Table of Contents

Volume 1

CHAPTER 1. THE IMPORTANCE TO THE EMPLOYER OF UNDERSTANDING EQUAL EMPLOYMENT OPPORTUNITY LAW

§ 1:1 Effect of equal employment opportunity law on the employer's operation
§ 1:2 Effect of equal employment opportunity litigation on an employer
§ 1:3 Distinct nature of the antidiscrimination statutes

CHAPTER 2. THE EQUAL PAY ACT

I. BASICS OF THE ACT

§ 2:1 Statutory language
§ 2:2 Employers covered by the act
§ 2:3 Elements of a substantive violation
§ 2:4 Statutory exceptions
§ 2:5 Retaliation claims
§ 2:6 Interplay between the Equal Pay Act and Title VII
§ 2:7 Comparable worth theory

II. REQUIREMENT OF THE SAME ESTABLISHMENT

§ 2:8 Problems in defining "establishment"

III. REQUIREMENT OF EQUAL WORK

§ 2:9 Similar job content

IV. REQUIREMENT OF EQUAL SKILL, EFFORT, AND RESPONSIBILITY

§ 2:10 Defining equal skill, effort, and responsibility

V. COMMON PROBLEMS IN ASSESSING WHETHER WORK IS EQUAL

§ 2:11 Actual job duties, not descriptions, usually control

§ 2:12 When extra duties justify wage difference
§ 2:13 —General principles
§ 2:14 Extra duties of specially skilled employees
§ 2:15 Extent to which the extra duties must be performed by all higher-paid employees or be available to both sexes
§ 2:16 —Defining the relevant time period for extra duties
§ 2:17 Significance of the wage differential's size in assessing whether the work is equal
§ 2:18 Examples of equal and unequal jobs

VI. REQUIREMENT OF SIMILAR WORKING CONDITIONS

§ 2:19 Common factual patterns in determining whether similar working conditions exist

VII. REQUIREMENT THAT THE DIFFERENTIAL BE PAID ON THE BASIS OF SEX

§ 2:20 Role of motive
§ 2:21 Violations involving job successors/predecessors

VIII. DEFENSE BASED ON FACTOR OTHER THAN SEX

§ 2:22 General principles
§ 2:23 Sex-neutral compensation plans
§ 2:24 Red circle rates
§ 2:25 Bona fide training program
§ 2:26 Head-of-household distinctions
§ 2:27 Pay differential based on market forces, salary history, or experience
§ 2:28 Pay differential based on job evaluation or classification
§ 2:29 Employment cost not factor other than sex
§ 2:30 Relevance of disproportionate wage differential

IX. OTHER DEFENSES

§ 2:31 Seniority, merit, and productivity

X. ENFORCEMENT AND REMEDIES

§ 2:32 Generally
§ 2:33 EEOC enforcement
§ 2:34 Enforcement by employees

§ 2:35 Liquidated damages
§ 2:36 Union liability

CHAPTER 3. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964—SCOPE, DISPARATE TREATMENT

I. SCOPE OF TITLE VII

§ 3:1 Statutory language
§ 3:2 Concurrent and supplemental jurisdiction over Title VII and state equal employment claims
§ 3:3 Exhaustion of administrative remedies
§ 3:4 Employers subject to Title VII
§ 3:5 —Problems in defining employer
§ 3:6 —Problems counting part-time and contingent workers
§ 3:7 —Exemption for private clubs
§ 3:8 —Limited exemption for religious institutions
§ 3:9 —Religious Institutions—First Amendment "ministerial exception," ecclesiastical abstention doctrines
§ 3:10 —Liability of individuals
§ 3:11 —Liability of unions
§ 3:12 Application of Title VII to employers outside the United States
§ 3:13 Employee groups protected by Title VII
§ 3:14 —Defining employee under the statute
§ 3:15 —Testers
§ 3:16 —Exemption for personal staff of elected officials

II. DISPARATE TREATMENT

A. THEORY OF DISPARATE TREATMENT

§ 3:17 The theory of disparate treatment
§ 3:18 Requirement of intent in disparate treatment cases
§ 3:19 Requirement that employee be similarly situated

B. PROOF

§ 3:20 Proving disparate treatment
§ 3:21 —Direct evidence of discrimination
§ 3:22 —Proof of discrimination in mixed-motive cases
§ 3:23 — —Supreme Court alters mixed-motive proof scheme under Title VII
§ 3:24 —Proof by circumstantial evidence—The prima facie case

§ 3:25 —Requirement of adverse employment action

C. STATISTICS

§ 3:26 Use of statistics in prima facie case

D. REBUTTAL AND RESPONSE

§ 3:27 Employer's response—The legitimate nondiscriminatory reason
§ 3:28 Rebuttal to the nondiscriminatory reason—Pretext
§ 3:29 Defining the plaintiff's burden to show pretext—The Supreme Court's decisions in *Hicks* and *Reeves*
§ 3:30 "Same-hirer, same-firer" inference or presumption
§ 3:31 Effect of application for total disability on proof of pretext
§ 3:32 —Bona fide occupational qualification defense
§ 3:33 "Cat's Paw" theory of liability—"Middle-manager" cases

E. BASED ON SEX

§ 3:34 Disparate treatment on the basis of sex
§ 3:35 —Benefit plans
§ 3:36 —Sexual Orientation, Gender Identity or Expression, and Transgender Status
§ 3:37 —Appearance and dress codes
§ 3:38 —Physical and mental fitness tests
§ 3:39 —Discrimination in pay—Rejection of comparable worth theory
§ 3:40 —Pregnancy and pregnancy benefits
§ 3:41 — —Pregnancy discrimination
§ 3:42 — —Fetal protection policies
§ 3:43 — —Pregnancy accommodations and benefits

F. SEXUAL HARASSMENT

§ 3:44 Sexual harassment—Generally
§ 3:45 —Quid pro quo sexual harassment
§ 3:46 —Hostile environment sexual harassment
§ 3:47 — —The severe or pervasive standard
§ 3:48 — —Requirement that advances were unwelcome
§ 3:49 — —Reasonable woman versus reasonable person standard
§ 3:50 —Same-sex sexual harassment
§ 3:51 — —The "stereotype theory" and same-sex harassment

§ 3:52 — —Same-sex sexual harassment under state laws
§ 3:53 —Employer liability for sexual harassment
§ 3:54 — —Application of *Faragher* and *Ellerth*
§ 3:55 — —Direct liability of owners and high ranking officers
§ 3:56 — —Employer liability for harassment by co-employees
§ 3:57 — —Employer liability for harassment by nonemployees
§ 3:58 — —Employer liability for adverse action against accused harassers
§ 3:59 Sexual harassment and arbitration

G. RACE OR COLOR

§ 3:60 Discrimination based on race or color
§ 3:61 —Intraracial discrimination
§ 3:62 —Racial harassment
§ 3:63 —Reverse discrimination

H. NATIONAL ORIGIN ANCESTRY OR CITIZENSHIP

§ 3:64 Discrimination based on national origin, ancestry, or citizenship
§ 3:65 —Prohibited practices, generally
§ 3:66 —Harassment
§ 3:67 —Discrimination based on citizenship
§ 3:68 —English fluency requirements
§ 3:69 —English-only rules

I. RELIGION OR CREED

§ 3:70 Discrimination based on religion or creed
§ 3:71 —Discriminatory practices prohibited
§ 3:72 —Religious opposition to homosexuality
§ 3:73 —Reasonable accommodation
§ 3:74 —Undue hardship
§ 3:75 —Preemployment inquiries

J. RETALIATION

§ 3:76 Discrimination based on retaliation for opposing discriminatory practices
§ 3:77 —Activities protected from retaliation
§ 3:78 —Proof of intent to retaliate

K. GENETIC TESTING

§ 3:79 Genetic testing—Generally

CHAPTER 3A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964—DISPARATE IMPACT, REMEDIES

I. DISPARATE IMPACT

§ 3A:1 The theory of disparate impact
§ 3A:2 Conceptual framework for disparate impact claims—*Wards Cove* and the Civil Rights Act of 1991
§ 3A:3 Determining when disparate impact arises—The four-fifths rule and standard deviation analysis
§ 3A:4 Testing
§ 3A:5 Discriminatory adjustment of test scores
§ 3A:6 Educational requirements
§ 3A:7 Experience requirements
§ 3A:8 Height and weight requirements
§ 3A:9 Subjectivity in job evaluations or screening procedures
§ 3A:10 Criminal records
§ 3A:11 Recruiting practices
§ 3A:12 Head-of-household requirements for benefit coverage
§ 3A:13 Drug testing as discrimination
§ 3A:14 English-only rules
§ 3A:15 Garnishment
§ 3A:16 Appearance and grooming codes
§ 3A:17 Layoffs and reductions in force
§ 3A:18 Reverse discrimination because of affirmative action obligations
§ 3A:19 Present effects of past discrimination
§ 3A:20 Defenses to disparate impact—The bottom line controversy
§ 3A:21 — —Business necessity
§ 3A:22 — —Validation
§ 3A:23 — —Rebuttal to the business necessity and validation defenses—The less discriminatory alternative
§ 3A:24 — —Bona fide seniority system

II. REMEDIES AVAILABLE UNDER TITLE VII

§ 3A:25 Remedies available under Title VII—Generally
§ 3A:26 Back pay
§ 3A:27 Duty to mitigate damages
§ 3A:28 Front pay
§ 3A:29 Compensatory and punitive damages—Relationship

§ 3A:30 Caps on damages
§ 3A:31 Injunctive relief
§ 3A:32 Court-ordered affirmative action
§ 3A:33 Attorneys' fees
§ 3A:34 —Prevailing defendants
§ 3A:35 —Determining reasonableness of fee requests
§ 3A:36 —Contingency enhancements
§ 3A:37 —Expert witness fees
§ 3A:38 Effect of mixed-motive analysis on available remedies
§ 3A:39 Effect of after-acquired evidence on available remedies
§ 3A:40 Right to jury trial
§ 3A:41 Class actions
§ 3A:42 Conciliation

CHAPTER 4. CIVIL RIGHTS ACTS AND EXECUTIVE ORDERS

I. OVERVIEW

§ 4:1 Civil rights acts and executive orders affecting employment claims

II. SECTION 1981

§ 4:2 Statutory language
§ 4:3 Employers and others covered by § 1981
§ 4:4 Employee groups covered by § 1981
§ 4:5 —Other minority groups: The rule of law approach
§ 4:6 —Other minority groups: The question of fact approach
§ 4:7 —Scope of protection afforded undocumented immigrants
§ 4:8 Practices prohibited under § 1981
§ 4:9 —*Patterson* and pre-amendment case law
§ 4:10 —Retaliation
§ 4:11 —Other practices
§ 4:12 Intent requirement
§ 4:13 Disparate treatment analysis
§ 4:14 Use of statistics to prove intent
§ 4:15 Seniority systems under § 1981

III. SECTION 1983

§ 4:16 Statutory language of § 1983
§ 4:17 Section 1983 as a vehicle for assertion of federal rights

§ 4:18 Substantive rights for which § 1983 provides a right of action
§ 4:19 Employment practices subject to challenge under § 1983, generally
§ 4:20 —Discrimination based on sexual orientation or gender identity
§ 4:21 —Religious discrimination and First Amendment claims
§ 4:22 —Discrimination based on religious opposition to homosexuality
§ 4:23 —Reverse discrimination: Affirmative action plans
§ 4:24 —Retaliation claims
§ 4:25 Requirement of intent
§ 4:26 Use of Title VII concepts in § 1983 actions
§ 4:27 Preemption of § 1983 claims
§ 4:28 Effect of state court proceedings on § 1983 actions
§ 4:29 Employers covered by § 1983: Color-of-law/state action requirement
§ 4:30 —Public function theory
§ 4:31 —Significant state involvement test
§ 4:32 —Concerted action approach
§ 4:33 Local government liability
§ 4:34 Supervisory liability
§ 4:35 Absolute and qualified immunity of individuals under § 1983

IV. SECTION 1985

§ 4:36 Statutory language of § 1985
§ 4:37 Application of § 1985(2) in the employment context
§ 4:38 Employee groups protected: Class-based animus
§ 4:39 Employers subject to § 1985: State action issue
§ 4:40 Claims which may be asserted through § 1985
§ 4:41 Conspiracy requirement
§ 4:42 —Alleged conspiracies within corporations
§ 4:43 —Prevailing view: No intracorporate conspiracy
§ 4:44 —Exceptions to the prevailing view
§ 4:45 —Procedural implications of conspiracy allegations

V. REMEDIES AVAILABLE UNDER THE RECONSTRUCTION ERA CIVIL RIGHTS ACTS

§ 4:46 Back pay and affirmative relief
§ 4:47 Compensatory and punitive damages

§ 4:48 —Proof needed to justify compensatory damages
§ 4:49 —Facts needed to justify punitive damages
§ 4:50 Attorneys' fees
§ 4:51 —Prevailing party requirement
§ 4:52 —Computation of fee award
§ 4:53 Expert witness fees
§ 4:54 Jury trial

VI. EXECUTIVE ORDER 11,246

§ 4:55 Basic provisions of Executive Order 11,246
§ 4:56 Employers subject to the Order
§ 4:57 —Application to specific employers or types of contracts
§ 4:58 —Employers exempted
§ 4:59 Employee groups protected by the order
§ 4:60 General obligations of the Order
§ 4:61 Obligation to have an affirmative action compliance program
§ 4:62 Employers required to have an affirmative action compliance program
§ 4:63 The utilization analysis requirement
§ 4:64 —Goals and timetables
§ 4:65 Other requirements
§ 4:66 —Responsibility for implementation
§ 4:67 —Problem area identification
§ 4:68 —Audit and reporting systems
§ 4:69 —Miscellaneous requirements
§ 4:70 Sanctions and remedies
§ 4:71 —Sanctions
§ 4:72 —Remedies
§ 4:73 Special problems for contractors with unions
§ 4:74 Findings and recommendations of the Glass Ceiling Commission
§ 4:75 The "glass ceiling" audit
§ 4:76 —Emphasis on back pay and individual relief

VII. OTHER EXECUTIVE ORDERS

§ 4:77 Executive Order 12,989
§ 4:78 Executive Order 11,478
§ 4:79 Executive Order 13,145: Genetic testing in federal employment

CHAPTER 5. THE FAMILY AND MEDICAL LEAVE ACT

I. STATUTORY FRAMEWORK AND COVERAGE

§ 5:1 Statutory language of the Act

§ 5:2 Regulatory framework
§ 5:3 Employers covered by the FMLA
§ 5:4 Employees covered by the FMLA

II. TYPES OF LEAVE

§ 5:5 FMLA leave for birth, adoption, or foster-child placement
§ 5:6 Serious health conditions
§ 5:7 Military caregiver leave
§ 5:8 Military "qualifying exigency" leave
§ 5:9 Veteran caregiver leave
§ 5:10 Caring for family members
§ 5:11 Substance abuse

III. ARRANGING FOR LEAVE—CERTIFICATION, NOTICE, OTHER ISSUES

§ 5:12 Health care provider certification
§ 5:13 Duration of leave
§ 5:14 Obligation of employees to give notice
§ 5:15 Substitution of paid leave
§ 5:16 Continuation of benefits

IV. REINSTATEMENT OF EMPLOYEE AFTER LEAVE, DEFENSES

§ 5:17 Employee's right to be reinstated
§ 5:18 —Position elimination defense
§ 5:19 —Key-employee defense
§ 5:20 —Substandard employee performance
§ 5:21 —Excessive leave or absenteeism
§ 5:22 —Nonreinstatement due to underlying medical condition
§ 5:23 —Noncompliance with employer policies
§ 5:24 —Employee fraud or dishonesty
§ 5:25 —Increased exposure to liability
§ 5:26 Notification of intent to return

V. RETALIATION, INTERFERENCE, AND WAIVER

§ 5:27 Retaliation and constructive discharge
§ 5:28 Nonretaliatory interference with FMLA rights
§ 5:29 Waiver of FMLA rights

VI. THE FMLA AND OTHER LAWS

§ 5:30 Interplay with other laws and constitutional provisions

§ 5:31 Interplay with other laws—Fair Labor Standards Act
§ 5:32 —Disability leave
§ 5:33 —Workers' compensation
§ 5:34 —State and federal antidiscrimination laws
§ 5:35 —State family and medical leave laws

VII. NOTICE POSTING AND RECORDKEEPING REQUIREMENTS

§ 5:36 FMLA notice posting requirements
§ 5:37 Required recordkeeping under the FMLA

VIII. REMEDIES FOR VIOLATION OF THE FMLA

§ 5:38 Remedies
§ 5:39 "Cat's Paw" theory of liability—"Middle Manager" cases

CHAPTER 6. AGE DISCRIMINATION IN EMPLOYMENT ACT

I. OVERVIEW OF ACT

§ 6:1 Statutory language of the Act
§ 6:2 Employee groups protected by the Act
§ 6:3 —Reverse age discrimination
§ 6:4 Employees precluded from bringing ADEA action by application for disability benefits
§ 6:5 Employers subject to the Act
§ 6:6 Problems in determining a plaintiff's employer
§ 6:7 —Religious institutions
§ 6:8 —Liability of agents and individuals
§ 6:9 Use of Title VII concepts in age discrimination cases
§ 6:10 Disparate treatment
§ 6:11 —Direct evidence of discrimination
§ 6:12 —Mixed-motive analysis and "but-for" causation
§ 6:13 —Circumstantial evidence of discrimination
§ 6:14 —Requirement of adverse employment action
§ 6:15 —Recognition of the unique evidentiary problems of age cases
§ 6:16 Testimony of other employees in age discrimination claims
§ 6:17 Disparate treatment—"Same-hirer, same-firer" presumption
§ 6:18 "Cat's Paw" theory of liability—Supervisor bias cases

§ 6:19 Disparate treatment—Evidentiary effect of "stray remarks"
§ 6:20 —Decisions based on factors correlated to age
§ 6:21 —Employer's response to prima facie case: The legitimate nondiscriminatory reason
§ 6:22 —Use of "after-acquired" evidence
§ 6:23 —Use of statistical evidence
§ 6:24 —Proving pretext under the ADEA
§ 6:25 Bona fide occupational qualification
§ 6:26 —Application of the BFOQ defense
§ 6:27 Disparate impact claims and defenses
§ 6:28 Viability of disparate impact claims—*Smith v. City of Jackson*
§ 6:29 Defenses: Bona fide seniority system
§ 6:30 Defenses: Reasonable factors other than age (RFOA)
§ 6:31 The OWBPA and waivers of ADEA claims

II. COMMON PRACTICES GIVING RISE TO AGE DISCRIMINATION CLAIMS

§ 6:32 Forced retirement
§ 6:33 —Exemptions from forced retirement prohibitions
§ 6:34 Questions about employees' plans to retire
§ 6:35 Layoffs and reductions in force
§ 6:36 Proof in reduction in force (RIF) cases
§ 6:37 Demotions, transfers, and reorganizations
§ 6:38 Hiring and promotions
§ 6:39 Employee benefits and seniority systems
§ 6:40 Retaliation
§ 6:41 Age-based harassment

III. COURT PROCEDURES AND REMEDIES IN AGE DISCRIMINATION ACTIONS

§ 6:42 Procedures and remedies, generally
§ 6:43 —Jury trials
§ 6:44 —Issues for the judge
§ 6:45 —Representative actions
§ 6:46 —Restrictions on the opt-in class
§ 6:47 —Back pay
§ 6:48 —Liquidated damages
§ 6:49 —Front pay
§ 6:50 Other remedies
§ 6:51 —Attorneys' fees
§ 6:52 —Mitigation of damages

CHAPTER 7. OBLIGATIONS TOWARD PERSONS WITH DISABILITIES

I. OVERVIEW

§ 7:1 Introduction
§ 7:2 The Rehabilitation Act of 1973

II. OBLIGATIONS OF FEDERAL CONTRACTORS UNDER SECTION 503 OF THE REHABILITATION ACT

§ 7:3 Statutory language of Section 503
§ 7:4 Size of the contract
§ 7:5 Nature of the contract
§ 7:6 Location of employment
§ 7:7 Waivers for national security, national interest, and special circumstances
§ 7:8 Individuals with disabilities protected under Section 503
§ 7:9 Nature of the obligations toward individuals with disabilities under Section 503
§ 7:10 —Nondiscrimination
§ 7:11 —Reasonable accommodation
§ 7:12 —Justification of job training and selection requirements
§ 7:13 —Consideration of persons with disabilities for job vacancies and training
§ 7:14 —Designation of responsible executive
§ 7:15 —Employers required to have a written affirmative action program
§ 7:16 —Private right of action under Section 503

III. OBLIGATIONS OF RECIPIENTS OF FEDERAL ASSISTANCE UNDER SECTION 504 OF THE REHABILITATION ACT

§ 7:17 Statutory language of Section 504
§ 7:18 Employers' operations subject to Section 504
§ 7:19 Persons with disabilities protected under Section 504
§ 7:20 Differences between Sections 503 and 504
§ 7:21 Preemployment medical examinations and inquiries under Section 504
§ 7:22 Enforcement of recipients' employment obligations under Section 504

IV. OBLIGATIONS OF FEDERAL EMPLOYERS UNDER SECTION 501 OF THE REHABILITATION ACT

§ 7:23 Statutory language of Section 501
§ 7:24 Employers subject to Section 501
§ 7:25 Reasonable accommodation in federal employment

V. THE AMERICANS WITH DISABILITIES ACT OF 1990

§ 7:26 Statutory language
§ 7:27 ADA Amendments Act of 2008 and EEOC Regulations
§ 7:28 Retroactivity of ADA Amendments Act
§ 7:29 Pregnant Workers Fairness Act
§ 7:30 Employers and employees covered by the ADA
§ 7:31 Prohibited practices under the ADA
§ 7:32 Preemployment inquiries under the ADA
§ 7:33 Postemployment disability-related inquiries and medical examinations
§ 7:34 Genetic testing

VI. CONCEPTS GENERALLY APPLICABLE TO DISABILITY DISCRIMINATION

§ 7:35 Standard for determining liability under the ADA and Rehabilitation Act
§ 7:36 Persons with disabilities: Physical and mental impairments
§ 7:37 —Lifting restrictions
§ 7:38 Temporary impairments
§ 7:39 Pregnancy-related disability
§ 7:40 Mitigating measures
§ 7:41 Infertility as a disability
§ 7:42 Persons regarded as having such an impairment
§ 7:43 Employees outside the general definition
§ 7:44 —Scope of "safe harbor" for employees in rehabilitation
§ 7:45 Mental disabilities
§ 7:46 Qualified individual with a disability
§ 7:47 Essential functions of the position
§ 7:48 Direct threat exception
§ 7:49 —Contagious disease or infection
§ 7:50 Reasonable accommodation
§ 7:51 —Work rules
§ 7:52 —Telecommuting as reasonable accommodation

§ 7:53 —Light duty positions and other transfers
§ 7:54 —Job sharing
§ 7:55 Delay in providing reasonable accommodation
§ 7:56 Undue hardship
§ 7:57 Misconduct related to disability
§ 7:58 Disability discrimination in employee benefits
§ 7:59 Discrimination based on AIDS or HIV infection
§ 7:60 Harassment based on disability
§ 7:61 Retaliation for assertion of rights under the ADA
§ 7:62 Interference with exercise of rights under the ADA
§ 7:63 Conflict between the federal disability laws and other employment regulations
§ 7:64 Effect of application for Social Security or other disability benefits
§ 7:65 Employment obligations toward persons with disabilities under state laws
§ 7:66 Remedies—Back pay, equitable relief, and attorneys' fees
§ 7:67 Arbitration

CHAPTER 8. OBLIGATIONS TOWARD MEMBERS OF THE UNIFORMED SERVICES

I. INTRODUCTION

§ 8:1 Employment obligations toward members of the uniformed services

II. OBLIGATIONS OF EMPLOYERS TO MEMBERS OF THE UNIFORMED SERVICES

§ 8:2 Uniformed Services Employment and Reemployment Rights Act (USERRA)
§ 8:3 Effective date
§ 8:4 Prohibited discrimination
§ 8:5 —Causation and proof of discrimination
§ 8:6 — —"Cat's Paw" discrimination cases
§ 8:7 Eligibility for reemployment
§ 8:8 —Employees and employers covered by USERRA
§ 8:9 —Covered Military Service
§ 8:10 —Causal nexus between absence from employment and service in uniformed services
§ 8:11 —Required notifications to employer
§ 8:12 —Application
§ 8:13 —Periods and character of service

§ 8:14 Reasonable accommodation for military service and employer's undue hardship
§ 8:15 Rights and benefits due persons absent for military service
§ 8:16 Rights relating to employee health and pension benefit plans
§ 8:17 Position due upon return from uniformed service
§ 8:18 Protection under the USERRA from discharge without cause
§ 8:19 Retaliation under USERRA
§ 8:20 Release of the USERRA rights
§ 8:21 Compliance under the USERRA
§ 8:22 Enforcement against private employers
§ 8:23 —Available remedies
§ 8:24 Enforcement against federal agencies
§ 8:25 Veterans Employment Opportunities Act (VEOA)—Federal agencies

III. OBLIGATIONS OF FEDERAL CONTRACTORS TO VETERANS

§ 8:26 Section 402 of the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA)
§ 8:27 Employers' operations subject to VEVRAA § 402
§ 8:28 —Size and nature of contract
§ 8:29 —Location of employment
§ 8:30 —Involvement of operations in contract performance
§ 8:31 —National security waiver
§ 8:32 Veterans protected under VEVRAA § 402
§ 8:33 Enforcement under VEVRAA
§ 8:34 —Preemption of state law claims
§ 8:35 Employment obligations under VEVRAA § 402
§ 8:36 Nondiscrimination under VEVRAA § 402
§ 8:37 Listing of employment openings under VEVRAA § 402
§ 8:38 —Exceptions
§ 8:39 Reasonable accommodation
§ 8:40 Justification of job and training selection requirements
§ 8:41 Consideration of protected veterans for job vacancies and training

IV. AFFIRMATIVE ACTION PROGRAM

§ 8:42 Affirmative Action Program (AAP)—Applicability of requirement
§ 8:43 —Required elements—Policy statement

§ 8:44 — —Review of Personnel Processes
§ 8:45 — —Review of Physical and Mental Qualifications and Anti-Harassment Procedures
§ 8:46 — —External Communication
§ 8:47 — —Internal Communication and Training
§ 8:48 — —Monitoring Effectiveness
§ 8:49 — —Invitation to Self-Identify and Data Collection Analysis
§ 8:50 — —Benchmarks for Hiring

Appendix A. Guidelines on a Contractor's Duty to Provide Reasonable Accommodation

Appendix B. Appendix B to Part 60-300: Sample Invitation to Self-Identify

Appendix C. Appendix C to Part 60-300: Review of Personnel Processes

CHAPTER 8A. RETALIATION UNDER EMPLOYMENT DISCRIMINATION AND LEAVE STATUTES

§ 8A:1 What is retaliation?
§ 8A:2 Elements of a retaliation claim
§ 8A:3 —Protected activity—Opposition
§ 8A:4 — — —Reasonableness
§ 8A:5 — —Participation
§ 8A:6 —Materially adverse action
§ 8A:7 — —Employment-related
§ 8A:8 — —Non-employment-related
§ 8A:9 —Causal connection
§ 8A:10 — —Circumstantial evidence

CHAPTER 9. THE IMPACT OF TRADITIONAL LABOR LAW ON EQUAL EMPLOYMENT OPPORTUNITY

I. PROTECTIONS GRANTED UNDER THE N.L.R.A.

§ 9:1 Overview
§ 9:2 Employee groups protected by the National Labor Relations Act
§ 9:3 NLRA applicable to union and nonunion employers
§ 9:4 —Board protection of employees protesting discrimination
§ 9:5 —Board protection for filing federal or state equal employment opportunity charges

§ 9:6 —Board protection for equal employment opportunity-related complaints
§ 9:7 Board cooperation with EEOC in enforcement of ADA
§ 9:8 Protections against employer restraint of activities opposing discrimination
§ 9:9 —Interrogation
§ 9:10 —Soliciting withdrawal of charges
§ 9:11 —Restrictions on employee discussion of alleged discrimination

II. REQUIREMENTS APPLICABLE TO UNION EMPLOYERS

§ 9:12 NLRB regulations applicable only to union employers
§ 9:13 Liability for union discrimination
§ 9:14 Duty to bargain regarding equal employment opportunity compliance
§ 9:15 Duty to provide EEO information
§ 9:16 Accommodation of religious objectors to union dues

III. RAILWAY LABOR ACT PROTECTIONS

§ 9:17 The Railway Labor Act and equal employment opportunity
§ 9:18 Violation of contract clauses

IV. EFFECT OF MULTIPLE PROCEEDINGS INVOLVING LABOR LAW AND NON-LABOR LAW CAUSES OF ACTION

§ 9:19 Res judicata and collateral estoppel effects
§ 9:20 Relation of parallel proceedings
§ 9:21 Preemption of discrimination claims

Volume 2

CHAPTER 10. MINIMIZING EXPOSURE TO EMPLOYMENT DISCRIMINATION CLAIMS

I. MINIMIZING EXPOSURE

§ 10:1 Minimizing exposure, in general
§ 10:2 Procedural and substantive objectives of equal employment opportunity compliance

§ 10:3 Four pronged approach to avoid equal employment opportunity claims

II. EMPLOYER POLICIES

§ 10:4 Employer policies against discrimination and harassment
§ 10:5 Sexual harassment policies
§ 10:6 Other employment policies
§ 10:7 —Progressive discipline
§ 10:8 —Job posting systems
§ 10:9 —Written job descriptions
§ 10:10 —Internal complaint and processing machinery

III. TRAINING AND INVESTIGATION

§ 10:11 Training management
§ 10:12 Equal employment opportunity officer or equivalent
§ 10:13 Investigation

IV. DOCUMENTATION

§ 10:14 Documenting the decision—Maintaining and assembling data
§ 10:15 —Required data
§ 10:16 —Other data
§ 10:17 —Applicant flow information—A special case
§ 10:18 —Review of existing documents
§ 10:19 —Review and control of personnel decision making

V. COMMON TRAPS AND TERMINATION

§ 10:20 Common traps to avoid
§ 10:21 Failing to follow written policies
§ 10:22 The "special case"
§ 10:23 Unrealistic performance reviews
§ 10:24 Trying to set an employee up for termination
§ 10:25 Other practices to reduce the risk of equal employment litigation
§ 10:26 EEO audit
§ 10:27 Posting of notices and EEO rights

VI. ARBITRATION AND ADR

§ 10:28 Adoption of arbitration agreements
§ 10:29 Adoption of alternative dispute resolution agreements

CHAPTER 11. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PROCEEDINGS AND LITIGATION

§ 11:1 Overview
§ 11:2 Introduction and background
§ 11:3 EEOC procedures
§ 11:4 —Precharge processing
§ 11:5 —The filing of the charge
§ 11:6 —Investigation by the EEOC
§ 11:7 — —Conclude that the investigation is complete
§ 11:8 — —Initiation of settlement
§ 11:9 — —Continue investigation and/or initiation of settlement
§ 11:10 — —Fact-finding conference
§ 11:11 — —The investigative conference
§ 11:12 — —Investigations under other procedures
§ 11:13 — — —Interviews
§ 11:14 — — —On-site investigations
§ 11:15 — — —EEOC subpoenas
§ 11:16 — — —Investigations in systemic cases
§ 11:17 —Predetermination interview
§ 11:18 —Determination
§ 11:19 —Conciliation
§ 11:20 —Right-to-sue letter
§ 11:21 Settlement at the EEOC level
§ 11:22 Alternative dispute resolution at the EEOC level
§ 11:23 Special procedural issues in litigation with the EEOC as the plaintiff
§ 11:24 Special procedural issues in EEOC suits—Administrative procedures the EEOC must follow prior to filing suit
§ 11:25 —Requirements for a timely suit by the EEOC
§ 11:26 —The scope of the EEOC's suits

CHAPTER 12. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS PROCEEDINGS

§ 12:1 Overview
§ 12:2 —Need for an AAP
§ 12:3 —Performance under the AAP
§ 12:4 Compliance reviews
§ 12:5 —Periodic reviews
§ 12:6 —Pre-award inquiries
§ 12:7 —Corporate management reviews
§ 12:8 Handling a compliance review

§ 12:9 —Preparation for the desk audit
§ 12:10 —Desk audit procedures
§ 12:11 —On-site review
§ 12:12 Complaint investigations by OFCCP
§ 12:13 Conciliation and enforcement proceedings
§ 12:14 —Conciliation
§ 12:15 —Enforcement proceedings
§ 12:16 —Dealing with the press and publicity
§ 12:17 Freedom of Information Act requests to the OFCCP
§ 12:18 Artificial Intelligence and Equal Employment Opportunity for federal contractors

CHAPTER 13. ASSESSING LITIGATION RISKS

§ 13:1 Overview
§ 13:2 Need for special analysis in employment discrimination cases
§ 13:3 Desirability of early and recurring risk analysis
§ 13:4 —Role of counsel
§ 13:5 —Factors for consideration
§ 13:6 —Impact of settlement on operations
§ 13:7 Procedural defenses
§ 13:8 —Prima facie case
§ 13:9 —Summary judgment possibilities
§ 13:10 Class action potential
§ 13:11 —Numerosity
§ 13:12 —Commonality and typicality
§ 13:13 —Adequacy of representation
§ 13:14 —Conclusions
§ 13:15 Assessing discovery risks
§ 13:16 Marshaling and maintaining the evidence
§ 13:17 Assessing the company's interests

CHAPTER 14. SETTLING DISCRIMINATION CLAIMS

§ 14:1 Overview
§ 14:2 General settlement issues
§ 14:3 —Planning a settlement strategy
§ 14:4 —Role of the employer's counsel
§ 14:5 —Taking the initiative in substantive proposals
§ 14:6 —Taking the initiative in drafting settlement documents
§ 14:7 —Settlement enforceability
§ 14:8 —Special provisions in settlement agreements
§ 14:9 Considerations in nonclass action cases

§ 14:10 —Issues with current and former employees
§ 14:11 —Tax consequences
§ 14:12 —Paying the plaintiff's attorney
§ 14:13 —Special considerations in multiple claimant cases
§ 14:14 Enforcing settlement agreements
§ 14:15 Class actions
§ 14:16 —Ingredients of a defensible class settlement
§ 14:17 —Negotiating with dissenters
§ 14:18 —Extinction of individual and class claims
§ 14:19 —The consent decree
§ 14:20 Special considerations for age discrimination claims
§ 14:21 —The Older Workers Benefit Protection Act provisions
§ 14:22 Special considerations for disability discrimination claims—Changing the workplace
§ 14:23 Special considerations in settlements with the EEOC

CHAPTER 15. PROCEDURAL QUESTIONS IN EMPLOYMENT DISCRIMINATION LITIGATION

§ 15:1 Overview
§ 15:2 Sorting out the proper parties
§ 15:3 —Who may bring suit
§ 15:4 — —Title VII
§ 15:5 — —Equal Pay Act
§ 15:6 — —Section 1981
§ 15:7 — —Age Discrimination in Employment Act
§ 15:8 — —Americans with Disabilities Act
§ 15:9 —Who may be sued
§ 15:10 — —Title VII
§ 15:11 — —Equal Pay Act
§ 15:12 — —Section 1981
§ 15:13 — —Age Discrimination in Employment Act
§ 15:14 — —Americans with Disabilities Act
§ 15:15 — —Pregnancy Discrimination Act
§ 15:16 Exhaustion of administrative remedies
§ 15:17 —Exhaustion requirement under Title VII
§ 15:18 — —What constitutes a charge
§ 15:19 — —What a valid charge contains
§ 15:20 — —What constitutes filing
§ 15:21 — —Timeliness of filing a charge
§ 15:22 — —When the time for filing begins
§ 15:23 — —Effect of an untimely filing

§ 15:24 — —Continuing violation
§ 15:25 — —Relation back doctrine
§ 15:26 — —Related charge
§ 15:27 — —Failure to cooperate with the EEOC
§ 15:28 —Exhaustion requirements under the Age Discrimination in Employment Act
§ 15:29 —Exhaustion requirements under the Americans with Disabilities Act
§ 15:30 —Statutes without exhaustion requirements: Equal Pay Act and § 1981
§ 15:31 Timeliness of suit—Title VII
§ 15:32 —Section 1981
§ 15:33 —Equal Pay Act
§ 15:34 —Age Discrimination in Employment Act
§ 15:35 —Americans with Disabilities Act
§ 15:36 Venue
§ 15:37 Effect of other proceedings
§ 15:38 —Arbitration
§ 15:39 —Determinations of other federal courts
§ 15:40 —Determinations of other federal agencies
§ 15:41 —Determinations of state courts and administrative agencies

CHAPTER 16. DISCOVERY IN THE EMPLOYMENT DISCRIMINATION CASE

§ 16:1 Overview
§ 16:2 General issues
§ 16:3 Why discovery in equal employment opportunity cases is different
§ 16:4 Goals and objectives in discovery in equal employment opportunity cases
§ 16:5 Limitations and restrictions on discovery
§ 16:6 Defendant's discovery plan
§ 16:7 —Need for a theory of the case
§ 16:8 —Discovery plans in special cases
§ 16:9 —Implementing the plan
§ 16:10 — —Prior to the plaintiff's deposition
§ 16:11 — —The plaintiff's deposition
§ 16:12 — —After the plaintiff's deposition
§ 16:13 Special circumstances of discovery in class action cases
§ 16:14 Philosophical issues in responding to plaintiff's discovery
§ 16:15 Practical issues in responding to the plaintiff's discovery
§ 16:16 —Interrogatories, requests for admission, and document requests

§ 16:17 —Tendering documents
§ 16:18 —Depositions
§ 16:19 Attorney-client and work product issues
§ 16:20 Other privileges
§ 16:21 —Employee privacy
§ 16:22 —Self-analysis privilege

CHAPTER 17. DISPOSING OF THE CASE BEFORE TRIAL

I. OVERVIEW

§ 17:1 Overview

II. PRETRIAL RESOLUTION

§ 17:2 Obtaining a pretrial resolution
§ 17:3 —Strategic plan
§ 17:4 —Discovery plan
§ 17:5 Settlement
§ 17:6 Resolution before trial

III. MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

§ 17:7 Motion to dismiss and motion for summary judgment—Expense vs. benefit
§ 17:8 —Motions to dismiss
§ 17:9 — —Educating the plaintiff
§ 17:10 — —Cause of action elimination
§ 17:11 — —Limiting areas for discovery
§ 17:12 — —Attacking the meritorious case
§ 17:13 — —Grounds
§ 17:14 — — —Jurisdictional issues
§ 17:15 — — —Discrimination law coverage
§ 17:16 — — —Administrative remedy exhaustion
§ 17:17 — — —The prima facie case
§ 17:18 — — —Missing elements
§ 17:19 — — —Legitimate nondiscriminatory reason
§ 17:20 — — —Statute of limitations
§ 17:21 —Attacking the amended complaint
§ 17:22 —Motions for summary judgment
§ 17:23 — —General considerations
§ 17:24 — —Dispositive but reluctantly granted
§ 17:25 — —Educating the court and the plaintiff
§ 17:26 — —Motions for partial summary judgment
§ 17:27 —Summary judgment motions and settlement

§ 17:28 — —Grounds
§ 17:29 — — —Procedural issues
§ 17:30 — — —Inadequacy of plaintiff's case
§ 17:31 — — —Affirmative defenses—Policies against harassment

IV. PRETRIAL DISPOSITION

§ 17:32 Pretrial dispositions of class actions
§ 17:33 —General issues for consideration on class certification motion
§ 17:34 —Attacking the class
§ 17:35 —Identity of class
§ 17:36 —Adequacy of class representative

CHAPTER 18. TRIAL

§ 18:1 Introduction and overview
§ 18:2 Preparation for trial
§ 18:3 —Preparation for a jury trial and selection of the employer's representative
§ 18:4 —Fact and issue organization
§ 18:5 —Document issues
§ 18:6 —Witness problems in preparation and at trial
§ 18:7 Witness problems—Company witnesses likely to be called as adverse witnesses in the plaintiff's case
§ 18:8 —Testimony of two key witnesses: the decision-maker and the replacement or successful candidate
§ 18:9 —Dealing with hostile former employees
§ 18:10 —Use of other employees
§ 18:11 Special trial issues
§ 18:12 —Admissibility of certain evidence
§ 18:13 —The use of statistics
§ 18:14 — —Statistics in discrimination cases
§ 18:15 — —Determining underlying data
§ 18:16 — —Defending the results' accuracy and appropriateness
§ 18:17 — —Attacking the plaintiff's statistical case
§ 18:18 —Proof problems on certain affirmative defenses
§ 18:19 — —Proving the mixed motive affirmative defense
§ 18:20 — —Proving the bona fide occupational qualification defense
§ 18:21 — —Disparate impact cases
§ 18:22 — —Anti-harassment policies—Reasonable care affirmative defense
§ 18:23 —Problems with damages

§ 18:24 —Punitive damages
§ 18:25 — —Dealing with the punitive damage case
§ 18:26 —Post trial attorneys' fees motions
§ 18:27 —Post trial attorneys' fees motion—When should the motion for fees be filed?
§ 18:28 —Post trial attorneys' fees motions—Who can recover attorney's fees and other costs?
§ 18:29 — —Attacking the fees claimed

CHAPTER 19. ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION OF EQUAL EMPLOYMENT CLAIMS

I. INTRODUCTION

§ 19:1 Introduction

II. THE LAW OF ARBITRATION

§ 19:2 The Federal Arbitration Act and enforcement of agreements to arbitrate equal employment claims
§ 19:3 What is an enforceable agreement to arbitrate equal employment claims

III. THE PRACTICE OF ARBITRATION

§ 19:4 Handling the arbitration of an equal employment claim
§ 19:5 Arbitrating an equal employment claim—Selecting the arbitrator and the applicable rules
§ 19:6 —Discovery and the presentation of evidence
§ 19:7 —Pre-hearing motion practice
§ 19:8 —The hearing
§ 19:9 —Post-award issues

IV. OTHER FORMS OF ALTERNATIVE DISPUTE RESOLUTION

§ 19:10 Alternative dispute resolution of equal employment claims other than arbitration
§ 19:11 Alternative dispute resolution of equal employment claims—Internal grievance procedures
§ 19:12 —Mediation
§ 19:13 —Fact finding and mini-trials

CHAPTER 20. STATISTICS IN EQUAL EMPLOYMENT CASES

§ 20:1 Overview

§ 20:2 Role of statistics in employment discrimination cases
§ 20:3 General considerations in developing and evaluating employment statistics
§ 20:4 —Accuracy
§ 20:5 —Validity
§ 20:6 —Intelligibility
§ 20:7 —Methodological soundness
§ 20:8 Developing and evaluating statistics in hiring cases
§ 20:9 —Determining the relevant labor market
§ 20:10 —Utilization statistics
§ 20:11 Developing and evaluating statistics in promotion cases
§ 20:12 Developing and evaluating statistics in other cases
§ 20:13 Problems of methodology
§ 20:14 —Binomial distribution
§ 20:15 —Regressions

Table of Laws and Rules

Table of Cases

Index