

# HUMAN RIGHTS

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## FEDERAL LAWS PROHIBITING DISCRIMINATION

Under Title VII of the U.S. Civil Rights Act of 1964, it is unlawful for any employer of 15 or more employees to refuse to hire, to discharge, or to treat employees differently in any way because of their race, color, religion, sex or national origin. Employers may not limit, segregate, or classify employees in any manner so as to deprive them of employment opportunities or adversely affect a worker's employment status because of race, color, religion, sex or national origin. All aspects of the employment relationship are covered.

The Genetic Information Nondiscrimination Act (GINA) expands Title VII by prohibiting employers from discriminating against employees on the basis of "genetic information".

The Age Discrimination in Employment Act (ADEA) protects persons age 40 or older from discrimination by employers of 20 or more employees. Under that law, employers also must provide the same level of health care benefits to persons over the age of 65 as offered to younger employees. Note that the EEOC has issued guidance on, and many courts have decided cases involving, the type of waivers of claims under the ADEA that employers may lawfully obtain from their employees.

As a result of amendments, these laws are also applicable to state and local governments, government agencies, and other political subdivisions.

The Rehabilitation Act of 1973 prohibits discrimination because of physical or mental disability and applies to any employer who receives federal financial assistance or is a federal contractor. This law is enforced by the Office of Civil Rights, in the U.S. Department of Health and Human Services, Chicago, Illinois and the U.S. Department of Labor. Any employer with a federal contract of \$2,500 or more must comply with an affirmative requirement to employ disabled persons. Alleged violations of this part of the Act are handled by the U.S. Office of Federal Contract Compliance.

The Americans With Disabilities Act prohibits discrimination on the basis of disability. The employment provisions of this Act are substantially similar to those in the Rehabilitation Act of 1973. The employment provisions of the Act apply to employers of 15 or more employees. To assist businesses in making structural modifications necessary to make their facilities accessible to disabled persons, both the Internal Revenue Code and Minn. Stat. allow some or all of these expenses to be deducted in computing income tax.

The Uniformed Services Employment and Reemployment Rights Act of 1994 prohibits employers from discriminating with respect to the employment, promotion or employee benefits of persons who serve, or apply to serve, in the uniformed services. As that Act is written in broad terms, employers are urged to seek the advice of counsel in this area.

For the most part, the federal laws are administered by the Equal Employment Opportunity Commission (EEOC).

## STATE LAW PROHIBITING DISCRIMINATION

The Minnesota law prohibiting illegal discrimination (including reprisals against persons who sought relief against discrimination) is the Minnesota Human Rights Act, Minn. Stat. § 363. Generally, it has wider application than the federal anti-discrimination laws. It applies to all employers in the state who have one or more employees, as well as to employment agencies, labor organizations and temporary help agencies.

The state law makes it an unfair employment practice, except when based on a limited, statutory exception or a *bona fide* occupational qualification, for an employer to refuse to hire, to discharge, or otherwise to treat a person differently with respect to hire, tenure, compensation, terms, upgrading, conditions, facilities or privileges of employment, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, age, or sexual orientation; or in reprisal for objecting to, or participating in the investigation or litigation of, alleged discrimination or for associating with a disabled person or persons of a different race, color, creed, religion, sexual orientation or national origin. Employers may not use these protected characteristics as a factor in making any employment decision. In rare instances, certain jobs may require persons to be chosen on the basis of one of these characteristics, but there is a strict burden of proof on the employer to show that the discrimination was demanded by the job in that all or virtually all persons excluded on the basis of the protected characteristic could not perform the job or that some other compelling business reason exists that justifies the action.

Before hiring, an employer may not require or request from applicants, or from any source, information which pertains to a protected characteristic, including on an application form or in an interview. An employer may, however, seek information to determine whether a person can safely and efficiently perform the duties of the position at issue. This may include requiring or requesting a physical examination, if the requirements of the law are met (see the section of the Small Business Assistance Office publication, *A Guide To Starting A Business In Minnesota* on pre-employment testing). In general, employers also may, with the consent of the employee, after employment has commenced, obtain additional medical information to assess continuing ability to perform the job or to assess employee health insurance eligibility; for purposes mandated by law; for purposes of assessing the need to reasonably accommodate an employee; or pursuant to the state drug testing law; or other legitimate business reasons not otherwise prohibited by law. With limited exceptions, medical documentation must be collected and maintained on separate forms and kept confidential.

Under the state law, businesses with 15 or more full-time or part-time employees must provide reasonable accommodation for their employees' and job applicants' known disabilities, unless the business can demonstrate that the accommodation would impose an undue hardship on the business. This requirement is similar to that required by the federal Americans with Disabilities Act. "Reasonable accommodation" under the state law generally means making facilities readily accessible to the disabled person, or initiating practices like job restructuring, work schedule modifications, reassignment to a vacant position, acquisition or modification of equipment or devices, or providing aides on a temporary or periodic basis. "Undue hardship" is determined by evaluating a number of factors, including the size of the business, the type of operation, work force size and composition, the nature and cost of the needed accommodation, the employer's ability to finance the accommodation, and good faith efforts to explore less restrictive or less expensive alternatives with the employee and individuals or organizations knowledgeable about the needs of disabled persons.

The state law provides that whenever health care records or medical information adversely influence any hiring, firing or promotional decision about an applicant or employee, the employer must notify that person of that fact within 10 days of the final decision. There is no requirement in the state law that the employee must first request the information from the employer.

The Act also makes it a discriminatory practice for an employer not to treat women who are pregnant, or who have pregnancy-related disabilities, the same as other persons who are not so affected, but who are similar in their ability or inability to work. An employer's duty to make reasonable accommodation, as discussed above, also applies to women disabled by pregnancy, childbirth or related disabilities.

The Human Rights Act prohibits a business from refusing to do business with a woman based on her use of her current or former surname; and a business may not intentionally refuse to do business with or contract with, or discriminate in the basic terms of the contract because of a person's race, national origin, color, sex, sexual orientation or disability, unless it is for a legitimate business purpose.

Businesses are also prohibited from discriminating in the extension of personal or commercial credit, because of race, color, creed, religion, disability, national origin, sex, sexual orientation, marital status, or receipt of public assistance, including medical or rental assistance.

Another Minnesota law (Minn. Stat. § 181.938) prohibits an employer from retaliating against an employee or prospective employee who engages in the lawful use of food, alcoholic beverages, or tobacco during non-working hours. Exceptions apply for *bona fide* occupational requirements or to avoid a conflict of interest, and in certain other circumstances.

Valid, voluntary or required affirmative action programs are not prohibited by the Human Rights Act. Obtaining otherwise prohibited information from applicants is allowed for affirmative action purposes, but it must be kept separate and apart from other job application information and not be provided to or considered by any person involved in the selection of an employee, except when an effort is being made to make a hiring decision from among candidates in an underutilized protected group, pursuant to a *bona fide* affirmative action plan.

The Human Rights Act prohibits advertisements for employment that state a preference for applicants based on any of the protected characteristics, such as race, color, creed, religion, sex, age, sexual orientation, or marital status. Employers should avoid using terms which convey a preference for persons of a particular age or gender, e.g., "girl friday," or "maintenance man."

As a place of public accommodation, a business is prohibited from discriminating against the public on the basis of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex. Thus, a business must make reasonable accommodation, including removal of physical barriers and modification of policies, for a person with a disability, unless such access would pose a direct threat. A properly identified service animal, accompanying a person with a disability, must be allowed in a public place, provided the animal is properly leashed.

## CHARGES OF DISCRIMINATION

An employee or applicant who feels discriminated against because of his or her age, race, sex, religion or other protected characteristic may file a charge with the Minnesota Department of Human Rights within one year of the occurrence of the discriminatory practice. The Department, after determining jurisdiction and accepting a charge for filing, will gather facts relevant to the charge and weigh the evidence provided by both sides. While parties to a charge may be represented by legal counsel, every effort is made to keep the procedure simple enough so that neither side will necessarily have to retain an attorney. Both sides are encouraged to settle the matter at any time in the process. In Minnesota, aggrieved parties may bypass the Human Rights Department and go directly to state district court to bring suit against the employer.

If the evidence does not support the charge, the Department will issue a “no probable cause” finding on the merits of the charge. Note also that whether or not the Department concludes that the evidence supports the charging party’s allegations, the Department has the discretion to “dismiss” charges for a variety of reasons, such as not warranting the resources of that Department or a failure of the charging party to submit a rebuttal to the responding party’s answer to the charge. Note that both a finding of “no probable cause” and a “dismissal” may be appealed (although there are different time periods for each appeal). Note again that a charging party, no matter what the Department concludes, may file a private lawsuit in district court. If the charge of discrimination is supported by the evidence, action is taken to stop the discriminatory act or practice and relief is sought for the person who was discriminated against. If relief is not obtained through this conciliation, the Department or the charging party may take the matter to court or to a public hearing.

Relief in employment discrimination cases may include the hiring, reinstatement, or upgrading of a person; up to three times back pay, including compensation for fringe benefits and interest accrued; and adoption of policies or participation in a training program. Relief could also include other compensatory damages, punitive damages, and damages for mental anguish. Violators of the law also may be assessed a civil penalty payable to the state. A person who violates the laws regarding public accommodations discrimination is guilty of a misdemeanor.

Minnesota Rules 5000.2250 requires that an employer charged with discrimination must retain all charge-related documents, under its control, until the Department informs the employer that the charge has been resolved. All job applicant and employment records must be retained by an employer for at least one year after they are made, whether or not a charge has been filed.

In addition, a number of federal statutes govern the retention of records regarding employees’ charges of discrimination, including disability discrimination, improper termination, or violation of civil rights. These impose retention requirements of from one year to final disposition of charges, whichever is later. Each year a comprehensive update of federal record keeping requirements is published in the *Federal Register*. A business or government reference librarian can direct employers to the latest compilation.

## GUIDELINES FOR PREVENTING DISCRIMINATION IN HIRING

When interviewing job applicants, the employer should only ask questions which reasonably relate to the job in question. The burden of proof is on the employer to demonstrate that questions

are not used to discriminate. Asking an applicant to supply information that is not job-related or that might reveal an applicant's protected status could lead to charges of discrimination. Inquiries that may improperly request protected status information include those about age, date of birth, marital status (including identity or situation of spouse), sexual orientation, sex, race, creed, color, religion, national origin, and disabilities.

The employer may ask questions that help assess the applicant's ability to do the job, and which are asked of all applicants for the job. Inquiries that elicit information about the applicant's education, experience, abilities, licenses and certifications that are job related generally are permissible, as are inquiries about willingness to travel, salary expectations, references, and the applicant's interest in the job. It generally is permissible to talk about job duties and responsibilities, the business itself, career growth potential, and opportunities for advancement, so long as these topics are relevant to the job and are presented consistently to applicants, regardless of their individual status within a protected class.

An employer may not use prohibited information obtained from any source for the purpose of making a hiring or job decision. Employers should examine job requirements to ensure that they are not based on assumptions or stereotypes that are unrelated to job performance. Employers with questions in this area may contact the Minnesota Department of Human Rights at the address and telephone number provided in the Resource Directory section of the *Guide*.

## **AMERICANS WITH DISABILITIES ACT (ADA)**

The ADA is a complex piece of federal legislation that prohibits discrimination against people with disabilities in everyday activities, such as buying an item at a store, going to the movies, enjoying a meal at a restaurant, exercising at the health club, or having the car serviced at a garage.

To meet the goals of the ADA, the law established requirements for businesses of all sizes. These requirements initially went into effect in 1992 and have been evolving since. Businesses that serve the public must modify policies and practices that discriminate against people with disabilities; comply with accessible design standards when constructing or altering facilities; remove barriers in existing facilities where achievable; and provide auxiliary aids and services when needed to ensure effective communication with people who have hearing, vision, or speech impairments. All businesses, even those that do not serve the public, must comply with accessible design standards when constructing or altering facilities.

Title I of the ADA requires employers of 15 or more employees, to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment-related opportunities available to others. For example, it prohibits discrimination in recruitment, hiring, promotions, training, pay, social activities, and other privileges of employment. It restricts questions that can be asked about an applicant's disability before a job offer is made, and it requires that employers make reasonable accommodation to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship.

Title I with respect to private employers is enforced by the Equal Employment Opportunity Commission (EEOC).

Title II of the ADA applies the laws on both hiring and access to local, state and federal government agencies and public transportation. Title II (other than transportation) is enforced by the U.S. Department of Justice.

Title III of the ADA prohibits discrimination against persons with disabilities in places of public accommodation and commercial facilities. Places of public accommodation include privately owned businesses, establishments of all sizes such as restaurants, hotels, theaters, convention centers, medical offices, retail stores, museums, libraries, private schools, health spas, and day care centers. Commercial facilities are businesses whose operations affect commerce, such as office buildings, factories, and warehouses. Public accommodations (that is, every business that opens its doors to the public) must: provide goods and services in an integrated setting, unless separate or different measures are necessary to ensure equal opportunity; eliminate unnecessary eligibility standards or rules that deny individuals with disabilities an equal opportunity to enjoy the goods and services of a place of public accommodation; and make reasonable modifications in policies, practices and procedures that deny equal access to individuals with disabilities, unless a fundamental alteration would result in the nature of goods and services provided. (Examples of policies and procedures would be if a store has a policy to exclude all animals, the policy should be changed to permit people who use service animals, such as “seeing-eye dogs” and “hearing-assist-dogs” to enter the store with their service animals. A store that has a special accessible entrance that remains locked during business hours will need to change the policy and keep the door unlocked when the store is open. If security is a problem, an accessible call box or buzzer, identified by a sign and mounted in an accessible location and height, should be installed to enable people with disabilities to call staff to unlock the door. A restaurant that restricts seating of people with disabilities to one area must revise the policy to permit the range of choices enjoyed by others.) They must also ensure effective communication through the use of auxiliary aids and services when necessary, unless an undue burden or fundamental alteration would result. (Examples of auxiliary aids and services include reading written information to a person who is blind or who has low vision or providing large print, audiotope or Braille; and using written notes, sign language interpreters or using captioning to communicate with a person who is deaf, hard of hearing or who has a speech disability.) They must remove architectural and structural communication barriers in existing facilities where readily achievable, and provide goods and services through alternative measures when removal of barriers is not readily achievable. (“Readily achievable” means easily accomplished without much difficulty or expense. The “readily achievable” requirement is based on the size and resources of the business. The Justice Department, as part of new ADA regulations, is adopting a “safe harbor” allowing businesses that comply with 1991 ADA standards to postpone compliance with 2010 standards until the building or building elements are altered. Larger businesses with more resources are expected to take a more active role in removing barriers than small businesses. The ADA also recognizes that economic conditions vary. When a business has the resources to remove barriers, it is expected to do so; but when profits are low, barrier removal may be reduced or delayed. Barrier removal is an ongoing obligation. Businesses are expected to remove barriers in the future as resources become available.) When public accommodations or commercial facilities design and construct new facilities, or alter existing facilities, they must do so in accordance with the Standards of Accessible Design. (In some cases, existing conditions, limited resources, or both will make it not “readily achievable” to follow the Standards fully. If this occurs, barrier removal measures may deviate from the Standards so long as the measures do not pose a significant risk to the health or safety of individuals with disabilities or others.) New proposals also address the ADA accessibility of websites, movie theaters, and equipment and furniture. Title III is enforced by the U.S. Department of Justice.

To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability. An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered, recent amendments mandate the definition of “disability” to be construed in favor of broad coverage of individuals. Employers can expect more employees to fall within the definition of “disabled” which will trigger the employer’s duty to engage in the interactive process and provide reasonable accommodation more often.

There is a lot of guidance available regarding the ADA. For small businesses, compliance with the ADA is not difficult. To help businesses with their compliance efforts, Congress has established various technical assistance programs to answer questions about the ADA and has provided tax incentives. A listing of the various resources and tax code provisions is included in the Resource Directory Section of the *Guide* under Federal Government Listings and Additional Resources.

The ADA Amendments Act (ADAAA) significantly broadens the coverage of the ADA so that more employees with less severe impairments are protected by the definition of “disability”. Employers are strongly encouraged to consult with legal counsel regarding disability assessments and reasonable accommodation issues, particularly in light of the ADAAA amendments.

## **AFFIRMATIVE ACTION REQUIREMENTS FOR GOVERNMENT CONTRACTORS**

Businesses that contract with the government may be subject to affirmative action requirements. Federal, state and local laws each have different criteria to determine if a business must comply with their respective affirmative action or equal employment opportunity requirements.

Under Executive Order 11246 (“Non-Discrimination in Employment by Government Contractors and Subcontractors”), as amended, and its implementing Regulations issued on November 13, 2000, by the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP), a business with 50 or more employees that has a non-construction contract (or subcontract) with the federal government of \$50,000 or more, or a business receiving in excess of \$10,000 for a federally assisted construction project, must develop an affirmative action plan. Note that those Regulations, according to the OFCCP, refocus compliance emphasis from the development of a written affirmative action plan to the implementation of such a plan into the overall management of the contracting or subcontracting business. Note also that those Regulations place greater emphasis on (and give OFCCP greater/monitoring powers over) whether such businesses are discriminating with respect to employee pay. Compliance with the Executive Order is monitored by the Office of Federal Contract Compliance Programs.

Under Minn. Stat. § 363A.36, vendors who intend to bid on any purchases or contracts exceeding \$100,000, and have had on any single working day in the past year more than 40 employees in Minnesota, must apply for a Certificate of Compliance from the Minnesota Department of Human Rights. State agencies cannot accept bids or proposals on purchases or contracts exceeding \$100,000 from Minnesota vendors unless the Commissioner of Human Rights has received the vendor’s affirmative action plan for the employment of minority persons, women, and disabled individuals. State agencies cannot make awards exceeding \$100,000 to Minnesota vendors unless

the Commissioner of Human Rights has approved the vendor's affirmative action plan and issued a certificate of compliance to the vendor. Vendors who do not have more than 40 employees in the state in which their principal place of business is located, will be required to certify that the business is in compliance with federal affirmative action requirements in order to receive awards exceeding \$100,000. The Department of Human Rights charges a \$75 fee for each certificate of compliance issued.

The cities of Minneapolis and St. Paul have city ordinances which require compliance with their specific affirmative action requirements. The Minneapolis Department of Civil Rights and the St. Paul Department of Human Rights are the agencies which enforce the respective city ordinances. Other cities or counties in Minnesota also may have affirmative action or equal employment opportunity requirements for businesses who contract with them. The entity awarding the contract should be able to inform the business of its affirmative action requirements.