EMPLOYMENT DISCRIMINATION—IN GENERAL (OTHER THAN AGE DISCRIMINATION, DISABILITY DISCRIMINATION AND HARASSMENT)*

[2:1] **Scope:** This Chapter deals with federal laws assuring equal opportunity in employment and prohibiting discrimination in employment generally. Particular types of discrimination are covered in other chapters:

- *Age Discrimination, see Ch. 3.*
- *Disability Discrimination, see Ch. 4.*
- *Harassment, see Ch. 5.*
- *Wages and Hours, see Ch. 6.*

[2:2] **Choosing Between Federal and State Law:** Plaintiffs claiming employment discrimination usually have the choice of suing under *either* federal law (e.g., Title VII) or a similar state law, in either federal or state court. State laws governing employment discrimination are preempted only if they actually *conflict* with federal law (which is rare). [42 USC §2000e-7; *California Fed. Sav. & Loan Ass'n v. Guerra* (1987) 479 US 272, 281-284, 107 S.Ct. 683, 689-691]

Even where Congress has not totally supplanted a state law, the state law is voided to the extent it directly conflicts with federal statutes *or federal regulations*. This type of conflict arises when "compliance with both federal and state regulations is a physical impossibility" or where "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [*Arizona v. United States* (2012) 567 US 387, 399, 132 S.Ct. 2492, 2501 (internal quotes omitted); *Coalition to Defend Affirmative Action v. Granholm* (6th Cir. 2006) 473 F3d 237, 251; *Chinatown Neighborhood Ass'n v. Harris* (9th Cir. 2015) 794 F3d 1136, 1141]

a. [2:2.1] **Where state exhaustion requirement preempted:** Courts may not deny claims made under 42 USC §1983 on the ground that a state exhaustion requirement functionally immunizes state officials from such claims. A state law that immunizes government conduct otherwise subject to suit under §1983 is preempted. [*Williams v. Reed* (2025) 604 US 168, 174, 145 S.Ct. 465, 470]

[2:3] ***PRACTICE POINTERS:*** Some state laws are more advantageous to plaintiffs than federal law. For example, some state laws allow plaintiffs to recover *unlimited compensatory*

*Contributing Editor: Dale Willett, Esq., JAMS Research Attorney *and punitive damages* (*see* ¶*2:1180*), instead of the limited damages recoverable under Title VII (*see* ¶*2:1181*).

State law claims may also have procedural advantages: Plaintiffs can sue in their own state courts, and many states do not require a unanimous jury verdict as is required in federal court. And, some states do not require exhaustion of administrative remedies as prerequisite to filing suit.

For these and other reasons, plaintiffs may favor proceeding under state law in state court, while defendants will often look for opportunity to *remove* the case to federal court (*see* ¶*12:236 ff.*).

[2:4] *Reserved.*

[2:5] **Equal Employment Opportunity Commission (EEOC):** Under federal law, the Equal Employment Opportunity Commission (EEOC) is charged with the responsibility of preventing unlawful employment practices by employers, unions and employment agencies. To do so, the EEOC accepts and investigates charges of discrimination filed by or on behalf of individuals claiming to have been subjected to an unlawful employment practice. The EEOC enforces not only Title VII but also the Age Discrimination in Employment Act (ADEA), the Equal Pay Act, and portions of the Americans with Disabilities Act (ADA).

The EEOC may resolve charges in a number of ways, including dismissing them, mediating, suing on the employee's behalf or issuing the employee a right-to-sue letter (*see* ¶*2:986 ff.*).

The EEOC has authority to issue "suitable procedural regulations" to enforce Title VII (see 42 USC §2000e-12). But it lacks authority to promulgate substantive rules or regulations that have the force of law. [*General Elec. Co. v. Gilbert* (1976) 429 US 125, 141, 97 S.Ct. 401, 410 (superseded by statute on other grounds as recognized by *Shaw v. Delta Air Lines, Inc.* (1983) 463 US 85, 88-89, 103 S.Ct. 2890, 2895-2896); *Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222* (10th Cir. 2002) 297 F3d 1146, 1151-1152]

[2:6-24] *Reserved.*

A. COVERAGE ANALYSIS—TITLE VII

[2:25] Claims under Title VII or equivalent state statutes usually require determination of the following:

- *Employee:* whether the worker is an "employee" covered by the law in question (*see* ¶*2:76*);
- *Employer:* whether the employer is subject to the law in question (*see* ¶*2:29*);
- *Prohibited conduct:* whether the conduct the worker is complaining about is covered by the law in question (*see* ¶*2:101 ff.*); and
- *Administrative exhaustion:* whether the worker exhausted his or her administrative remedy (¶*2:1011*) before commencing suit.

- *Defenses: See Chapter 10.*

  [2:26-27] *Reserved.*

B. ENTITIES SUBJECT TO TITLE VII

[2:28] Title VII prohibits unlawful employment practices by—employers, employment agencies, labor organizations, and joint labor management committees controlling job training programs. [42 USC §2000e-2(a)-(d); see also 42 USC §2000e-16 (federal employment)]

1. [2:29] **Employers:** "Employer" under Title VII means a person:
   — engaged in an industry *affecting commerce,*
   — who has *15 or more employees* for each working day *in each of 20 or more calendar weeks* in the current or preceding year, and
   — "any agent of such a person." [42 USC §2000e(b)]

   a. [2:30] **"Industry affecting commerce":** This term includes any activity or industry "affecting commerce" within the meaning of federal labor laws (LMRA and LMRDA). [42 USC §2000e(h)]

      (1) [2:30.1] **"Industry" includes nonprofit organizations:** "[I]t is clear that Congress intended to cover all activities affecting commerce, to the extent permitted by the Constitution, regardless of whether they are operated for non-profit or charitable purposes." [*Johnson v. Apna Ghar, Inc.* (7th Cir. 2003) 330 F3d 999, 1004, fn. 4]

      For example, a church may "affect commerce" where it uses interstate communications and transportation to solicit and receive donations, and to provide social, community and educational services; or where the church building itself is used in a way that affects commerce (e.g., for regular radio broadcasts as part of program to increase membership and attendance). [*United States v. Rayborn* (6th Cir. 2002) 312 F3d 229, 233-234; *United States v. Odom* (11th Cir. 2001) 252 F3d 1289, 1294]

      (2) [2:30.2] **"Affecting commerce":** Only a *minimal impact* on interstate commerce is required. [*Johnson v. Apna Ghar, Inc.* (7th Cir. 2003) 330 F3d 999, 1003—nonprofit organization that maintained interstate telephone service, solicited employment applicants from out of state and received financial support from out of state was an "employer" engaged in an "industry affecting commerce" subject to Title VII]

      [2:31-34] *Reserved.*

   b. [2:35] **Determining "employer" status:** Normal principles of agency law establish the existence of an employer-employee relationship. [*Daggitt v. United Food & Comm'l Workers Int'l Union, Local 304A* (8th Cir. 2001) 245 F3d 981, 989]

   But Title VII liability is not limited to the entity that issues paychecks to the employee. The term "employer" is "sufficiently broad to encompass any party who *significantly affects access of any individual to employment opportunities*, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law." [*Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.* (1st Cir. 1994) 37 F3d 12, 17 (emphasis added; internal quotes omitted); *Satterfield v. State of Tennessee* (6th Cir. 2002) 295 F3d 611, 616-618 (recognizing three tests adopted in *Carparts Distribution Ctr.*)]

- [2:36] Compensation is an essential condition of an employment relationship. [*Daggitt v. United Food & Comm'l Workers Int'l Union*, *Local 304A* (8th Cir. 2001) 245 F3d 981, 987]
- [2:37] An entity's power to hire and fire and *control the manner and means* by which workers accomplish their tasks is evidence of an employment relationship. [*Daggitt v. United Food & Comm'l Workers Int'l Union*, *Local 304A* (8th Cir. 2001) 245 F3d 981, 988-989; *Lockard v. Pizza Hut, Inc.* (10th Cir. 1998) 162 F3d 1062, 1070—franchisor not liable as "employer" of franchisee's workers]

c. [2:38] **Determining number of employees:** In determining whether a company meets the minimum 15-employee requirement for Title VII coverage, the focus is on the number of workers *on the payroll* rather than those actually working and receiving compensation on a given day. Thus, employees who are on the payroll but work only a part of a week are counted. [*Walters v. Metropolitan Educational Enterprises, Inc.* (1997) 519 US 202, 206, 117 S.Ct. 660, 663-664—rejecting day-by-day method that would "turn the coverage determination into an incredibly complex and expensive factual inquiry"; *Aly v. Mohegan Council, Boy Scouts of America* (1st Cir. 2013) 711 F3d 34, 44-45]

Plaintiff bears the burden of demonstrating by a preponderance of the evidence that the employer meets the 15-employee threshold. [*Aly v. Mohegan Council, Boy Scouts of America*, supra, 711 F3d at 45; see *Prince v. Appleton Auto, LLC* (7th Cir. 2020) 978 F3d 530, 537-538 (aggregation of employees of related entities denied for Title VII purposes)]

(1) [2:39] **Only "employees" counted:** Persons who are not employees (e.g., independent contractors) do not count in making this determination. [See *Devine v. Stone, Leyton & Gershman, P.C.* (8th Cir. 1996) 100 F3d 78, 80—partners of law firm or shareholder-directors of professional corporation not counted; *see further discussion at ¶2:81 ff.*]

(a) [2:39.1] **Managers:** Managers and supervisors count in determining the number of "employees" *unless* they own an interest in the business, in which event they are treated as "employers." [*Smith v. Castaways Family Diner* (7th Cir. 2006) 453 F3d 971, 978; *Trainor v. Apollo Metal Specialties, Inc.* (10th Cir. 2002) 318 F3d 976, 986-987—corporate officer may be considered employee in some circumstances]

(2) [2:40] **Leased employees:** Leased employees may count toward the 15-employee threshold. [See Equal Employment Opportunity Commission, Policy Guide on Whether Part-Time Employees May Be Counted to Satisfy Number Requirements for Title VII and ADEA Coverage, EEOC Compliance Manual (BNA) §605.8(b) (4/20/90)]

[2:40.1-40.4] *Reserved.*

(a) [2:40.5] **Compare—persons employed by both staffing agency and client:** Under appropriate circumstances, the same person may have two or more employers for the same work and be counted as an "employee" of both the leasing agency and the lessee. [*Hunt v. State of Missouri, Dept. of Corrections* (8th Cir. 2002) 297 F3d 735, 742—nurses paid by staffing agency to work at state prison under supervision of prison officials were employees of both agency and prison]

(3) [2:41] **Compare—independent contractors:** Persons hired as true independent contractors are not "employees" within the Act. [*Weary v. Cochran* (6th Cir. 2004) 377 F3d 522, 524-525; *Alberty-Veléz v. Corporación de Puerto Rico Para La Difusión Publica* (1st Cir. 2004) 361 F3d 1, 9; *see discussion at* ¶*2:81 ff.*]

[2:42-44] *Reserved.*

d. [2:45] **Joint employers:** A worker may be employed by more than one "employer" for purposes of Title VII *where each exercises the requisite amount of control* over the worker's compensation, hours and terms of employment (e.g., where a temporary personnel agency screens and hires workers for a short-term project for one of its customers). In such cases, both employers may be subject to Title VII. [See *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (SD NY 1984) 611 F.Supp. 344, 349—worker placed by temporary personnel agency on staff of brokerage firm; *EEOC v. Sage Realty Corp.* (SD NY 1981) 507 F.Supp. 599, 611—office building lobby attendant on payroll of janitorial service; *Magnuson v. Peak Technical Services, Inc.* (ED VA 1992) 808 F.Supp. 500, 508—sales rep working simultaneously for several manufacturers; compare *Peppers v. Cobb County, Georgia* (11th Cir. 2016) 835 F3d 1289, 1301—"focal point" of inquiry is which entity or entities controlled fundamental and essential aspects of employment relationship when taken as a whole]

One critical factor in the "control" inquiry is the right to terminate the employment relationship. Other factors include the ability to set work rules, assignments and conditions of employment; day-to-day supervision, including discipline, of the employee; and control of employee records, including payroll, insurance and taxes. [*Knitter v. Corvias Military Living, LLC* (10th Cir. 2014) 758 F3d 1214, 1226; *Nischan v. Stratosphere Quality, LLC* (7th Cir. 2017) 865 F3d 922, 929-930 (applying five-factor test)—corporation was not an employer where it had no hiring and firing power over employee, did not train employee, did not provide employee with tools and equipment necessary to perform her job, did not pay or give employee benefits, and actual employer assigned employee "to the lot and had no expectation [she] would leave and work for [corporation] once [its] contract with [corporation] terminated"; *EEOC v. Global Horizons, Inc.* (9th Cir. 2019) 915 F3d 631, 641—where defendants, fruit growers, obtained temporary workers through labor contractor, "[t]he power to control the manner in which housing, meals, transportation, and wages were provided to the . . . workers, even if never exercised, is sufficient to render the Growers joint employers as to non-orchard-related matters"; *Perry v. VHS San Antonio Partners, L.L.C.* (5th Cir. 2021) 990 F3d 918, 929-930—hospital owner's limited contractual right to "fire" doctor by requesting professional association terminate his professional services agreement evidenced lack of requisite control; *Adams v. C3 Pipeline Const. Inc.* (10th Cir. 2021) 30 F4th 943, 962-965—successor-in-interest not employer where evidence showed it had no authority or right to hire, retain, fire, discipline or otherwise manage employees; *EEOC v. Village at Hamilton Pointe LLC* (7th Cir. 2024) 102 F4th 387, 435-437—management company was *not* joint employer of long-term care facility employees where it only gave input into firing decisions; department managers actually made decisions and otherwise controlled employees; *Hoffman v. Inova Health Care Services* (4th Cir. 2026) 169 F4th 207, 214-218—healthcare facility/hospital operator was not joint employer of longtime nurses where *staffing company* made hiring/firing decisions, retained payroll and records control, provided hospital trainings regarding charting system, equipment, workplace harassment and patient privacy laws which reflected patient-care oversight rather than day-to-day employment supervision; *Vincent v. Jefferson County Bd. of Ed.* (11th Cir. 2025) 152 F4th 1339, 1346-1347—genuine dispute over staffing agency's control barred summary judgment where contract gave agency performance oversight and school requested athletic trainer's removal]

The test is a fact-specific inquiry, typically applied in a summary judgment context. [*Miller v. Sam Houston State Univ.* (5th Cir. 2021) 986 F3d 880, 890-891—district court erred by prematurely deciding issue under FRCP 12(b)(6) standard]

A foreign corporation under control of an American corporation can be a joint employer of an employee. [42 USC §2000e-1(c)(3); see *St. Jean v. Orient-Express Hotels Inc.* (SD NY 2013) 963 F.Supp.2d 301, 308 (citing four factors to be considered)]

(1) [2:45.1] **Applicant for position:** Title VII protects employees not independent contractors. Similarly, it protects *applicants* for employment, not independent contractor positions. [*Felder v. United States Tennis Ass'n* (2nd Cir. 2022) 27 F4th 834, 845-846—by merely asserting USTA refused to issue credentials, security guard failed to plead it was his employer]

(2) [2:46] **No vicarious liability:** An employee claiming discrimination against two joint employers "must show that [each] defendant knew or should have known of the discriminatory conduct and that it failed to take those corrective measures within its control." [*Williams v. Grimes Aerospace Co.* (D SC 1997) 988 F.Supp. 925, 937 (brackets in original; internal quotes omitted)—employee could not establish Title VII claim against temporary agency stemming from manufacturer's failure to place her in full-time position, absent evidence that temporary agency knew or had reason to know of alleged discrimination; *EEOC v. Global Horizons, Inc.* (D HI 2012) 860 F.Supp.2d 1172, 1188—claim against two or more employers may be established if supported by "specific incidents, standard operating procedures, and surrounding circumstances" at each defendant's workplace; *Vincent v. Jefferson County Bd. of Ed.* (11th Cir. 2025) 152 F4th 1339, 1348-1351—staffing agency not liable where no reasonable jury could conclude agency knew or should have known employee's sex was why employer asked agency to remove athletic trainer from her position; compare *EEOC v. Global Horizons, Inc.,* supra, 915 F3d at 641-642 (claim against employer based on actions of labor contractor requires that employer knew or should have known about the conduct)]

e. [2:47] **Related business entities as single employer?** A parent corporation generally is *not* liable for discriminatory actions by a subsidiary; each is regarded as a *separate employer* with separate employees. [See *Brown v. Fred's, Inc.* (8th Cir. 2007) 494 F3d 736, 739—"strong presumption that a parent company is not the employer of its subsidiary's employees, and the courts have found otherwise only in extraordinary circumstances" (internal quotes omitted); *Frank v. U.S. West, Inc.* (10th Cir. 1993) 3 F3d 1357, 1362; *Keane v. Expeditors Int'l of Wash., Inc.* (1st Cir. 2025) 138 F4th 613, 617-618 & fn. 5]

But separate business entities may be treated as a single employer under the following tests:

(1) [2:48] **Integrated enterprise test:** Most courts hold that where parent and subsidiary (or other related business entities) *operate as an "integrated enterprise,"* the parent is liable for discrimination by any subsidiary (and the employees of both are aggregated to meet the 15-employee minimum). [See *Hukill v. Auto Care, Inc.* (4th Cir. 1999) 192 F3d 437, 442 (abrogation on other grounds recognized by *Butler v. Drive Automotive Indus. of America, Inc*. (4th Cir. 2015) 793 F3d 404, 408, fn. 3); *Anderson v. Pacific Maritime Ass'n* (9th Cir. 2003) 336 F3d 924, 929; *Davis v. Ricketts* (8th Cir. 2014) 765 F3d 823, 826-827, 829—evidence of common control and financial backing insufficient to establish single employer status where little interrelation of operations between two companies and little if any shared control of labor relations]

(a) [2:49] **Factors considered:** In determining whether an "integrated enterprise" exists, courts focus on the following factors:

— interrelation of operations;

— centralized control of labor relations;

— common management; and

— common ownership or financial control. [*Cook v. Arrowsmith Shelburne, Inc.* (2nd Cir. 1995) 69 F3d 1235, 1240; *Kang v. U. Lim America, Inc.* (9th Cir. 2002) 296 F3d 810, 815; *Davis v. Ricketts* (8th Cir. 2014) 765 F3d 823, 827 (finding two entities not integrated enterprise)]

Of these factors, control of labor relations is the most important, and the central question is "[w]hat entity made the final decisions regarding employment matters related to the person claiming discrimination?" [*Brown v. Daikin America Inc.* (2nd Cir. 2014) 756 F3d 219, 227-228 (brackets in original; internal quotes omitted)—allegations that Japanese parent corporation closely directed operations of wholly-owned subsidiary, that parent insisted on approving all significant actions taken by subsidiary, and that parent directed subsidiary to discharge only employees who were not Japanese were sufficient to allege integrated enterprise; *Anwar v. Dow Chemical Co.* (6th Cir. 2017) 876 F3d 841, 852—domestic affiliate not an employer for purposes of plaintiff's Title VII claims]

However, no single factor is dispositive. [*Perry v. VHS San Antonio Partners, L.L.C.* (5th Cir. 2021) 990 F3d 918, 928—hospital owner and professional association were not a single, integrated enterprise where several factors weighed against it and evidence revealed only "singular involvement" in personnel retention]

(2) [2:50] **Compare—corporate "sham" as test:** A few courts treat separate companies as a single employer only if:

— the parent corporation split itself into several entities for the *purpose* of utilizing the few-employees exemption from discrimination liability; or

— the parent corporation *directed* discriminatory acts by one of its subsidiaries; or

— conditions are present for "piercing the corporate veil" (which would allow a creditor to sue either parent or affiliates). [*Papa v. Katy Indus., Inc.* (7th Cir. 1999) 166 F3d 937, 940-941; compare *Nesbit v. Gears Unlimited, Inc.* (3rd Cir. 2003) 347 F3d 72, 86—rather than applying "piercing" test in corporation law context, court applied factors to determine when substantively to consolidate two or more entities in bankruptcy context; see also *Keane v. Expeditors Int'l of Wash., Inc.* (1st Cir. 2025) 138 F4th 613, 617-618 & fn. 5—fact that parent company and subsidiary employer shared certain common management and employer required to implement and follow parent company's code of business conduct, personnel policies and business directives insufficient to establish that parent company directed and controlled subsidiary, and used subsidiary for improper purposes, as required to pierce corporate veil]

(3) [2:51] **Need not be party:** It is not necessary for each of the entities involved to be joined as a party defendant. I.e., if the relationship is in fact so close that it meets the single-employer standards, each would obviously have notice of the proceedings. [*Caudle v. Bristow Optical Co., Inc.* (9th Cir. 2000) 224 F3d 1014, 1022, fn. 4]

[2:52-59] *Reserved.*

f. [2:60] **Foreign employers:** Treaties with other countries may permit foreign companies operating in the U.S. to prefer their own citizens for employment over U.S. citizens. E.g., the Treaty of Friendship, Commerce and Navigation between the U.S. and Japan (4 UST 2063) permits this preference as to "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." [See *Sumitomo Shoji America, Inc. v. Avagliano* (1982) 457 US 176, 183, 102 S.Ct. 2374, 2378; *Fortino v. Quasar Co., a Div. of Matsushita Elec. Corp. of America* (7th Cir. 1991) 950 F2d 389, 392-394]

Otherwise, however, foreign employers are subject to federal anti-discrimination laws. [See *Morelli v. Cedel* (2nd Cir. 1998) 141 F3d 39, 43 (ADEA case)]

(1) [2:61] But a domestic subsidiary of a foreign company *may* be able to prove that foreign citizenship is a *bona fide occupational qualification* for certain jobs; e.g., those requiring familiarity with the foreign culture, etc. [See *Sumitomo Shoji America, Inc. v. Avagliano* (1982) 457 US 176, 189-190, 102 S.Ct. 2374, 2382, fn. 19]

[2:62-64] *Reserved.*

g. [2:65] **Compare—exempt employers:** Title VII does not apply to certain employers including:

- *American Indian tribes.* [42 USC §2000e(b); see *Thomas v. Choctaw Mgmt./Services Enterprise* (5th Cir. 2002) 313 F3d 910, 911—corporations owned by Indian tribe may be subject to Title VII, but *unincorporated* business venture *wholly owned* by Indian tribe was exempt; *EEOC v. Peabody Western Coal Co.* (9th Cir. 2014) 773 F3d 977—Title VII's prohibition against national origin discrimination does not prohibit tribal hiring preferences required as condition of leases permitting mining on tribal land]
- *Bona fide private membership clubs* (other than labor organizations). [42 USC §2000e(b)]
- *Religious organizations* for actions taken on the basis of religion (limited exemption). [42 USC §2000e-1(a); *Conway v. Mercy Hosp. St. Louis* (8th Cir. 2025) 146 F4th 704, 708; *see ¶2:131*]

2. [2:66] **"Agent" of Employer:** Title VII defines "employer" to include "any agent" of an employer. [42 USC §2000e(b)]

A third-party agent may be liable as an employer where the agent has been delegated functions traditionally exercised by an employer. [*Mobley v. Workday, Inc.* (ND CA 2024) 740 F.Supp.3d 796, 806-807]

a. [2:67] **Creates respondeat superior liability:** This merely means that discriminatory actions by an employer's agent on the employer's behalf may be imputed to the employer: "In express terms, Congress has directed federal courts to interpret Title VII *based on agency principles*." [*Burlington Indus., Inc. v. Ellerth* (1998) 524 US 742, 754-755, 118 S.Ct. 2257, 2265 (emphasis added); see *Village of Freeport v. Barrella* (2nd Cir. 2016) 814 F3d 594, 616—actions of high-ranking officials can give rise to respondeat superior liability for municipality (dictum)]

(1) [2:67.1] **Actions taken by "officials":** Employers may be held directly liable for actions taken by "officials" at such a high level within the organization that they are treated as the organization's "proxy," including e.g., owners, partners, proprietors, corporate officers and some high level managers. In some circumstances,