:42 Requirements of Rule 23(b)

§ 12:43	Certification of class action suits
§ 12:44	Immediate appeal from a federal district court's order granting or denying class certification—Fed. Rule Civ. P. 23(f)
§ 12:45	Seeking preliminary injunction for an order enjoining defendant from retaliating against plaintiff and witnesses in a putative class action
§ 12:46	Removal of lawsuits filed in state courts to federal courts if they meet the statutory requirements for removal under either 28 U.S.C.A. § 1441(a) or the Class Action Fairness Act
§ 12:47	Class members' relationship to the class action— Jurisdictional requirements and res judicata effects
3 12:48	—Jurisdictional requirements and limitation period
§ 12:49	Class members relationship to the class—Evaluating specific jurisdiction
§ 12:50	Class members' relationship to the class action— Preclusive effect of the class action judgment on the claims of individual class members
§ 12:51	Notice
§ 12:52	Proper and improper communications with parties in a class action—The ABA's "anti-contact" rule
3 12:53	Settlement
§ 12:54	District court jurisdiction to address objector settlements against the interest of the class— "Objector blackmail" in proposed class settlements
§ 12:55	Appeals of class certification rulings
§ 12:56	Rule 68 offer to named plaintiff in class action does not end the class action

#### X. STATEMENT OF FEDERAL CLAIMS

§ 12:57 Generally

#### XI. PENDENT JURISDICTION

- § 12:58 Generally
- $\$  12:59 Supreme Court doctrine—United Mine Workers v. Gibbs and Aldinger v. Howard
- § 12:60 Judicial Improvements Act of 1990

#### XII. JURY DEMAND

§ 12:61 Generally

#### XIII. RELIEF REQUESTED

§ 12:62 Generally

### CHAPTER 13. DEFENDANT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

### I. DEFENDANTS' MOTION TO DISMISS—IN GENERAL

§ 13:1 Generally

### II. MOTIONS TO DISMISS BASED ON STATUTE OF LIMITATIONS—IN GENERAL

- § 13:2 Generally
- § 13:3 Motion to dismiss for plaintiff's failure to file a timely EEOC charge
- § 13:4 Motion to dismiss for failure to file a timely federal court complaint

### III. MOTION TO DISMISS FOR FAILURE TO NAME A DEFENDANT IN THE EEOC CHARGE

§ 13:5 Generally

#### IV. MOTION TO DISMISS BECAUSE SCOPE OF THE FEDERAL SUIT GOES BEYOND THE EEOC CHARGE

§ 13:6 Generally

### V. MOTION TO DISMISS A PENDENT STATE CLAIM

§ 13:7 Generally

# VI. MOTION TO DISMISS BASED ON THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL—IN GENERAL

- § 13:8 Generally
- § 13:9 The impact of a state court judicial affirmance of a state fair employment agency's determination—

  \*\*Kremer v. Chemical Constr. Corp.\*\*
- § 13:10 Decisions by state agencies operating in a "judicial capacity" have no preclusive effect—*University of Tennessee v. Elliott*
- § 13:11 Application of preclusion doctrine by lower courts
- § 13:12 Evidentiary uses of prior decisions

### VII. MOTION TO DISMISS AND TO COMPEL ARBITRATION

§ 13:13 Generally

§ 13:14	Gilmer case—Approval of predispute mandatory arbitration of age discrimination claims
§ 13:15	Post- <i>Gilmer</i> decisions expand application to other claims of statutory discrimination
§ 13:16	Section 1 of FAA exemption application to employees engaged in interstate commerce—Circuit City Stores, Inc. and Southwest Airlines Co. v. Saxon
§ 13:17	FAA prohibits pre-dispute arbitration agreement or pre-dispute joint-action waiver with respect to a case which relates to a sexual assault or the sexual harassment dispute unless at the election of the person alleging such conduct
§ 13:18	Collective bargaining agreements arbitration clauses
§ 13:19	Individual remedies sought by EEOC for agreement to arbitrate—Waffle House
§ 13:20	—Open questions
§ 13:21	—Double recovery and two bites at the apple
§ 13:22	—Fraction of cases
§ 13:23	Prohibited mandatory arbitration agreements—DoD contractors and subcontractors
§ 13:24	Individual remedies sought by EEOC for agreement to arbitrate—Limitation to changes of forum— Consequences of no waiver of statutory rights
§ 13:25	Formation of Agreements—Challenges and defenses
§ 13:26	—Contracts of adhesion
§ 13:27	—Unconscionability
§ 13:28	—Voluntariness, knowledge and sufficient notice—
, 10. <b>2</b> 0	Generally
§ 13:29	Voluntariness, knowledge and sufficient notice— "Knowingly and voluntary" agreement
§ 13:30	—Handbook provisions
\$ 13:31	—Contract disclaimers
§ 13:32	—Notice concerning waiver of claims
§ 13:33	Formation of agreements—Mutuality
\$ 13:34	—Consideration
§ 13:35	Use of arbitration procedure may alter employment- at-will relationship—"Just cause" standard
§ 13:36	Does threat of or termination over refusal to sign agreement constitute retaliation?
§ 13:37	Arbitration agreement provision—Fairness and equivalent rights
§ 13:38	—Selection of arbitrators
§ 13:39	—Fees and costs sharing—Generally
§ 13:40	Cole decision—No employee charge for arbitration
§ 13:41	—No extension to nonstatutory state claims
§ 13:42	—Other costs
§ 13:43	Supreme Court's Green Tree decision
§ 13:44	Post—Green Tree cases

#### EMPLOYMENT DISCRIMINATION LAW AND LITIGATION

§	13:45	Green Tree applied—Income and expenses documentation
8	13:46	Limited discovery
-	13:47	Post—Green Tree invalidated agreements
_	13:48	Objections to agreements based on cost–sharing provisions
_	13:49	Standards and criteria to determine if arbitration is "prohibitively expensive"—Three judicial approaches
-	13:50	—Case–by–case focus
-	13:51	—"Chilling effect" of cost–splitting provision
§	13:52	—Incurring substantial costs
§	13:53	—Financial burden—Lack of uniformity in
		application of proof
§	13:54	—Additional criteria
-	13:55	Enforceability of agreements requiring fees and costs sharing—Arbitration organizations' rules on costs
-	13:56	—Arbitrator bias
_	13:57	Remedies limitations—Generally
-	13:58	—Punitive damages limitations
§	13:59	—Attorneys' fees limitations
§	13:60	Recovery of attorney's fees caused by the breach of a mandatory arbitration clause when the employee files an action in court—No reported cases
8	13:61	Remedies limitations—Statutory time limits
-	13:62	—Hearing time limitations
_	13:63	—Hearing location limitation
_	13:64	Right to appeal limitation
_	13:65	Remedies limitations—Discovery
_	13:66	—Written awards
_	13:67	Evidence
-	13:68	
		Arbitration agreement provisions—Class actions
-	13:69	Remedies limitations—Severability
8	13:70	Section 3 of the FAA stay of action—Whether a litigant knowingly relinquished a known right and on appeal whether appellate courts have jurisdiction to review denials of stays
§	13:71	Section 4 of FAA to compel in federal district courts— Existence of subject matter jurisdiction when federa question raised
8	13:72	Court's role in determining dispute arbitrability and
		in arbitration
§	13:73	Standard of review applied when party seeks to overturn arbitration award and appealability questions
Ş	13:74	—Manifest disregard for the law
	13:75	—The award conflicts with a strong public policy
	13:76	——Questions of appealability—Orders compelling

#### TABLE OF CONTENTS

§ 13:77	arbitration and orders confirming, denying confirmation of, or vacating an arbitration award State court decisions—Federal preemption and amendment to the FAA to invalidate pre-dispute arbitration agreements and joint-action waivers with respect to cases that relate to sexual assault or sexual harassment at the election of the party alleging such conduct
§ 13:78	Supreme Court significantly narrowed the jurisdiction of the federal courts to confirm, vacate or modify arbitration awards under FAA—Most actions will be handled by state courts
§ 13:79	Arbitration process and litigation
§ 13:80	The rules governing the arbitration
§ 13:81	Whether representation of a party by an out-of-state licensed attorney at an arbitration proceeding constitutes the unauthorized practice of law
§ 13:82	Disclosure and disqualification standards for "neutral arbitrators"
§ 13:83	Supreme Court's evident partiality standard— "Appearance of bias" or reasonableness?
§ 13:84	Arbitration awards and disclosure—Generally
§ 13:85	FAA and federal interpretation of "evident partiality" in disclosure cases
§ 13:86	Courts highlight factors such as financial interest, the contemporaneity and the nature/depth of a relationship
§ 13:87	Financial interest will generally constitute "evident partiality"
§ 13:88	Temporal proximity
§ 13:89	Business and law firm relationships
§ 13:90	Arbitrator lack of knowledge of undisclosed conflict
§ 13:91	Waiver
§ 13:92	Arbitration process and litigation—Bifurcating the arbitration
§ 13:93	—Dismissals before hearing
§ 13:94	Class action arbitration rules
§ 13:95	Arbitration process and litigation—Waiver
§ 13:96	Arbitrators application of the preclusive effect of prior judgments under the doctrines of res judicata and collateral estoppel
§ 13:97	International employment contract controlled by the convention on the recognition and enforcement of foreign arbitral awards

## VIII. MOTION FOR SUMMARY JUDGMENT BASED ON AFTER-ACQUIRED EVIDENCE

§ 13:98 Generally

# IX. OBTAINING SUMMARY JUDGMENT DISMISSING A DISCRIMINATION CLAIM: AN EMPLOYER'S PERSPECTIVE

§ 13:99	Introduction
§ 13:100	Summary judgment standard
§ 13:101	Setting the stage
§ 13:102	—The complaint
§ 13:103	—Investigation of the case
§ 13:104	—Anticipating plaintiff's evidence of pretext
§ 13:105	Discovery
§ 13:106	—Depositions
§ 13:107	—Written discovery
§ 13:108	Winning the motion—Preparing the briefs
§ 13:109	—Motion for partial summary judgment
§ 13:110	—Arguing the motion
8 13·111	Conclusion

# X. DEFEATING EMPLOYER'S MOTIONS FOR SUMMARY JUDGMENT: A PLAINTIFF'S PERSPECTIVE

3:112	Motions for summary judgment—In general
3 13:113	Direct proof of discrimination—Avoiding the three-part test
§ 13:114	Pretext case under McDonnell Douglas, Burdine and Hicks
3:115	Specific problems of proof—Comparators—How close must the comparison be?
3:116	—Statistical evidence—Sufficiency at the summary judgment stage
§ 13:117	Planning to fight a motion for summary judgment— Initial client interview
3 13:118	—Prelitigation investigation and research—Fact investigation
3:119	— —Legal research
3:120	——Prelitigation settlement efforts
3:121	—Drafting the complaint
3:122	—Mandatory disclosures
3:123	—Pretrial discovery
3:124	Fighting the motion for summary judgment
3:125	Sufficiency of affidavits
3 13:126	Rule 56(f) verified motions for extension of time to obtain additional discovery
§ 13:127	Cross motions for summary judgment

#### XI. CONTRADICTORY DEPOSITION ERRATA SHEETS AND AFFIDAVITS CONTRADICTING DEPOSITION TESTIMONY SUBMITTED AS PART OF MOTION FOR SUMMARY JUDGMENT

- § 13:128 In General
- § 13:129 Contradictory deposition errata sheets
- § 13:130 Affidavits contradicting deposition testimony

#### XII. MOTION TO DISMISS OR SUMMARY JUDGMENT ON JUDICIAL ESTOPPEL GROUNDS WHEN PLAINTIFF, WHO FILED FOR BANKRUPTCY, FAILED TO DISCLOSE CLAIMS AS REQUIRED BY BANKRUPTCY CODE

- § 13:131 Generally
- § 13:132 Court decisions

#### CHAPTER 14. DISCOVERY

#### I. DISCOVERY—IN GENERAL

§ 14:1 Discovery

#### II. PLAINTIFF'S DISCOVERY STRATEGY

§ 14:2 Discovery strategy—Plaintiff

#### III. DEFENDANT'S DISCOVERY STRATEGY

§ 14:3 Discovery strategy—Defendant

#### IV. PRE-COMPLAINT DISCOVERY—IN GENERAL

- § 14:4 Pre-complaint discovery
- § 14:5 Availability of EEOC records
- § 14:6 Obtaining EEOC records
- § 14:7 Admissibility of EEOC information
- § 14:8 Witnesses working for the charged employer— Limitations and ethical concerns
- § 14:9 Discharge cases and discovery issues
- § 14:10 —Unemployment insurance and arbitration forums
- § 14:11 —Psychological damages—Discovery of treating therapist
- § 14:12 Tester discovery and evidence

#### V. POST-COMPLAINT DISCOVERY—IN GENERAL

§ 14:13 Post-complaint discovery

§ 14:14 Stages of discovery
§ 14:15 —Stage 1—The structural framework
§ 14:16 —Stage 2—The statistical case
§ 14:17 —Stage 3—Discovery of defendant's experts
§ 14:18 Use of interrogatories
§ 14:19 Discovery for statistical argument
§ 14:20 —Working with experts
§ 14:21 —Recordkeeping requirements

### VI. ELECTRONIC EVIDENCE: DISCOVERY AND PRODUCTION—INTRODUCTION

§ 14:22	Overview
§ 14:23	Practical considerations—Differentiating attributes of electronic data
§ 14:24	Nuts and bolts of electronic evidence
§ 14:25	—File slack space
§ 14:26	—Delete does not mean delete
§ 14:27	—File copying utilities
§ 14:28	—Mirror imaging
§ 14:29	—De-duplication technologies
§ 14:30	Evolving legal landscape
§ 14:31	Overview of key electronic discovery amendments to the Federal Rules of Civil Procedure
§ 14:32	Discoverability of electronic information
§ 14:33	Electronic discovery cost allocation
§ 14:34	—Categories of data in order of accessibility
§ 14:35	Breadth, scope and protocol of electronic discovery
§ 14:36	Courts application of proportionality rule under the 2015 amendment to Rule 26
§ 14:37	Predictive coding and key word searches
§ 14:38	Discovering information on social network sites-in general
§ 14:39	Obtaining information from social media sites informally pre-discovery and ethical rules
§ 14:40	Ethical Rules
§ 14:41	Seek social media information through discovery
§ 14:42	Stored Communication Act
§ 14:43	Party may move to quash a subpoena directed to a third party provider under the SCA
§ 14:44	Discovery and production of privileged and confidential information
§ 14:45	Cellphone privacy in discovery—Forensic examination is a drastic and intrusive measure
§ 14:46	Channel-based platforms to communicate may be subject to discovery
§ 14:47	Spoliation and the duty to preserve computer data evidence

Table of Contents		
§ 14:48	B —Preservation obligations	
§ 14:49		
§ 14:50	-	
§ 14:51	-	
§ 14:52	* *	
§ 14:53	——————————————————————————————————————	
§ 14:54		
3 11.01	timely filing of motions	
§ 14:55		
§ 14:56	· ·	
§ 14:57	-	
	expert	
VII.	BREADTH AND LIMITATIONS OF DISCOVERY	
§ 14:58	v	
§ 14:59		
§ 14:60	·	
§ 14:61		
§ 14:62		
§ 14:63		
§ 14:64	Psychotherapist-patient privilege	
VIII.	ETHICAL ISSUES—IN GENERAL	
§ 14:65	6 Ethical issues	
§ 14:66		
Ü	an opposing employer party represented by counsel	
§ 14:67		
§ 14:68		
§ 14:69	-	
§ 14:70		
§ 14:71	· · · · · · · · · · · · · · · · · · ·	
§ 14:72		
§ 14:73		
Ü	class members	
§ 14:74	—Title VII Rule 23 class actions	
§ 14:75	—ADEA class actions	
§ 14:76	B Defendant's attorney's communication with putative	
	or actual class members	
§ 14:77		
	employers and employees designated defendants by	
	plaintiffs—In general	
§ 14:78		
0 4 4 ===	environment cases	
§ 14:79		
§ 14:80	Tape recorded conversations—Legal and ethical issues	

§ 14:81	—Ethical considerations
§ 14:82	—Admissibility
§ 14:83	—Employee disloyalty
§ 14:84	—Eavesdropping of union activity violates the NLRA
§ 14:85	Inadvertent disclosure and improper acquisition of privileged documents and information
§ 14:86	—Ethical obligations of recipient—ABA and state ethics committees' opinions
§ 14:87	—Waiver of privilege due to inadvertent disclosure— Three judicial approaches
§ 14:88	——Balancing test
§ 14:89	— —Inadvertent disclosure never waives the privilege
§ 14:90	— —Inadvertent disclosure always waives the privilege
§ 14:91	—Present or former employees' improper acquisition and inspection of information protected from disclosure
§ 14:92	—Lawyer participation in deception by undercover investigators and discrimination testers

#### CHAPTER 15. STATISTICAL PROOF

#### I. STATISTICAL PROOF—IN GENERAL

§ 15:1 Generally

#### II. USING STATISTICS—OVERVIEW

§ 15:2 Generally

#### III. TYPES OF STATISTICAL PROOF

§ 15:3	Generally
§ 15:4	Pass/fail comparisons
§ 15:5	—Potential applicant flow
§ 15:6	—Actual applicant flow
§ 15:7	Population/work force comparisons
§ 15:8	—Use of general population and civilian labor force data
§ 15:9	—Qualified labor market data
§ 15:10	—Census data as source for qualified labor pool
§ 15:11	Multiple regression analysis

### IV. RELEVANT LABOR MARKET—GEOGRAPHIC SCOPE OF STATISTICS

§ 15:12 Generally

### V. COMPARABLE TIME PERIOD—TIME FRAME FOR STATISTICS

§ 15:13 Generally

### VI. STATISTICAL SIGNIFICANCE—WEIGHT GIVEN TO STATISTICAL PROOF

- § 15:14 Generally
- § 15:15 Measures of significance—Probability level
- § 15:16 The four-fifths rule
- § 15:17 Sample size

### CHAPTER 16. VALIDATION OF EMPLOYEE SELECTION CRITERIA AND DEVICES

I. VALIDATION OF EMPLOYEE SELECTION CRITERIA AND DEVICES—SECTION 703(H) AND AN OVERVIEW

§ 16:1 Generally

### II. THE DEVELOPMENT OF THE UNIFORM EMPLOYEE SELECTION GUIDELINES

§ 16:2 Generally

### III. UNIFORM GUIDELINES' CONSISTENCY WITH PROFESSIONAL STANDARDS

§ 16:3 Generally

#### IV. COVERAGE OF THE UNIFORM GUIDELINES

§ 16:4 Generally

### V. ADVERSE IMPACT UNDER THE UNIFORM GUIDELINES

§ 16:5 Generally

#### VI. THE BOTTOM-LINE CONCEPT

§ 16:6 Generally

#### VII. RECORDKEEPING REQUIREMENTS

§ 16:7 Generally

# VIII. DEMONSTRATING THE "VALIDITY" OF SELECTION CRITERIA OR DEVICES—IN GENERAL

§ 16:8	Generally
§ 16:9	Selection criteria or devices must be "reliable" and "valid": Definition of terms
§ 16:10	Retaining an expert
§ 16:11	First step of validation—Conduct a job analysis
§ 16:12	The three validation strategies—Criterion-related, content-related, and construct-related
§ 16:13	—Criterion-related validation
§ 16:14	—Content-relation validation
§ 16:15	—Construct-related validation

#### IX. RANKING APPLICANTS BY TEST SCORES— MARGIN OF ERROR AND PROHIBITION AGAINST ADJUSTING SCORES BASED ON PROTECTED GROUP STATUS

§ 16:16 Generally

### X. VALIDATION OF WIDELY USED SUBJECTIVE DEVICES

§ 16:17	Generally
§ 16:18	Interviews
§ 16:19	Rating scales
§ 16:20	Experience requirements

### CHAPTER 17. TRIAL OF EMPLOYMENT DISCRIMINATION CASES

#### I. IN GENERAL

§ 17:1 Introduction

#### II. TRIAL PREPARATION

17:2	Alternative dispute resolution
§ 17:3	—Preparation for alternative dispute resolution
$\ 17:4$	Pretrial report
§ 17:5	Exhibits
§ 17:6	—Documentary exhibits
§ 17:7	—Preparation of demonstrative evidence
§ 17:8	Motions in limine
§ 17:9	Trial briefs
§ 17:10	Jury instructions

xxvi

- § 17:11 Special verdict forms
- § 17:12 Damages
- § 17:13 Preparation for jury selection
- § 17:14 —Pretrial jury investigation
- § 17:15 —Preparation for voir dire
- § 17:16 Lay witness preparation
- § 17:17 Expert witness preparation
- § 17:18 Planning and anticipating cross-examination
- § 17:19 Special considerations in preparing for bench trials
- § 17:20 Jury selection—Voir dire examination
- § 17:21 —Race and sex-based exclusions
- § 17:22 —Challenges for cause
- § 17:23 —Peremptory challenges

#### III. OPENING STATEMENT

- § 17:24 Generally
- § 17:25 Plaintiff's opening statement
- § 17:26 Defendant's opening statement

#### IV. THE PLAINTIFF'S CASE IN CHIEF

- § 17:27 Generally
- § 17:28 Adverse examination of the defendant's key personnel
- § 17:29 The testimony of the plaintiff
- § 17:30 The plaintiff's lay witnesses
- § 17:31 The plaintiff's experts—Liability experts
- § 17:32 —Damages experts
- § 17:33 ——Lost past and future compensation
- § 17:34 ——Mental and emotional distress damages
- § 17:35 ——Punitive damages
- § 17:36 Effect of bifurcation
- § 17:37 Defense motions after the plaintiff's case

#### V. THE DEFENDANT'S CASE IN CHIEF

- § 17:38 Defendant's case in chief—Generally
- § 17:39 Defendant's lay witnesses
- § 17:40 Defendant's experts

#### VI. PLAINTIFF'S REBUTTAL

§ 17:41 Plaintiff's rebuttal—Generally

#### VII. MOTIONS AFTER ALL THE EVIDENCE

§ 17:42 Motions after all the evidence—Generally

#### VIII. JURY INSTRUCTION CONFERENCE

§ 17:43 Jury instruction conference—Generally

#### IX. CLOSING ARGUMENTS

- § 17:44 Closing arguments—Generally
- § 17:45 Plaintiff's closing argument
- § 17:46 Defendant's closing argument
- § 17:47 Plaintiff's rebuttal

#### X. JURY DELIBERATIONS AND VERDICT

- § 17:48 Jury deliberations and verdict—Generally
- § 17:49 Federal Rule Civil Procedure 54(d) permits a district court to tax costs authorized by federal statute
- § 17:50 Advisory jury

#### XI. EVIDENTIARY ISSUES

- § 17:51 Introduction to evidentiary issues
- § 17:52 Preserving objections for appeal—Rule 103(a)
- § 17:53 —Penalty for violating the rules
- § 17:54 —Objection
- § 17:55 —Proffer
- § 17:56 —Appellate review standard
- § 17:57 Distinguishing judge and jury functions—Rule 104
- § 17:58 Judicial notice—Rule 201(b)
- § 17:59 Relevance—Rule 401
- § 17:60 —Comparing employees
- § 17:61 —Comparing discriminations against others or stereotyping
- § 17:62 —Time-barred acts
- § 17:63 Balancing probative value and harm—Rule 403
- § 17:64 —Relevance of remarks
- § 17:65 —Relevance of EEOC findings
- § 17:66 —Limiting the harm—Jury instructions and cross-examinations
- § 17:67 Other acts evidence—Rule 404(b)
- § 17:68 Sexual acts and history
- § 17:69 Privileges—Rule 501
- § 17:70 —Preserving attorney-client and other privilege
- § 17:71 —Maintain privilege logs
- § 17:72 —Crime-fraud and other exemptions
- § 17:73 —Negotiation confidentiality
- § 17:74 —Burden on party—Seeking new privileges
- § 17:75 Specific acts impeaching credibility—Rule 608(b)
- § 17:76 Examining witnesses—Rule 611(a)
- § 17:77 Prior inconsistent statements—Rule 613(b)
- § 17:78 Personal knowledge and lay opinion—Rules 602 and 701
- § 17:79 Expert testimony and scientific evidence—Rule 702

§ 17:80	—Daubert—The Supreme Court standard to be used
	by trial judges in determining the admissibility of
	expert testimony
§ 17:81	—Recent decisions interpreting Daubert
§ 17:82	—Daubert employment cases
§ 17:83	—Daubert's application to employment cases relying
	on statistics
§ 17:84	—Daubert's application to disability cases
§ 17:85	—Daubert's application to experts in sex harassment
	and sex stereotyping cases
§ 17:86	—Daubert's impact on expert testimony on damages
§ 17:87	Hearsay and exceptions
§ 17:88	Authentication—Rule 901(a)
§ 17:89	Best evidence (original document) rule

#### CHAPTER 18. REMEDIES

#### I. REMEDIES—IN GENERAL

§ 18:1 Generally

#### II. MONETARY AWARD—AN OVERVIEW

- § 18:2 Generally
- § 18:3 The "make whole" standard
- § 18:4 Front pay
- § 18:5 Red circle pay

### III. ESTABLISHING AND DEFENDING A BACKPAY CLAIM

§ 18:6 Generally

### IV. CALCULATING THE AMOUNT OF THE AWARD—THE INDIVIDUALIZED METHOD

- § 18:7 Generally
  § 18:8 Reconstructing the employment history
  § 18:9 The backpay period
  § 18:10 Backpay defined—All economic remuneration and benefits
  § 18:11 Mitigation obligation and amounts that reduce
- backpay
- § 18:12 Calculating the total backpay—Different formulas with different results

### V. CALCULATING THE BACKPAY AMOUNT IN CLASS ACTIONS

§ 18:13 Generally

# VI. TAX LIABILITY WITH SETTLEMENT AND COURT AWARDS UNDER TITLE VII, THE ADA AND ADEA

§ 18:14	Generally
§ 18:15	Nonpunitive damages for physical injuries are tax free, while emotional distress recoveries are taxable (other than for medical expenses)
§ 18:16	Limitation on deductibility of payments made for claims of sexual harassment and abuse subject to nondisclosure agreements
§ 18:17	Attorney's fees deductible for amounts a plaintiff pays in connection with an action involving a claim of "unlawful discrimination"
§ 18:18	Tax consequences of state causes of action
§ 18:19	Allocating the award
§ 18:20	Timing of awards—Lump sum and deferred payments
§ 18:21	Award of additional damages to compensate for negative tax consequences
§ 18:22	Class action awards
§ 18:23	Wage reporting and tax withholding rules

#### VII. PREJUDGMENT INTEREST

§ 18:24 Prejudgment interest—Generally

#### VIII. COMPENSATORY AND PUNITIVE DAMAGES AND JURY TRIALS ARE AVAILABLE IN INTENTIONAL DISCRIMINATION CASES

§ 18:25 Availability of compensatory and punitive damages and jury trials—Generally

#### IX. EMOTIONAL INJURY DAMAGES

§ 18:26	Introduction
§ 18:27	Emotional damages: Threshold issue whether evidence supports any award
§ 18:28	—The burden is on the plaintiff to prove an injury
§ 18:29	— —Tort law's traditional recovery thresholds governing compensation for emotional injuries do not apply in civil rights cases, but the need for real evidence to support such damages awards is taken quite seriously by the courts
§ 18:30	— —Emotional injuries will not be presumed and must be shown by a substantial evidentiary presentation
§ 18:31	——Since a significant emotional reaction to a severe

	injury or loss is normal, expert testimony is not required to support damages for emotional distress,
	but substantial awards are frequently supported by expert opinion evidence
§ 18:32	——Lay damages testimony, while not required by law, is in practice advisable
§ 18:33	— Evidence that an emotional injury has manifested itself physically is probably not required by law, but is desirable
§ 18:34	— —The fact and extent of emotional injury can be lawfully inferred in part from the circumstances under which it occurred
§ 18:35	Amounts of damages: Variation in the courts—The statutory cap on damages
§ 18:36	—Challenges to the damages verdict
§ 18:37	Preexisting injuries and multiple claims as factors in awards
§ 18:38	—In a multiple-claim case, a bifurcated trial can correctly focus the damages evidence
§ 18:39	—Multiple and alternative claims may help plaintiffs avoid damages caps
§ 18:40	—Multiple and alternative claims may help plaintiffs avoid taxation
§ 18:41	— —Claims for physical injuries
§ 18:42	— — Worker's compensation claims
§ 18:43	Conclusion

#### X. PUNITIVE DAMAGES STANDARD UNDER TITLE VII, THE ADA, AND THE REHABILITATION ACT

§ 18:44 Availability of punitive damages § 18:45 Punitive damages based on employer's state of mind § 18:46 Restrictions —Application of general common-law punitive § 18:47 damages principles § 18:48 Agency principles relevant to punitive damages § 18:49 —Restatement of Agency § 217 comment a: Proving that the principal authorized the doing and manner of the act —Restatement of Agency § 217 comment b: Proving § 18:50 that the agent was unfit and the principal was reckless in employing him —Restatement of Agency § 217 comment c as § 18:51 modified in Kolstad: Proving that the agent was acting in a managerial capacity and was acting in

faith efforts to comply with Title VII"

the scope of employment and that the challenged decision was not contrary to the employer's "good-

- § 18:52 —Restatement of Agency § 217 comment d: Proving that the principal or a managerial agent of the principal ratified or approved the Act
- § 18:53 Application of punitive damages in employment discrimination claims

### XI. THE AVAILABILITY OF DAMAGES FOR "TESTERS"

§ 18:54 Generally

### XII. BACKPAY AGAINST STATE GOVERNMENT DEFENDANTS

§ 18:55 Generally

#### XIII. INJUNCTIONS—IN GENERAL

§ 18:56 Generally

#### XIV. RELIEF FOR IDENTIFIABLE VICTIMS OF UNLAWFUL EMPLOYMENT PRACTICES— REINSTATEMENT AND RETROACTIVE SENIORITY

§ 18:57 Generally

#### XV. SETTLEMENT OF A TITLE VII DISPUTE

- § 18:58 Generally
- § 18:59 Waivers in private settlements
- § 18:60 Back pay—In general

#### CHAPTER 19. AFFIRMATIVE RELIEF

#### I. AFFIRMATIVE ACTION—IN GENERAL

§ 19:1 Affirmative action—Generally

### II. DRAWING THE LINES—THE DEBATE OVER AFFIRMATIVE ACTION

§ 19:2 Generally

#### III. DEFINITION OF AFFIRMATIVE ACTION

§ 19:3 Generally

### IV. HISTORICAL DEVELOPMENT OF AFFIRMATIVE ACTION

§ 19:4 Generally

xxxii

§ 19:5	From the reconstruction congress's civil rights enactments to the origins of federal contracting requirements
§ 19:6	Executive Order No. 11246—Federal contractors are required to take affirmative action
§ 19:7	Affirmative action coverage, substantive content, compliance and enforcement of nonconstruction contractors under Executive Order No. 11246
§ 19:8	—Contract obligation
§ 19:9	—Coverage
§ 19:10	—Substantive content
§ 19:11	—Compliance and enforcement

# V. THE CASES—SUPREME COURT DEVELOPMENT OF AFFIRMATIVE ACTION DOCTRINE

§ 19:12	Generally
\$ 19:13	Laying the foundation—The <i>Bakke</i> , <i>Weber</i> , <i>Fullilove</i> trilogy
§ 19:14	—Bakke
§ 19:15	—Weber
\$ 19:16	—Fullilove
§ 19:17	Layoffs of white employees barred—Stotts and Wygant
\$ 19:18	—Stotts
3 19:19	—Wygant
§ 19:20	Extending <i>Weber</i> —Voluntarily adopted preferences in the public sector
§ 19:21	—Local 93
\$ 19:22	$ olimits_{Johnson}$
§ 19:23	Judicially ordered preferences—Sheet Metal Workers and Paradise
§ 19:24	—Sheet Metal Workers
§ 19:25	—Paradise
\$ 19:26	State contract set-aside programs limited by the constitution—City of Richmond v. Croson
§ 19:27	Rights of nonparties to challenge a race-conscious consent decree— <i>Martin v. Wilks</i> and congressional reversal
§ 19:28	Federal preference policies—Metro Broadcasting, Inc. v. FCC and Adarand Constructor's, Inc. v. Pena
3 19:29	—Metro Broadcasting
3 19:30	—Adarand Constructor's, Inc.
§ 19:31	Public university admissions decisions—Limited guidance for employers

#### VI. SUMMARY OF THE RULES GOVERNING RACE AND GENDER PREFERENCE PROGRAMS

§ 19:32 Generally
 § 19:33 Voluntary and court-ordered state and local public sector plans under the constitution
 § 19:34 Court-ordered plans under Title VII
 § 19:35 Voluntarily adopted plans under Title VII
 § 19:36 Voluntarily adopted or congressionally mandated federal plans

# VII. STRATEGIES FOR DESIGNING AND IMPLEMENTING VOLUNTARILY ADOPTED STATE AND LOCAL PLANS

	D	
§ 19	9:37	Generally
§ 19	9:38	Remedying identified discrimination
§ 19	9:39	—Specific findings for each group
§ 19	9:40	—Methods of proof
§ 19	9:41	Nonremedial bases for affirmative action
§ 19	9:42	Classification must be narrowly tailored
§ 19	9:43	—Efficacy of race-neutral alternative remedies
§ 19	9:44	—Waivers
§ 19	9:45	—Burden on "innocent persons"
§ 19	9:46	—Flexibility
§ 19	9:47	—The relationship between numerical goal and labor market
§ 19	9:48	Federal mandated classifications implemented by state and municipal entities
§ 19	9:49	Post-Croson circuit court decisions
8 19	9.50	Reliance on court-sanctioned affirmative action

### CHAPTER 20. ATTORNEY FEES, LITIGATION EXPENSES AND SANCTIONS

#### I. IN GENERAL

programs

§ 20:1 Introduction to attorney fees, litigation expenses and sanctions

# II. THEORY, RECENT REALITY, AND CONGRESSIONAL CORRECTION

§ 20:2 Theory, recent reality, and congressional correction— Generally

#### III. GOVERNMENT LIABILITY

§ 20:3 Government liability—Generally

xxxiv

#### IV. PREVAILING PLAINTIFFS

- § 20:4 Prevailing plaintiffs—Generally
- § 20:5 Alleged "special circumstances"
- § 20:6 The extent of success necessary to prevail
- § 20:7 Plaintiffs as "catalysts"
- § 20:8 Administrative proceedings
- § 20:9 Pendent claims

#### V. PREVAILING DEFENDANTS

- § 20:10 Frivolous lawsuits
- § 20:11 Prevailing defendants against the EEOC
- § 20:12 Impecunious plaintiffs
- § 20:13 Voluntary dismissal

#### VI. METHODS OF FEE COMPUTATION

- § 20:14 Early formulations
- § 20:15 The lodestar method of computation

#### VII. COMPONENTS OF FEE COMPUTATION

- § 20:16 Components of fee computation—Generally
- § 20:17 No artificial ceiling on fees
- § 20:18 —Amount of monetary recovery
- § 20:19 —Contingency fee agreements
- § 20:20 —Public interest organizations
- § 20:21 Compensable hours—Compensable tasks—In general
- § 20:22 —Specific compensable tasks
- § 20:23 —Time spent against defendant intervenors
- § 20:24 —Billing judgment
- § 20:25 —Time records
- § 20:26 —Multiple claim lawsuits
- § 20:27 Reasonable hourly rates—Local or out-of-town rates
- § 20:28 —Flat, current rates
- § 20:29 —Market or actual rates
- § 20:30 —Nonprofit attorneys
- § 20:31 —Paralegals and law clerks
- § 20:32 —Equal access to Justice Act rates
- § 20:33 Adjustments to the lodestar
- § 20:34 Interest

#### VIII. PROCEDURE

- § 20:35 The fee application
- § 20:36 Interim fees
- § 20:37 Post-judgment fee requests
- § 20:38 Appeals

§ 20:39 Collection of fees

### IX. PROCEDURAL ISSUES INVOLVING SETTLEMENTS

- § 20:40 Simultaneous negotiation of the merits and of fees
- § 20:41 Rule 68 and its effects upon fees

#### X. RECOVERABILITY OF LITIGATION EXPENSES

§ 20:42 Generally

#### XI. SANCTIONS UNDER RULE 11—AN OVERVIEW

§ 20:43 Generally Historical development § 20:44 § 20:45 The chilling effect of Rule 11 on civil rights litigation § 20:46 Application of the rule § 20:47 —Supreme Court decisions § 20:48 —Product approach of lower courts § 20:49 — —Innovative or unpopular legal arguments § 20:50 — — Unpolished papers and undeveloped arguments § 20:51 — —Indeterminacy of applicable standards —Conduct approach § 20:52

### PART D. OTHER LEGISLATION PROTECTING AGAINST DISCRIMINATION

#### CHAPTER 21. AGE DISCRIMINATION

### I. OTHER LEGISLATION PROTECTING AGAINST DISCRIMINATION

§ 21:1 Introduction

#### II. AGE DISCRIMINATION—IN GENERAL

- § 21:2 Generally
- § 21:3 ADEA's relationship to Title VII
- § 21:4 Legislative history of the ADEA
- § 21:5 The social history of older Americans in the workforce—Impact on the ADEA

#### III. COVERAGE

- § 21:6 Generally
- § 21:7 Covered employers
- § 21:8 —State, local and federal governments
- § 21:9 —Parent corporations
- § 21:10 —Foreign employers in the United States
- § 21:11 —Labor organizations
- § 21:12 —Employment agencies
- § 21:13 —Religious institutions
- § 21:14 —Indian tribes
- § 21:15 Covered employees
- § 21:16 —Independent contractors and equity structures such as partnerships
- § 21:17 —Americans overseas
- § 21:18 —Exceptions for firefighters and law enforcement officers but not tenured professors
- § 21:19 —Elected officials and staff exemptions
- § 21:20 —The bona fide executive and policymaking exceptions

#### IV. PROHIBITED PRACTICES—IN GENERAL

§ 21:21 Generally

### V. THEORIES OF AGE DISCRIMINATION—IN GENERAL

§ 21:22 Generally

#### VI. DISPARATE TREATMENT—IN GENERAL

§ 21:23 Disparate treatment—Generally

#### VII. INFERENTIAL PROOF IN ADEA CASES

- § 21:24 Generally
   § 21:25 Establishing an ADEA prima facie inferential proof case
- § 21:26 —Replacement requirement
- § 21:27 —Application requirement in refusal to hire and promote cases
- § 21:28 —Qualification requirement
- § 21:29 —Constructive discharge
- § 21:30 Sex-plus-age claims

### VIII. FACIAL DISCRIMINATION—DIRECT EVIDENCE CASES

§ 21:31 Generally

#### IX. REDUCTION IN FORCE (RIF) CASES

- § 21:32 Generally
- § 21:33 Intent prima facie formulation
- § 21:34 Unequal treatment prima facie formulation

# X. DEFENDANT'S REBUTTAL OF A PRIMA FACIE CASE

- § 21:35 Generally
- § 21:36 Rebuttal of circumstantial case
- § 21:37 Rebuttal in a direct evidence case

#### XI. PLAINTIFF'S PRETEXT CASE

§ 21:38 Plaintiff's pretext case—Generally

## XII. CAUSATION—AGE AS A "DETERMINATIVE" OR "DETERMINING" FACTOR

§ 21:39 Causation—Generally

#### XIII. HOSTILE ENVIRONMENT

§ 21:40 Hostile environment—Generally

#### XIV. SYSTEMIC DISPARATE TREATMENT

§ 21:41 Systemic disparate treatment—Generally

W	DIS	ZDA	R	TE	<b>IMP</b>	Δ	CT
A V -		7 -	<b>a a a</b> ./-			_	

- § 21:42 Disparate impact theory
- § 21:43 Lower courts' application of City of Jackson

### XVI. STATUTORY DEFENSES AND EXCEPTIONS—IN GENERAL

- § 21:44 Statutory defenses and exceptions—Generally
- § 21:45 Bona fide occupational qualification (BFOQ)
- § 21:46 —Narrow defense—Agency and Supreme Court interpretation
- § 21:47 "Particular business" requirement
- § 21:48 Reasonable factors other than age (RFOA) and the good cause defense
- § 21:49 Reasonable Factors Other than Age (RFOA) and the good cause defense—Reasonable factor other than age
- § 21:50 —The good cause exception
- § 21:51 Bona fide employee benefit plans
- § 21:52 —Observing the terms
- § 21:53 —"Bona fide"
- § 21:54 —"Benefit plan"
- § 21:55 —Bona fide seniority system
- § 21:56 —The *Betts* decision and the demise of the "subterfuge" language
- § 21:57 Good faith conformity and reliance on EEOC pronouncements
- § 21:58 Apprenticeship exemption

#### XVII. WAIVER OF RIGHTS OR CLAIMS

- § 21:59 Generally
- § 21:60 OWBPA provision and lower court's interpretation of related issues
- § 21:61 Employees who are not U.S. citizens and work outside of the United States for American employers (or foreign firms controlled by American employers) are not required to be included in disclosure requirements pursuant OWBPA
- § 21:62 Compulsory arbitration—Mandates and limits of Gilmer v. Interstate/Johnson Lane Corp.
- § 21:63 OWBPA applied in reduction-in-force releases

#### XVIII. THE CONSTITUTION AND AGE

§ 21:64 The constitution and age discrimination—Generally

### CHAPTER 22. AGE DISCRIMINATION ACT ENFORCEMENT PROCEDURES AND REMEDIES

## I. ADEA ENFORCEMENT PROCEDURES AND REMEDIES—IN GENERAL

§ 22:1 Generally

#### II. THE CHARGE OF DISCRIMINATION

§ 22:2	Generally
§ 22:3	EEOC charge defines scope of subsequent civil action
§ 22:4	Failure to name prospective defendant
§ 22:5	File charge with the EEOC
§ 22:6	Timely filing with the EEOC: Occurrence of a discriminatory act
§ 22:7	Modifying the filing period
§ 22:8	—Failure to post notices
§ 22:9	—Employer's misconduct

# III. FILING SUIT: THE SIXTY-DAY EEOC REFERRAL REQUIREMENT

§ 22:11 EEOC referral requirement

§ 22:10 Continuing violations

#### IV. STATE AGENCY DEFERRAL

§ 22:12 Deferral to state agencies

## V. THE FEDERAL COURT COMPLAINT—IN GENERAL

§ 22:13	Federal court complaint
§ 22:14	Statute of limitations
$\S~22:15$	Federal court pendent jurisdiction over state
	antidiscrimination claims
§ 22:16	Jury trial availability

#### VI. CLASS ACTION—IN GENERAL

§ 22:17	Generally
§ 22:18	Release agreements requiring individual arbitration of ADEA claims
§ 22:19	When consent must be filed
§ 22:20	EEOC charge filing requirement for representative party and consenting employee
§ 22:21	Issuance of notice

- § 22:22 Form of notification and consent
- § 22:23 Temporal scope of class

### VII. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENFORCEMENT—IN GENERAL

- § 22:24 Generally
- § 22:25 Effects of EEOC suit on private civil action
- § 22:26 EEOC initiated suits
- § 22:27 —Pre-litigation conciliation efforts
- § 22:28 —Resort to state remedies
- § 22:29 —Jury trials

### VIII. ACTIONS AGAINST THE FEDERAL GOVERNMENT

§ 22:30 Generally

### IX. REMEDIES—IN GENERAL

- § 22:31 Generally
- § 22:32 Governmental entities being subject to damage awards

#### X. MONETARY RELIEF

- § 22:33 Generally
- § 22:34 Backpay
- § 22:35 Commencement and termination of accrual period
- § 22:36 Damages tolled by bona fide offer of a position

#### XI. CALCULATING THE AMOUNT OF THE AWARD

- § 22:37 Generally
- § 22:38 Reconstructing the employment history
- § 22:39 Fringe benefits
- § 22:40 Pensions
- § 22:41 Other fringe benefits

#### XII. AMOUNTS THAT REDUCE BACKPAY

- § 22:42 Generally
- § 22:43 Interim earnings
- § 22:44 Employer post-termination payments
- § 22:45 Collateral source payments
- § 22:46 Duty to mitigate damages

### XIII. FRONT PAY FOR DAMAGES IN LIEU OF REINSTATEMENT

§ 22:47 Generally

- § 22:48 What entity determines propriety and amount of front pay—Courts or juries
- § 22:49 Computation of front pay

#### XIV. LIQUIDATED DAMAGES

- § 22:50 Generally
- § 22:51 Willfulness requirement—Trans World Airlines v. Thurston and Hazen Paper Co. v. Biggins
- Application of the *Thurston* willfullness standard by § 22:52 the lower courts
- § 22:53 Hazen Paper Co. v. Biggins—Court rejects Third, Sixth, Eighth and Tenth Circuits' formulations
- Computing liquidated damages § 22:54

#### XV. PREJUDGMENT AND POST JUDGMENT INTEREST

§ 22:55 Generally

#### XVI. ATTORNEYS FEES

§ 22:56 Generally

#### **EQUITABLE RELIEF INCLUDING** XVII. REINSTATEMENT

- § 22:57 Generally
- § 22:58 Reinstatement
- § 22:59 Injunctive relief

### CHAPTER 23. DISABILITY DISCRIMINATION

#### DISCRIMINATION AGAINST PEOPLE WITH **DISABILITIES**

- § 23:1 Discrimination against people with disabilities— Generally
- § 23:2 Incorporation of Title VII and Rehabilitation Act provisions into the ADA
- § 23:3 Similarities between the ADA and Rehabilitation Act
- Significant differences between the ADA and the § 23:4 Rehabilitation Act
- Legislative and social history § 23:5

#### II. THE AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) AND THE AMERICANS WITH DISABILITIES ACT AMENDMENTS OF 2008—IN GENERAL

§ 23:6 Generally

#### III. COVERAGE

- § 23:7 Generally
- § 23:8 Employers
- § 23:9 Labor organizations, etc.
- § 23:10 Employee

#### IV. WHAT IS A STATUTORY "DISABILITY"?

- § 23:11 Statutory disability—Generally
- § 23:12 Physical or mental impairment
- § 23:13 Whether expert medical testimony is required to establish a disability
- § 23:14 Substantial limitation of major life activity defined
- § 23:15 —Mitigating measures are not considered when determining whether an individual is disabled except ordinary eyeglasses and contact lenses
- § 23:16 Bragdon v. Abbott—Expanding meaning of "major life activity"
- § 23:17 —Whether impairment is not substantially limiting where person can perform other jobs
- § 23:18 Conditions excluded
- § 23:19 People with record of impairment
- § 23:20 People regarded as having impairment are covered

#### V. TREATMENT OF SUBSTANCE ABUSERS

- § 23:21 Treatment of substance abusers—Generally
- § 23:22 Medical or recreational use of marijuana—State laws that include explicit anti-discrimination protections
- § 23:23 Drug testing for marijuana
- § 23:24 Courts addressing federal preemption of state law and state courts interpreting state statues
- § 23:25 Prescription drug use resulting in addiction

#### VI. CONTAGIOUS EFFECTS OF A DISEASE

§ 23:26 Contagious effects of a disease—In general

#### VII. TYPES OF DISCRIMINATION PROHIBITED

- § 23:27 Types of discrimination prohibited—In general
- § 23:28 Prima facie case

§ 23:29 Class actions

### VIII. SPECIFIC PROHIBITIONS

§ 23:30	Specific prohibitions—In general
§ 23:31	Limiting, segregating, or classifying a job applicant or employee
§ 23:32	Discriminating through a contractual or other arrangement
§ 23:33	Utilizing standards, criteria, or methods of
	administration that have effect of discriminating
§ 23:34	Prohibiting discrimination based on association
§ 23:35	Failing to make reasonable accommodations
§ 23:36	Denying employment opportunities based on need to provide reasonable accommodation
§ 23:37	Using qualification standards, employment tests or other selection criteria that screen out individuals with disability
§ 23:38	Failing to select and administer tests that accurately reflect necessary skills
§ 23:39	Retaliation
§ 23:40	Whether damages and jury trials are available in retaliation claims

### IX. HOSTILE ENVIRONMENT

§ 23:41 Hostile environment—Generally

### X. REASONABLE ACCOMMODATION

§ 23:42	Overview of reasonable accommodation
§ 23:43	EEOC guidance on reasonable accommodation and undue hardship for Title I of ADA—Overview
§ 23:44	EEOC and U.S. DOJ guidances on use of software, algorithms, and artificial intelligence
§ 23:45	Illustrations of reasonable accommodations from ADA and case law
§ 23:46	Whether restructuring the job to provide for telecommuting or work at home is a reasonable accommodation
§ 23:47	Who must be accommodated—Qualified applicants or employees
§ 23:48	—Misconduct may disqualify individual
§ 23:49	—Individuals who can perform essential functions of the job
§ 23:50	Whether physical attendance in the workplace is an essential function of the job
§ 23:51	Who must be accommodated—Individuals regarded as disabled

#### TABLE OF CONTENTS

§ 23:52	—Employer must know of disability
§ 23:53	—Psychiatric disabilities
§ 23:54	—Burden of proof on who is qualified and whether job function is essential
§ 23:55	How to determine an appropriate reasonable accommodation
§ 23:56	—Interactive problem-solving approach
§ 23:57	—Technical assistance and role of treating physician
§ 23:58	—Responsibility for determining accommodation
§ 23:59	—Best available alternative accommodation or preference of individual not required
§ 23:60	ADA and reassignment—Competition against non- disabled employees
§ 23:61	How to determine an appropriate reasonable accommodation—An accommodation may be rejected by the individual
§ 23:62	Challenging an employer's decision to accept an accommodation voluntarily requested
§ 23:63	Tax incentives to provide reasonable accommodations
§ 23:64	Good faith efforts to make accommodation are a complete defense to compensatory and punitive damages
§ 23:65	Burdens of proof on whether an accommodation is reasonable
§ 23:66	Whether proof of adverse action is required in a failure-to-accommodate case
§ 23:67	Undue hardship
§ 23:68	Failure to reasonably accommodate a disability might constitute constructive discharge
§ 23:69	Protecting vulnerable employees of COVID-19 pandemic through reasonable accommodation
§ 23:70	Employer vaccination policies—Reasonable accommodations and mandates

### XI. MEDICAL EXAMINATIONS AND INQUIRIES

§ 23:71	Generally
§ 23:72	Preemployment
§ 23:73	Posthire
§ 23:74	Fit for duty or periodic medical monitoring
§ 23:75	Employer policies regarding prescription drug use
§ 23:76	Vaccinations and medical test requirements—
	vaccinations are not a medical exam according to
	the EEOC guidance

### XII. EMPLOYER DEFENSES

§ 23:77	Generally
---------	-----------

§ 23:78 Individual not "qualified"

§ 23:79	Undue hardship
§ 23:80	Job-related criteria
§ 23:81	Threat to health or safety
§ 23:82	Drug addicts and alcoholics
§ 23:83	Nondiscriminatory justifications
§ 23:84	Insurance and benefit plans
§ 23:85	Business necessity

#### XIII. NEW CONSTRUCTION

§ 23:86 Generally

#### XIV. ENFORCEMENT

§ 23:87	Generally
§ 23:88	Statute of limitations cannot be waived

# XV. CONFLICTS BETWEEN ADA PROVISIONS AND REQUIREMENTS UNDER THE NATIONAL LABOR RELATIONS ACT

8 20.00	The ADA's reasonable accommodation provision may
	conflict with the law of collective bargaining under
	the National Labor Relations Act (NLRA)
§ 23:90	EEOC regulations
§ 23:91	NLRA's prohibition against "direct dealing" may conflict with the ADA's requirement
§ 23:92	Employer's duty to bargain with the union
§ 23:93	Employer's duty to provide the union with information
§ 23:94	The union's obligation under the ADA and its duty of fair representation
§ 23:95	Employer's showing that requested accommodation conflicts with seniority rules is ordinarily sufficient to show that accommodation is not reasonable— <i>US Airways, Inc. v. Barnett</i>
§ 23:96	Harmonizing the conflicts
X 40.00	TIGHTHOTHZING WIC COMMICS

8 92.90 The ADA's reasonable assembled tion provision may

# XVI. CONFLICTS BETWEEN DISABILITY BENEFITS CLAIMS AND DISABILITY DISCRIMINATION CLAIMS

§ 23:97 Disability benefits claims and disabilities discrimination claims—Generally

## XVII. REHABILITATION ACT OF 1973—COVERAGE AND REMEDIES

§ 23:98 Rehabilitation Act coverage and remedies— Generally

§ 23:99	Section 501—Federal agencies
§ 23:100	Affirmative action for individuals with disabilities in
	federal employment
§ 23:101	Section 503—Federal contracts
§ 23:102	Section 504—Federal financial assistance
§ 23:103	Enforcement procedures and remedies
§ 23:104	—Section 501
§ 23:105	—Section 503
§ 23:106	—Section 504
§ 23:107	Availability of claims under 42 U.S.C. § 1983 to
	enforce the rights established in the Rehabilitation
	Act
XVIII.	PSYCHIATRIC DISABILITY—TREATMENT
11 / 111/	BY COURTS
§ 23:108	Psychiatric disabilities—Generally
§ 23:109	Impairment
§ 23:110	Major life activities
§ 23:111	Substantial limitation—Courts finding no disability
§ 23:112	—Courts finding plaintiff has or may have a
3	disability
§ 23:113	Regarded as substantially limited in a major life
	activity—Plaintiff is not "regarded as" substantially
	limited
§ 23:114	—Plaintiff is or may be "regarded as" substantially
	limited
§ 23:115	Qualified—Attendance as an essential function
§ 23:116	—Direct threat
§ 23:117	—Otherwise qualified
§ 23:118	Reasonable accommodation—Establishing
	entitlement to reasonable accommodation
§ 23:119	—Undue hardship
§ 23:120	Conduct
§ 23:121	Discrimination—Direct evidence—Disparate
	treatment

# XIX. EMPLOYER WELLNESS PROGRAMS—THE ADA AND GENETIC INFORMATION NON-DISCRIMINATION ACT

—Indirect evidence of discrimination—McDonnell-

§ 23:124 Employer wellness programs

Douglas analysis § 23:123 Medical examinations and inquiries

§ 23:122

## XX. PREFERENCES IN HIRING A VETERAN WITH A DISABILITY

§ 23:125 Veteran preferences by private sector employers

§ 23:126 Federal government preferences—Hiring veterans with and without disabilities

### CHAPTER 24. IMMIGRATION REFORM AND CONTROL ACT—NATIONAL ORIGIN DISCRIMINATION

## I. NATIONAL ORIGIN DISCRIMINATION—INTRODUCTION

§ 24:1 Generally

# II. THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 (IRCA): NATIONAL ORIGIN DISCRIMINATION—IN GENERAL

§ 24:2 Generally

#### III. COVERED ENTITIES AND EMPLOYEES

§ 24:3 Generally

#### IV. PROHIBITED DISCRIMINATION

- § 24:4 Generally
- § 24:5 Protected classes
- § 24:6 Covered practices
- § 24:7 Discriminatory intent and effect

#### V. EMPLOYER DEFENSES

- § 24:8 Employer defenses—Generally
- § 24:9 Government worksite visits—Compliance policies and responsive plan

#### VI. ENFORCEMENT

- § 24:10 Enforcement—Generally
- § 24:11 Administrative proceedings
- § 24:12 Judicial proceedings

#### VII. REMEDIES

- § 24:13 Generally
- § 24:14 Remedies, injunctions and back pay
- § 24:15 Damages
- § 24:16 Attorney fees

xxii

# CHAPTER 25. RECONSTRUCTION ERA CIVIL RIGHTS ACTS—(42 U.S.C.A. §§ 1981, 1983 AND 1985(3))

#### I. OTHER ANTIDISCRIMINATION LEGISLATION—IN GENERAL

§ 25:1 Other antidiscrimination legislation—Generally

### II. THE RECONSTRUCTION ERA CIVIL RIGHTS ACTS

§ 25:2 Generally

# III. THE CIVIL RIGHTS ACT OF 1866, (42 U.S.C.A. § 1981)—RACE DISCRIMINATION

- § 25:3 Generally
- § 25:4 Substantive coverage
- § 25:5 Party defendants
- § 25:6 Statute of limitations and exhaustion of administrative remedies
- § 25:7 Standard of proof
- § 25:8 Availability of jury trial and damages

## IV. THE CIVIL RIGHTS ACT OF 1871, § 1—(42 U.S.C.A. § 1983)

- § 25:9 Generally
- § 25:10 The elements of a Section 1983 cause of action
- § 25:11 —Person defendant
- § 25:12 —Under color of state law
- § 25:13 —Injured person plaintiffs
- § 25:14 —Right deprived
- § 25:15 Exhaustion of administrative remedies and statute of limitations
- § 25:16 Standard of proof
- § 25:17 Remedies and jury trial

# V. APPLICATION OF 42 U.S.C.A. § 1983 IN THE PUBLIC EMPLOYMENT CONTEXT

- § 25:18 Generally
- § 25:19 Due process clause claims—Property and liberty rights
- § 25:20 Property interest in public employment
- § 25:21 No property right found
- § 25:22 Liberty interests—Right of discharged public

	employee not to be stigmatized by charges publicly disseminated
	03-10-10-0-0-10-10-0-0-0-0-0-0-0-0-0-0-0
§ 25:23	Nature and extent of process due once a property or
	liberty interest is found
$\S 25:24$	Equal protection
$\S 25:25$	First Amendment association claims
$\S 25:26$	First Amendment free speech cases
$\S 25:27$	—Public employee or private citizen—"Matter of
	public concern"
$\S 25:28$	—Employer reasonableness and disruptive speech
$\S 25:29$	Political association rights
§ 25:30	Religious beliefs—Exercise of First Amendment
§ 25:31	Immunities available to defendants
§ 25:32	—Pleading standard
§ 25:33	—Eleventh Amendment immunity

# VI. CIVIL RIGHTS ACT OF 1871, § 2—(42 U.S.C.A. § 1985(3))

§ 25:34 Generally

### CHAPTER 26. EQUAL PAY ACT

#### I. IN GENERAL

§ 26:1 Introduction

#### II. STATUTORY PROHIBITION

§ 26:2 Generally

#### III. STATUTORY COVERAGE

§ 26:3 Generally

#### IV. PRIMA FACIE CASE

- § 26:4 Generally
- § 26:5 "Establishment"
- § 26:6 Unequal pay
- § 26:7 Equal work
- § 26:8 On the basis of sex

### V. AFFIRMATIVE DEFENSES TO UNEQUAL PAY

§ 26:9 Generally

## VI. DIFFERENCES BASED ON ANY FACTOR OTHER THAN SEX

§ 26:10 Generally

xxiv

- § 26:11 Bona fide training programs
- § 26:12 Education and experience
- § 26:13 Market rates
- § 26:14 "Red circle" rates
- § 26:15 Shift differentials
- § 26:16 "Head of household"
- § 26:17 Relative costs

### VII. ENFORCEMENT AND STATUTE OF LIMITATIONS

§ 26:18 Generally

#### VIII. CURING EQUAL PAY ACT VIOLATIONS

§ 26:19 Generally

#### IX. JURY TRIAL AND REMEDIES

§ 26:20 Generally

### X. RELATIONSHIP TO TITLE VII—THE BENNETT AMENDMENT

§ 26:21 Generally

### CHAPTER 27. LGBTQIA+ DISCRIMINATION

# I. LGBTQIA+ DISCRIMINATION—AN INTRODUCTION

§ 27:1 LGBTQIA+ individuals and discrimination—Generally

#### II. FEDERAL LAW AND SEXUAL ORIENTATION

- § 27:2 Title VII and sexual orientation—Generally
- § 27:3 Sexual orientation and gender identity employment discrimination including harassment under Title VII and the EEOC's Enforcement Guidance
- § 27:4 Federal regulation—EEOC strategic enforcement and administrative decisions
- § 27:5 —Federal civil personnel and contractors

# III. FEDERAL LAW AND TRANSGENDER STATUS, GENDER IDENTITY, OR GENDER TRANSITION

- § 27:6 Title VII transgender status or gender identity— Generally
- § 27:7 Disability discrimination, gender dysphoria, and concurrent medical conditions

#### EMPLOYMENT DISCRIMINATION LAW AND LITIGATION

§ 27:8 Federal enforcement and regulation—Civil rights agencies
§ 27:9 U.S. EEOC administrative decisions and strategic enforcement
§ 27:10 U.S. Department of Justice
§ 27:11 U.S. Department of Education and Title IX
§ 27:12 Federal regulation—Federal civil personnel and contractors
§ 27:13 —Military personnel

### IV. FEDERAL LAW AND NON-BINARY AND INTERSEX EMPLOYEES

- § 27:14 Title VII and employees with non-binary identity— Generally
- § 27:15 Title VII and intersex employees—Generally

#### V. STATE AND LOCAL STATUTORY PROTECTIONS

§ 27:16 Generally

### VI. COLLECTIVE BARGAINING, CONTRACT, AND TORT REMEDIES

§ 27:17 Generally

#### VII. BENEFITS

- § 27:18 Generally
- § 27:19 Anti-discrimination protections and benefits
- § 27:20 Marriage equality and benefits

#### VIII. RELATED DISCRIMINATION

- § 27:21 HIV/AIDS—Real or perceived
- § 27:22 Family responsibilities and LGBTQIA+ employees
- § 27:23 Nondiscrimination and religious refusals

# PART E. SPECIAL PROBLEMS OF PROTECTED GROUPS

# CHAPTER 28. NATIONAL ORIGIN AND ALIENAGE DISCRIMINATION

## I. NATIONAL ORIGIN DISCRIMINATION—INTRODUCTION

§ 28:1 Generally

#### II. SURNAME

§ 28:2 Surname—Generally

#### III. HEIGHT

§ 28:3 Generally

#### IV. LANGUAGE—A HISTORICAL OVERVIEW

- § 28:4 Generally
- § 28:5 The Treaty of Guadalupe-Hidalgo and the Treaty of Paris of 1898
- § 28:6 The legal principles
- § 28:7 English literacy: Vehicle for discrimination and stigma

# V. LANGUAGE-BASED NATIONAL ORIGIN DISCRIMINATION CLAIMS IN THE WORKPLACE

- § 28:8 Generally
- § 28:9 EEOC interpretations
- § 28:10 The *Garcia v. Gloor* modality—Employers may require bilingual employees to speak English only
- § 28:11 English-only and English proficiency rules

#### VI. ACCENT

§ 28:12 Generally

#### VII. RACE AND COLOR AS A COMPONENT OF NATIONAL ORIGIN DISCRIMINATION

- § 28:13 Generally
- § 28:14 Constitutional foundation
- § 28:15 Racial component of national origin claims under 42 U.S.C.A. § 1981

#### VIII. ALIENAGE

- § 28:16 Generally
- § 28:17 The *Espinoza v. Farah Mfg. Co.* modality—Allowing discrimination by private employers on the basis of citizenship
- § 28:18 EEOC's guideline on citizenship requirements
- § 28:19 Defining "country" one is from for national origin purposes is broader than principles of sovereignty
- § 28:20 The *Guerra v. Manchester Terminal Corp.* modality—Section 1981 and citizenship
- § 28:21 Deferred-action immigration status and employer alienage discrimination
- § 28:22 Immigration status and alienage discrimination— Discovery of status

### IX. RACIAL/NATIONAL ORIGIN SLURS, STEREOTYPES AND HARASSMENT

§ 28:23 Generally

### X. HIGH SCHOOL DIPLOMAS AND EXAMINATIONS

- § 28:24 Generally
- § 28:25 National security concerns and requirements
- § 28:26 Non-U.S. citizens are protected from discrimination
- § 28:27 Coverage of foreign nationals
- § 28:28 Foreign employers in the United States and American employers overseas
- § 28:29 —Foreign employers
- § 28:30 —American employers overseas

### CHAPTER 29. COMPOUND DISCRIMINATION—THE INTERSECTION OF RACE AND GENDER

#### I. IN GENERAL

§ 29:1 Introduction

#### II. JURISDICTION

§ 29:2 Generally

### III. OTHER WAYS OF CONCEPTUALIZING COMPOUND DISCRIMINATION

§ 29:3 Generally

#### PART F. RELATED LEGISLATION

# CHAPTER 30. FAMILY AND MEDICAL LEAVE ACT OF 1993

## I. OVERVIEW OF THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

- § 30:1 Legislative and social history
- § 30:2 Structure of the FMLA
- § 30:3 Effective dates of the act
- § 30:4 Regulatory provisions

#### II. FMLA COVERAGE AND DEFINITIONS

- § 30:5 Covered employers
- § 30:6 Eligible employees
- § 30:7 Types of leave governed
- § 30:8 Leave to care for an injured servicemember
- § 30:9 Leave for a qualifying exigency
- § 30:10 Care for an employee's spouse, child or parent with a serious health condition
- § 30:11 Federal Family and Medical Expansion Leave Act allowed employees to receive emergency leave
- § 30:12 Additional activities
- § 30:13 Definition of spouse, parent, son or daughter, next of kin
- § 30:14 Definition of a serious health condition
- § 30:15 DOL guidance addresses mental health leave

## III. DURATION AND CALCULATION OF THE LEAVE PERIOD

- § 30:16 Methods for calculating the 12-month period within which leave can be taken
- § 30:17 Special rules for leave periods due to birth, adoption, and foster care or placement
- § 30:18 Special rules when a husband and wife work for the same employer

	EMPLOYMENT DISCRIMINATION LAW AND LITIGATION
§ 30:19 § 30:20	Intermittent leave and reduced leave schedules Involuntary Leave
	EFFECT OF FMLA LEAVE ON EMPLOYEE BENEFITS
§ 30:21	Use of vacation, sick leave, or other paid leave benefits
§ 30:22 § 30:23	Health benefits
§ 30:24	-
§ 30:25	—Special health benefit rules for multi-employer plans
v. R	EEMPLOYMENT RIGHTS
	—Equivalent benefits
§ 30:33	and preserve records"  What record keeping requirements are imposed by the FMLA?—Items required in records
§ 30:34	
§ 30:35	Medical certifications, recertifications and histories records
§ 30:36	
§ 30:37	Employer willfully violated posting requirement
VII.	EMPLOYEE NOTICE AND MEDICAL
	CERTIFICATION REQUIREMENTS
§ 30:38 § 30:39 § 30:40 § 30:41	Generally Employee notice of the need for leave Designation notice Medical certification and fitness-for-duty reports
§ 30:42	Employee notice of intent to return to work

#### SPECIAL RULES FOR EDUCATIONAL VIII. **INSTITUTIONS**

§ 30:43 Generally

### IX. PROHIBITION AGAINST DISCRIMINATION AND RETALIATION

- § 30:44 Generally
- § 30:45 Interplay between COVID-19 pandemic-relief statues and other federal employment statutes

#### X. ENFORCEMENT PROCEDURES, STATUTE OF LIMITATIONS, BURDEN OF PROOF AND REMEDIES

- § 30:46 Resolution of claims under the FMLA
- § 30:47 Remedies for violations of FMLA rights
- § 30:48 Waiver of rights

# XI. RELATIONSHIP OF THE FMLA TO OTHER LAWS, COLLECTIVE BARGAINING AGREEMENTS, AND EXISTING EMPLOYMENT BENEFITS

§ 30:49 Generally

# CHAPTER 31. INSURANCE COVERAGE OF DISCRIMINATION CLAIMS

#### I. RISK MANAGEMENT TECHNIQUES FOR AVOIDING AND MINIMIZING EMPLOYMENT DISCRIMINATION LIABILITIES

- § 31:1 Generally
- § 31:2 Increasing exposure demands proactive risk management
- § 31:3 The role of insurance in risk management

### II. STANDARD INSURANCE COVERAGES: THE THREE DIMENSIONAL MODEL

- § 31:4 Generally
- § 31:5 Primary coverages
- § 31:6 Excess coverages
- § 31:7 Time dimension of coverages
- § 31:8 An example of the three dimensions of coverage

## III. PRINCIPLES OF INTERPRETATION: THE POLICY IN FAVOR OF COVERAGE

- § 31:9 Generally
- § 31:10 Reading against the drafter (contra proferentem)

§ 31:11 Protecting reasonable expectations

### IV. INTERPRETING INSURANCE POLICIES IN LIGHT OF PUBLIC POLICY

§ 31:12 Generally

#### V. INSURANCE COVERAGE FOR DISCRIMINATION LIABILITIES—CASE LAW ORGANIZED BY DIFFERENT POLICY COVERAGES

- § 31:14 Commercial general liability (CGL) and excess liability
- § 31:15 Directors & officers (D&O)
- § 31:16 Errors & omissions (E&O)
- § 31:17 Employment-related practices liability insurance (EPLI)
- § 31:18 Timing issues: "Occurrence" and "claims made"

#### VI. CLAIM PROCESSING AND LOSS ADJUSTMENT

- § 31:19 Insured's duties: Notice, cooperation and the misrepresentation defense
- § 31:20 Insurer's duties: Indemnification and defending claims

## VII. CONSIDERATIONS FOR THE THIRD PARTY PLAINTIFF ALLEGING DISCRIMINATION

§ 31:21 Generally

#### VIII. CONCLUSION

§ 31:22 Generally

# CHAPTER 32. GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008

- § 32:1 Genetic testing prohibitions—In general
- § 32:2 Employers prohibited from using genetic information in employment decisions
- § 32:3 Covered employees
- § 32:4 Covered employers
- § 32:5 Covered employment agencies and labororganization
- § 32:6 Remedies
- § 32:7 Retaliation prohibited
- § 32:8 Federal law—The "regarded as" prong of disability under the ADA

§ 32:9	—Executive order prohibits discrimination in federal employment based on genetic information
§ 32:10	State statutory regulations
§ 32:11	Federal law—The "regarded as" prong of disability under the ADA
§ 32:12	—Executive order prohibits discrimination in federal employment based on genetic information
§ 32:13	State statutory regulations
8 32:14	Insurance-related decisions

### CHAPTER 33. TITLE IX OF THE 1972 EDUCATIONAL ACT AMENDMENTS—SEX DISCRIMINATION PROHIBITED IN EDUCATIONAL PROGRAMS OR ACTIVITIES

§ 33:1	Title IX of the 1972 Educational Act Amendments—In
	general
§ 33:2	Title IX claims versus Title VII claims
§ 33:3	Retaliation claims are actionable when an individual
	reports claims of sex discrimination—Jackson v.
	Birmingham Bd. of Educ.

§ 33:4 Title VII burdens of proof are applied to Title IX claims

### **APPENDICES**

APPENDIX A.	Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e–2000e-17)
APPENDIX B.	Equal Pay Act of 1963 (29 U.S.C.A. § 206(d))
APPENDIX C.	Lily Ledbetter Act
APPENDIX D.	Information Useful in Proving Various Claims of Discrimination
APPENDIX E.	Sample Interrogatories for Statistical Discovery
APPENDIX F.	Expert Testimony Resources for Fetal Protection Cases
APPENDIX G.	Americans with Disabilities Act
APPENDIX H.	Age Discrimination in Employment Act (29 U.S.C.A. §§ 1621 to 634)
APPENDIX I.	Immigration Reform and Control Act (Pub. L. No. 99-603)
APPENDIX J.	Documents to Be Examined by Employers Pursuant to the Immigration Reform and Control Act of 1986 to Verify Employability and Identity
APPENDIX K.	Fair Labor Standards Act, §§ 15, 16, 17 (29 U.S.C.A. §§ 215 to 217)

### EMPLOYMENT DISCRIMINATION LAW AND LITIGATION

APPENDIX L.	Portal to Portal Act, Sections 6, 7, 11 (29 U.S.C.A. §§ 255, 256, 260)
APPENDIX M.	Civil Rights Attorney's Fees Awards Act (42 U.S.C.A. § 1988)
APPENDIX N.	Rehabilitation Act of 1973, §§ 8, 501, 503, 504, 505 (29 U.S.C.A. §§ 706, 791, 793, 794, 794a)
APPENDIX O.	Title IX of the Education Amendments of 1972, §§ 901, 902 (20 U.S.C.A. §§ 1681, 1682)
APPENDIX P.	Civil Rights Restoration Act of 1987 (Pub. L. No. 100-259, 102 Stat. 28)
APPENDIX Q.	Civil Rights Act of 1866 (42 U.S.C.A. § 1981 as amended by the Civil Rights Act of 1991)
APPENDIX R.	Model Retainer Agreement
APPENDIX S.	29 U.S.C.A. §§ 2601 et seq. (Family and Medical Leave Act)
APPENDIX T.	Title I of the FMLA, as Amended by the National Defense Authorization Act for FY 2008
APPENDIX U.	Policies and Procedures Manual
APPENDIX V.	EEOC Compliance Manual Section 902— Definition of the Term "Disability"
APPENDIX W.	Federal EEO Record-Keeping Requirements
APPENDIX X.	EEOC ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations
APPENDIX Y.	List of Federal Agencies' Section 504 Federal Financial Assistance Regulations
APPENDIX Z.	List of Federal Agencies' Section 504 Federally Conducted Programs and Activities Regulations
APPENDIX AA.	EEOC Enforcement Guidance: Psychiatric Disabilities and the Americans with Disabilities Act
APPENDIX BB.	EEOC Enforcement Guidance: Effect of Representations Made in Applications for Disability Benefits on the Determination of Whether a Person Is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act of 1990 (ADA)
APPENDIX CC.	EEOC Guidance on Investigating, Analyzing Retaliation Claims

APPENDIX DD. Regulation on Agreements Waiving Rights

and Claims Under the ADEA

APPENDIX EE. EEOC Enforcement Guidance: Reasonable

Accommodation and Undue Hardship Under the Americans with Disabilities Act

APPENDIX FF. EEOC Enforcement Guidance: Vicarious

Employer Liability for Unlawful Harassment by Supervisors

APPENDIX GG. State Laws Regarding Use of Genetic

Information or Genetic Testing in the

Workplace

APPENDIX HH. Sample Preservation Letters

Index