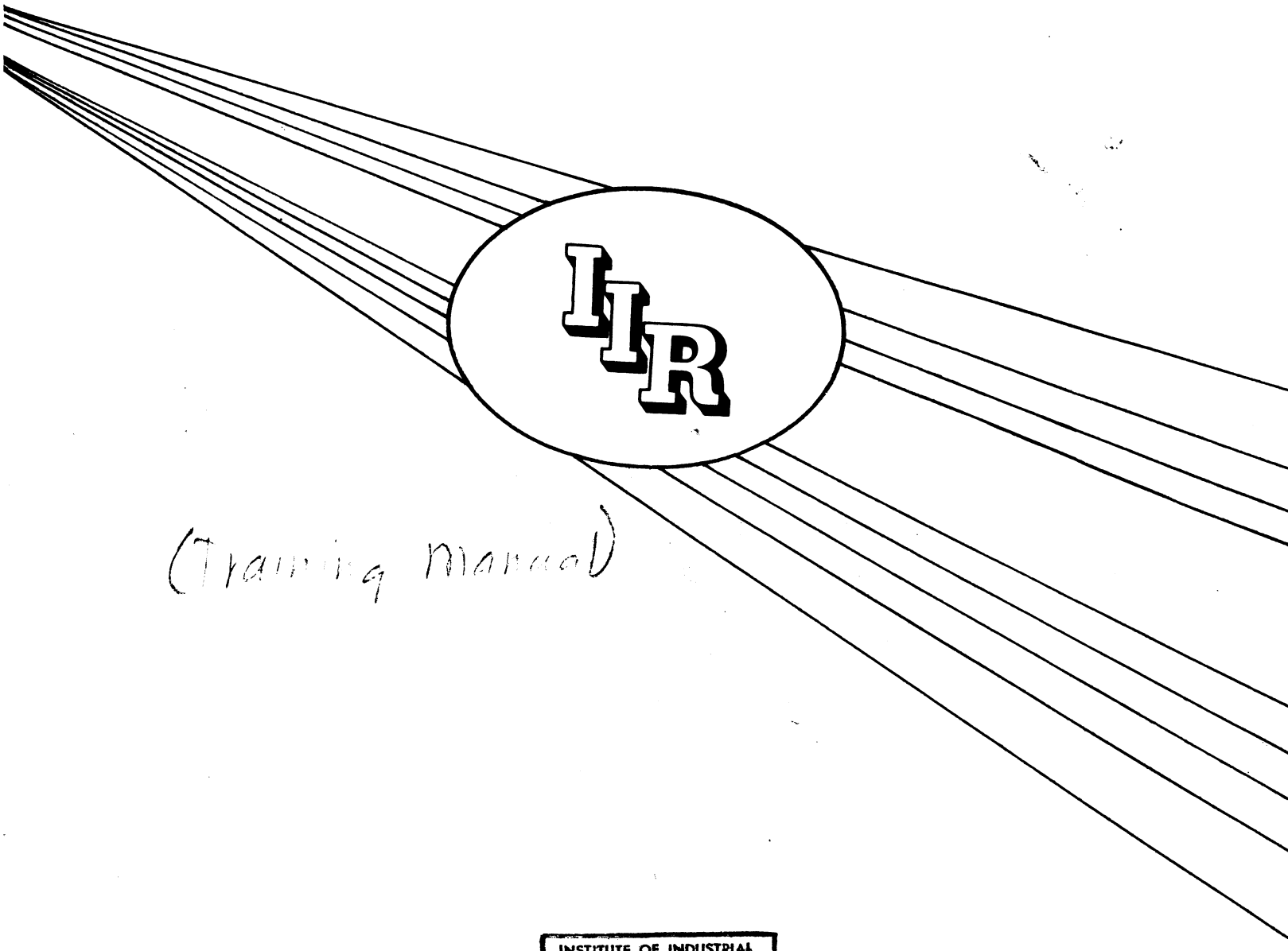
EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION IN LABOR-MANAGEMENT RELATIONS

—A PRIMER—



(Training Manual)

INSTITUTE OF INDUSTRIAL RELATIONS
UNIVERSITY OF CALIFORNIA, LOS ANGELES

EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION IN LABOR-MANAGEMENT RELATIONS

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FOREWORD

The Institute of Industrial Relations is happy to present this, the first of a series of training packages completed under the terms of a contract between the State of California and the University of California, Los Angeles. With funds provided to the State by the Federal Government, the State asked the Institutes at UCLA and Berkeley to assist in the training of state and local public managers and employees in the conduct of labor relations. A major portion of our role is to prepare and provide training materials.

Problems related to equal employment opportunity and affirmative action are among the most difficult and complex of those currently facing public managers and organizations of public employees. If one considers the compass of employment policies included in the classic roles of a personnel department--recruitment, selection, placement, training, promotion and retirement, each of these are deeply affected by the incorporation of the principles of equal opportunity and affirmative action in legislation and other expressions of explicit social policy. And, as every personnel department knows, the development and implementation of policies in these areas are of vital concern to representative organizations of employees at the bargaining table and in grievance procedures. Beyond that, they vitally affect the manner in which civil service and merit systems are administered.

Employee organizations find the task of representation made more complex by the impact of these policies on the duty of fair representation and on traditional ways of establishing and administering bargained criteria in those same areas of traditional concern to personnel departments.

Few among us question the need to establish equal employment opportunity or to implement such policies, in the light of historical practice, by affirmative action. But good will in implementation is insufficient. We need to know, as best we can, what means will work better and which worse. Beyond that, we must know what is permissible and what required, what impermissible and what forbidden by public policy. Unfortunately, the practitioner must find his way through a maze of law, developing judicial interpretation of law, and orders of executive and administrative agencies. This is true not only for public management; it is true for those who must conduct their collective bargaining relationships consistently with sometimes inconsistent policies.

It is our hope that this manual will provide at least a primer to the practitioner who wishes not only to comply with the law, but with its spirit and objectives, and that it will be of assistance to those who undertake to train practitioners so to comply. It is with this purpose that this material has been prepared.

January 1976

Frederic Meyers
Acting Director

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Applicable laws, executive orders, guidelines and related materials are found under various Tabs in specially prepared appendices.

INTRODUCTION

WHAT'S NEW ABOUT DISCRIMINATION?

The literal definition of employment discrimination has not changed: "a showing of partiality or prejudice in treatment; specifically, action or policies directed against the welfare of minority groups." (Webster's New World Dictionary of The American Language, Second College Edition, 1970.)

What is relatively recent is a new test as to what constitutes employment discrimination.

To understand this new test, it is necessary to glance back over our shoulders to pre-1965 days, i.e., before enactment of Title VII of the Civil Rights Act of 1964.

Before 1965, what was necessary to prove discrimination? Two tests of discrimination prevailed:

1. the evil motive test
2. the equal treatment test

1. Evil Motive Test (Pre-1965)

The evil motive test has been cogently explained by Alfred W. Blumrosen, Professor at Law at Rutgers University and Ruth G. Blumrosen, Associate Professor at Rutgers Graduate School of Business Administration:

> Prior to 1965, discrimination was understood as an individual act based on a purpose or motive to subordinate all members of a class, defined by race, color, religion, sex, or national origin. Blacks belong in their place: therefore, any black seeking employment will be assigned only to "black" jobs or not hired at all. Women belong "in the home," and will be given "women's work" or nothing. This "evil motive" test of discrimination made proof of violation virtually impossible.

The evil motive test was, in effect, an attempt to prove a state of mind, and, as noted above, "made proof of violation virtually impossible." Perhaps past critics of state FEP Commissions should take note that the virtually nil possibility of successful litigation in court under the evil motive test moved the FEP agencies over the years to stress conciliation.

2. Equal Treatment Test

The Blumrosens interpret the second test of discrimination -- equal treatment-- in this fashion:

> If similarly situated blacks and whites or men and women applied, and the white or male was preferred by the employer, such preference would be, or be evidence of, discrimination. This second test led to permitting the employer to rely on the subordination of minorities or women in other areas of life as a reason for denying them employment opportunities. Under this test, an employer could impose an educational level requirement, although minorities as a class had less education; a test requirement although minorities fared less well on written tests; a "no arrest" requirement, although minorities in metropolitan areas are more frequently arrested than whites; or a work experience requirement which ignored forms of experience which many women have had.

("Layoff or Work Sharing, "U.S. Civil Rights Digest, Spring, 1975, p. 36)

3. A Third Test Emerges -- The "Effect Test"

The Equal Employment Opportunity Commission, responsible for Title VII enforcement, designed a third test of discrimination. This test is based on effect rather than on motive.

The "effect test" was applied to employment pen-and-pencil examinations. The EEOC took the position in the use of employment tests that if a test had an adverse effect on minority employment, the use of such tests was illegal, unless justified by business necessity.

The Supreme Court in the landmark decision, Griggs v. Duke Power Co., upheld the use of the "effect test," holding that Congress directed the thrust of Title VII to the consequences of employment practices, not simply motivation. The Court in this and in a related case stated neither good intent nor lack of bad faith is a defense if the effect of the practice or policy is to discriminate, unless the practice or policy can be shown to be a business necessity. This "effect test" has had broad and far reaching results.

Other General Principles

Two other developments applied by the Courts are also central to what is new in employment discrimination:

1. Statistics which show, for example, racial disparity between an employer's work force and the population as a whole establish a prima facie case of discrimination. In the words of one court:

> "It is our belief that the often-stated aphorism, 'statistics often tell much and courts listen,' has particular application in Title VII cases." 443 F.2d at 551 (citation omitted).

2. While Title VII expresses the will of Congress that its provisions should look to the future, not to the past, the courts are taking a backward gaze when current practices, neutral on their face and not job-related, perpetuate the effects of past discrimination.

   A reading of the material in this manual will give substance to this shorthand version of principles and developments under equal employment opportunity laws.

   And perhaps the newest thing about discrimination: for statisticians and attorneys, Title VII and allied legislation is expanding their employment opportunities!

COLLECTIVE BARGAINING AND EQUAL EMPLOYMENT OPPORTUNITY

I. DISCRIMINATION GRIEVANCES AND CONTRACT PROVISIONS

The impact of Title VII and allied laws on collective bargaining becomes increasingly apparent. Court decisions are forging change. Bargaining unit members -- minorities and women -- are pushing for change. They seek in grievances involving employment discrimination more than the application of the "law of the shop." They seek resolution of such grievances through the application of the "law of the land."

Seeking Title VII type remedies under a grievance-arbitration procedure has advantages for both labor and management. Perhaps the most important advantage accrues to both parties when aggrieved employees look to the grievance-arbitration procedure to resolve job bias complaints rather than seek resolution through government intervention. But there are some major hurdles, as cogently stated below:

> ...today, the investigation of a grievance alleging discrimination is generally not carried out by a union steward and a management representative, but by an investigator of the EEOC or of a State or local deferral agency. The ultimate determination of equity in the grievance is made not by an arbitrator but by the Federal courts. The source of that determination is not a collectively bargained labor-management agreement, but Title VII.

> The grievant can utilize the grievance procedure and accept its results, but he is not required to do so. He can ignore the grievance procedure entirely and file a charge with the EEOC or a State or local deferral agency. Or he can utilize the grievance procedure and, if not satisfied with the outcome, still file a charge.
>
> (Source: "The Union Role in Title VII Enforcement," by Herbert Hammerman and Marvin Rogoff, U.S. Civil Rights Digest, Spring 1975)

The main problem of incorporating Title VII into a grievance-arbitration procedure is that the result is not final and binding, even when the agreement provides for final and binding arbitration. In Alexander v. Gardner Denver Co. (415 U.S. 36, 1974), the U.S. Supreme Court, in a unanimous decision, ruled that Title VII gives an individual rights that cannot be bargained away. The Court held that an individual does not give up the right to go to court on a Title VII charge, even if the case has been submitted to arbitration under a nondiscrimination clause of a contract.

The Court held that "we are unable to accept the proposition that the petitioner waived his cause of action under Title VII...there can be no prospective waiver of an employee's rights under Title VII."

The Supreme Court made a clear distinction between the filing of a grievance to assert rights under a collective agreement and the filing of a lawsuit to assert statutory rights under Title VII.

A. Court Considers Viewpoint of Employer

The Court also turned its attention to the argument that permitting an employee to have his discrimination claim considered in two forums -- arbitral and judicial -- is unfair to the employer. The employer would be bound by the arbitral award, but not the employee.

The district court in Gardner Denver agreed with this argument and had said it could not "accept a philosophy which gives the employee two strings to his bow when the employer has only one."

In disagreeing with the lower court, the Supreme Court said that in instituting a Title VII remedy, the employee is not seeking a review of the arbitrator's decision:

> Rather, he is asserting a statutory right independent of the arbitration process. An employer does not have "two strings to his bow" with respect to an arbitral decision for the simple reason that Title VII does not provide employers with a cause of action against employees. An employer cannot be the victim of discriminatory employment practices....

B. Court Looks at Role of Arbitrator in Discrimination Grievances

While the Supreme Court stated that individual rights under Title VII cannot be replaced or waived by an arbitration decision, the Court did not totally close the door on arbitral decisions.

The Court ruled that an arbitrator's decision may be admitted as evidence and given whatever weight it may deserve under the facts and circumstances.

In an important footnote, the Supreme Court listed the four factors that courts should evaluate and weigh in considering an arbitrator's decision. These four factors are, in part:

1. The existence of provisions in the collective-bargaining agreement that conform substanially with Title VII....

2. ... the degree of procedural fairness in the arbitral forum....

3. ...adequacy of the record with respect to discrimination....

4. ...and the special competence of particular arbitrators.

The court further added:

> Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record....

The ruling, of course, presents to management and employee organizations a challenge to make arbitration decisions more acceptable to the courts. This in turn means that the parties will have to achieve this goal -- if that is their mutual objective -- through contract changes.

The General Counsel for the International Union of Electrical Workers has said that the courts will accept arbitration awards only when the conditions spelled out by the Supreme Court are met. He has reported the IUE is recommending to its local unions that they seek contract changes as outlined below in order to have arbitration awards accepted by the courts:

1. The employer and the union shall not discriminate against any employee or applicant for employment, nor perpetuate the effects of past discrimination, if any, against any employee in any term or condition of employment, including but not limited to, payment of wages, hours of work, assignment of jobs, seniority, promotions and upgrades, training, layoffs, recall, discipline, and discharge because of race, color, religion, creed, age, sex, marital status, or national origin.

2. In making an award, the arbitrator shall apply Title VII of the Civil Rights Act of 1964, as amended, and all other federal, state or local anti-discrimination laws, and all rules and regulations promulgated thereunder and judicial interpretations applicable thereto. The arbitrator shall fashion an award so that it grants any and all relief appropriate to effectuate the provisions of this section, including any remedy which could be granted by a federal district court acting under Title VII.

   If the award requires rewriting any provisions of this agreement, the arbitrator shall direct the parties to open negotiations to make such changes, but shall retain jurisdiction over the case until such time as the arbitrator is assured that the contract provisions conform to the requirements of the law. If the parties are unable to agree upon contract provisions which the arbitrator determines to be in accord with the law, the arbitrator shall enter an award specifying the changes in this Agreement which are necessary to achieve compliance with Title VII. Such changes shall then be binding upon the parties and become terms and conditions of this agreement for the duration of this agreement.

3. In any arbitration of a grievance filed by an employee alleging a violation of Subsection A of this section, the employee who filed the grievance may appear as a party, present evidence, and be represented by counsel of her own choosing, the counsel fees and expenses of counsel to be paid for by such employee, and without limiting the right of the union also to participate in said arbitration in the same manner as if the employee had not exercised the rights conferred on him by this subsection.

Source: Daily Labor Report, BNA, November 17, 1975, A-10.

II. SENIORITY

A. Meaning of Seniority

Briefly defined, seniority is an employee's length of continuous service with a private company or public agency.

Seniority is an important factor to organized workers who consider it as a "property right." To the worker it means that objective standards, rather than arbitrary decisions or personal whims of the employer, will determine his or her chances of promotion or transfer; choice of vacation time; option to accept or reject overtime assignments, etc. And, understandably, the most important of all -- in a reduction in work force he or she will be laid off in line with years of service under the negotiated seniority system, plantwide or departmental, for example.

In short, from most employees' viewpoint, the seniority principle in layoffs establishes an objective standard to determine job retention as well as order of recall; that it is fair by providing greater job security for those who have held the jobs the longest. In fact, the moral underpinning of this has been called the "ethics of queue."

(Melvin W. Reder, "Job Scarcity and the Nature of Union Power," Industrial and Labor Relations Review, April, 1960, pp 353-357.)

And management's view of seniority? Writing on this point, James Craft, an Associate Professor of Business Administration, University of Pittsburgh, states:

> **. . .Management. . .while emphasizing the need to consider employee ability and plant efficiency in layoffs, has recognized a certain value in the use of seniority in layoffs. For example, in some cases, seniority tends to be related to productivity. In addition, the use of seniority does provide protection for loyal, long-time employees and may lead to better morale and less turnover among experienced employees. Therefore, seniority has been widely accepted by unions and management as one important criterion for determining layoffs -- especially when the seniority units are narrow and seniority layoffs reduce inefficiency from excessive bumping.**
>
> **("Equal Opportunity and Seniority: Trends and Manpower Implications," Labor Law Journal, Commerce Clearing House, Dec. 1975, p. 752)**

B. Seniority vs. Affirmative Action

The economic downturn has triggered layoffs of minorities and women who had gained employment as a result of imposed or voluntary affirmative action programs on the part of both private and public sector employers. Before Title VII (1965), many companies would not hire blacks, for instance, or if they did, they were assigned to the dirtiest, lowest-paying jobs in segregated departments or job units. The use of the seniority standard -- last hired, first out -- has resulted in layoffs of minorities and females hired under affirmative action programs.

The issue of seniority-based layoffs vs. affirmative action has been hotly debated and has fractured a long-time alliance between organized labor and some leading civil rights spokesmen.

C. Legislative History

During Senate debate concern was expressed that Title VII would adversely affect seniority provisions in contracts. To allay such fears, the Senate floor leaders, Clifford Case (R., N.J.) and Joseph Clark (D.,Pa.)submitted a memorandum which declared:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all white working force, when the Title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged--or, indeed, permitted--to fire whites in order to hire for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.
>
> (110 Congressional Record, p. 7213, April 8, 1964)

Senator Clark also entered into the Congressional Record a Justice Department memorandum that stated:

> "Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. . . .

> It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. . . . [I]n the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. (Id. at 7207)

At the time this interchange took place, there was no mention of seniority in the House-passed bill under Senate consideration. A substitute bill was passed (and later concurred in by the House) that contained Section 703(h) which states in part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply. . .different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, ...

D. Court Decisions

1. Departmental Seniority

a. The Quarles Case - the first reported case to reach the courts did not deal with layoffs. Rather, it concerned a departmental seniority system which was declared discriminatory and hence unlawful. (Quarles v. Philip Morris, Inc., 279 F. Supp. 505, E.D. Va. 1968)

A departmental seniority system is one under which promotion and layoffs are based on a worker's length of service or hire-in date in the department. Thus a worker with more employment seniority but less departmental

seniority may be laid off or denied a promotion, while a coworker with less employment seniority but with more departmental seniority is not laid off or receives a promotion because the agreement provides for departmental seniority. Often, employers hired blacks into segregated departments with the lowest-paying and hottest or dirtiest jobs. Before passage of Title VII, Philip Morris hired blacks into segregated departments with no opportunity to transfer into better paying departments. Then, after Title VII, departmental transfers were made possible. However, a black employee transferring to another department could not carry his seniority to the new department. This discouraged him from transferring, thus locking him in his low-paying job. On transferring he would be the junior employee on the seniority roster, though his years with the company may exceed those of many of the white workers in the department. In a departmental layoff he would be one of the first to go.

In Quarles the Court had no direction from Congress since the debate in the Senate did not deal with a departmental seniority system. The bona fide system discussed by the Senate was apparently a plantwide seniority system.

The Quarles case held:

> . . . a discriminatory seniority system established before the act cannot be held lawful under the act.

The Court added:

> It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act.

And:

> The Court holds that a departmental seniority system that has its genesis in racial discrimination is not a bona fide seniority system.

b. The Papermakers Local 189 Case - This case dealt with segregated progression lines in a southern Louisiana paper mill. A transfer between progression lines meant loss of seniority. Thus once the discriminatory job assignment practice ended, black employees could bid on jobs in an all white line of progression. But in moving to another progression line, the black worker would loose his seniority.

The U.S. Court of Appeals, Fifth Circuit, agreed with the Quarles decision.

The Paperworkers case may be considered a landmark case. While it did not deal with layoffs it has had a pervasive effect on layoff cases.

The importance of the Papermakers Local 189 case is that the Court examined three theories for bringing seniority systems into compliance with Title VII:

(1) "Freedom Now" theory

Basically a complete "purge" by giving blacks with more plant seniority the jobs of whites with less plant but more departmental seniority. In short, blacks would displace white incumbents holding jobs that--"but for" discrimination--the blacks would be entitled to because of greater plantwide seniority. The application of this approach would mean "bumping" white incumbents since the "Freedom Now" theory is not based on an existing job vacancy.

(2) "Rightful Place" theory

This concept forbids the future awarding of vacant jobs on the basis of a seniority system that "locks in" prior racial discrimination; that is, it perpetrates the effects of past (before Title VII) discrimination.

In short, incumbent white employees would not be "bumped" out of their positions by black workers with more plant seniority; rather, plant seniority (i.e. hire-in date or employment seniority) would be asserted by black employees when new openings or a vacancy occurred in previously all white departments. If a black employee thus transferred he loses none of his employment service credits.

(3) "Status Quo" theory

This is based on a literal reading of Title VII legislative history; i.e., Title VII is prospective, not retrospective. An employer satisfies Title VII merely by ending existing discrimination. In short, this approach does not undo the effects of past discrimination.

The Court rejected the "freedom now" and "status quo" theories and opted for the "rightful place" theory (a middle ground position) as a solution in accord with the purpose and history of the legislation. The decision directed that workers in the black progression lines be allowed to carry over their seniority upon transfer to previously all white progression lines. (The court did not order abandonment of progression lines). Then the Appellate Court made an observation that has had great effect in subsequent seniority cases, including layoff cases:

> It is one thing for legislation to require the creation of fictional seniority for newly hired Negroes, and quite another thing for it to require that time actually worked in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guarantee that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, creating fictional employment time for newly-hired Negroes would comprise preferential treatment rather than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race.
>
> (Papermakers, Local 189, v. United States, 416 F. 2d 980 (CA 5), 1969)

2. Layoff Cases

Three cases have dealt with layoffs under negotiated seniority provisions. To date, the appellate courts have upheld the seniority provisions.

a. Waters v. Wisconsin Steel Works

This was the first appellate court decision on the issue of layoffs based on a plantwide seniority system.

The U.S. Court of Appeals, 7th Circuit, sustained the seniority system, referring to the Fifth Circuit's decision in the Papermakers' case:

> "Title VII mandates that workers of every race be treated equally according to their earned seniority. It does not require as the Fifth Circuit said, that a worker be granted fictional seniority or special privileges because of his race."

The Court then made a distinction between an employment seniority (plantwide) system and a job/department seniority system:

> An employment seniority system is properly distinguished from job or department seniority systems for purposes of Title VII. Under the latter, continuing restrictions on transfer and promotion create unearned or artificial expectations of preference in favor of white workers when compared with black incumbents having an equal or greater length of service. Under the employment seniority system there is equal recognition of employment seniority which preserves only the earned expectations of long-service employees.

The Court concluded that:

> Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the "last hired, first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences. . . .
>
> (502 F. 2d 1309, (CA 7), 1974)

b. Watkins v. Steelworkers, Local 2369, and Continental Can Co.

The EEOC position was upheld at the federal district court level, but was overturned by the Appellate Court, 5th Circuit.

The question before the federal district court: does layoff based on "last hired, first fired" perpetuate yesteryear's exclusion of minority workers?

This was the question to be answered in this factual context: There was a major cutback in the operation of a southern Louisiana can factory. During World War II the plant had hired two blacks, but had hired no other blacks until 1965 (the year Title VII went into effect). Minority hiring picked up in the period 1969 through 1971 resulting in 50 blacks among 400 employees on the payroll in 1971.

Then there was an economic downturn, causing heavy layoffs -- including employees hired in 1951.

Result: except for the two blacks hired during World War II, the workforce was all white.

The district judge rejected the seniority system, even though it was plantwide, stating:

> ...employment preference cannot be allocated on the basis of length of service or seniority where blacks were, by virtue of prior discrimination, prevented from accumulating relevant seniority."
>
> (369 F. Supp. 1221 (E.D. La.), 1974)

The court granted a remedy that did not limit relief to those black employees who might have been hired earlier but for the employer's past hiring discrimination. The court granted a remedy which benefited black employees regardless of whether they were discriminated against by the layoff.

The district court judge ordered that a sufficient number of laid off black workers be recalled with back pay in order to achieve the ratio of black-white employment as it existed in 1971. The court also said that future layoffs should preserve the ratio. This would have meant that, assuming sufficient work to justify a recall, eight white employees would be

denied recall because of the reinstatement of the black workers. The eight white workers all had 1951 seniority dates. The age of the blacks who would have been reinstated ranged from more than two years of age to seven years of age at the time the whites who would be denied recall were first hired.

In essence, the lower court upheld the EEOC position that even a plantwide seniority system that carries forward past history of discrimination is not bona fide and thus does not come under the exemption of Section 703(h) of Title VII.

The case was appealed to the Fifth Circuit. The appellate court panel, in a unanimous decision, overturned the lower court and sustained the plantwide seniority provisions of the contract.

Judge Paul Roney, speaking for the panel, stated:

> Age, not race, is the principal reason the plaintiffs in this case did not have sufficient seniority to withstand layoff. All but one were under the age of legal employment when the Company commenced equal hiring. No plaintiff has alleged that he applied for employment with the Company prior to 1965 and was rejected for discriminatory reasons or that he would have applied for employment but for the discriminatory hiring practices of the Company. During the working lifetime of these plaintiffs, there has been no history of discrimination, and none of them has suffered individual discrimination at the hands of the Company.

> ...The result which plaintiffs seek...is not that personal remedial relief available under Title VII, but rather a preferential treatment on the basis of race which Congress specifically prohibited in Section 703(i)....

c. Jersey Central Power & Light Co. v. IBEW Locals 327, et al.

This, the third of the layoff cases, contained an element that was absent in the other two layoff cases: the company, Jersey Central Power, and seven locals of the International Brotherhood of Electrical Workers, entered into a conciliation agreement with the Equal Employment Opportunity Commission. The agreement was a result of an EEOC investigation in which the Commission found reasonable cause to believe the company discriminated against minority group persons and females with respect to hiring and job assignments.

The agreement, signed in January 1974, was to be effective from December 3, 1973 through December 3, 1977. It provided that the company would use its "best efforts" during this five-year period to increase the proportion of females and minority group members in the company's workforce to equal the proportion of these groups in the labor market. EEOC had tried to negotiate a seniority system in the conciliation agreement, but was unsuccessful.

In about mid-1974, economic conditions required a substantial employee cutback. The company sought court determination as to whether the contract or conciliation agreement would govern the layoff procedure.

The U.S. District Court of New Jersey issued an order which barred white male employees from bumping less senior minority and female employees if the percentages of women and minorities in the company's workforce fell 15 percent below the goal of the affirmative action program.

The IBEW locals appealed, arguing that preferential layoff rights constituted reverse discrimination.

Following the district court's decree, the company continued to layoff employees in line with the court's decree until the U.S. Court of Appeals, Third Circuit, granted a motion to stay the lower court's order. The company then followed the contract by laying off employees solely by reverse order of seniority.

The appeals court reversed the order of the lower court, stating that the union contract did not conflict with the conciliation agreement which did not contain a procedure for layoffs:

> As such the conciliation agreement sought an increase in the proportion of female and

> minority group workers by "hires" and not by "fires." It is highly significant to us that the conciliation agreement contains no overall layoff procedure or seniority system. Moreover, the express terms of the conciliation agreement do not attempt to affect, nor can we interpret them to affect, the layoff provisions of the collective bargaining agreement.

The court rejected the EEOC position that the company's affirmative action commitment under the conciliation agreement was an implicit modification of the seniority provisions of the contract. The Commission also argued that the objectives of the conciliation agreement would be thwarted if the seniority provisions of the contract prevailed.

(9 FEP Cases 117 (CA 3) 1975)

E. "Constructive" (Retroactive) Seniority Awaiting Supreme Court Decision

Oral argument has been heard by the Supreme Court in a case not involving layoffs, but that issue is lurking in the shadows.

The Franks v. Bowman Transportation Co. case arose when an employee of Bowman alleged that the company had violated Title VII and the Civil Rights Act of 1866 by engaging in various practices of race discrimination.

A federal district court found that the company had discriminatorily rejected black job applicants for over-the-road (OTR) drivers and ordered they be invited to reapply for jobs.

However, the lower court refused to order that those who might eventually be hired be granted seniority from the date they would have been hired, but for discrimination.

The U.S. Court of Appeals Fifth Circuit upheld the lower court, stating that Title VII barred the awarding of "constructive seniority" as a remedy for discrimination. The Appellate Court, however, did award back pay to those who were hired.

Organized Labor Supports Retroactive Seniority

The United Steelworkers of America, the collective bargaining agent at Bowman and a respondent in the case, and the National AFL-CIO filed a brief with the Supreme Court, taking the position that identifiable victims of discrimination are entitled to retroactive seniority to make them whole. This remedy, they argue, is not preferential treatment.

The brief states that retroactive seniority would give "a proven victim of discrimination his 'rightful place': the place in the seniority system which he would be occupying but for the prior discrimination against him."

The union brief notes that seniority is used as a measure of fringe-benefit entitlement, protection in layoffs, promotional opportunities, and other competitive purposes, and then states:

> The only way a discriminatee can be made whole is to give him the seniority date he would have had but for the refusal to hire him. That "rightful place" remedy

not only effectuates Congress' desire that discriminatees be made whole, it also preserves the integrity of seniority systems. Unions and employees have favored seniority as the determinant of employee competition because it furnishes an objective and equitable basis for allocating employment opportunities. But the system remains equitable only if all employees are given their proper seniority measure. Equity does not exist if some employees have had their seniority artificially reduced by the employer's discriminatory behavior. Reflecting this reality, the "rightful place" remedy has long been deemed an implicit part of collectively bargained seniority. When employees are discharged in violation of contract, unions invariably demand that they be reinstated without interruption of seniority, and arbitrators invariably grant that remedy.

... In sum, the "rightful place" remedy has always been recognized as an integral component of an equitable seniority system. It must be awarded if employees are to be made whole for the discrimination they have suffered. It is in no sense "preferential." It is, accordingly, wholly consistent with the congressional objectives embodied in Title VII.

Company Position

Bowman Transportation Co. agrees with both the black plaintiffs and the union position that a court may order "constructive" seniority as a remedy, but a refusal to do so is not an abuse of a court's discretion.

FEDERAL LEGAL SOURCES PROHIBITING EMPLOYMENT DISCRIMINATION

-- A SUMMARY --

(Texts of federal constitutional provisions and laws are contained at the end of this section, unless otherwise noted)

U.S. CONSTITUTION

Amendment V

The Fifth Amendment prohibits the federal government from engaging in discriminatory actions or policies. It provides, among other things, that "no person shall ... be deprived of life, liberty, or property, without due process of law." (emphasis added).

(Proposed September 25, 1789; ratified December 15, 1791).

Amendment XIV

The Fourteenth Amendment prohibits any state and local government from depriving any person of life, liberty, or property without due process of law. This amendment applies the restrictions contained in the Fifth Amendment involving federal action to state and local government action. The Fourteenth Amendment also provides that no person shall be denied equal protection under the law. The Equal Protection Clause does not appear in the Fifth Amendment.

The Fourteenth Amendment was the basis for the enactment of the Civil Rights Act of 1871 -- Section 1983.

(Proposed June 13, 1866; ratified July 9, 1868)

FEDERAL LAWS (in chronological order)

THE CIVIL RIGHTS ACT OF 1866 -- Section 1981

This measure was enacted to enforce the Thirteenth Amendment prohibiting slavery. Section 1981 provides that "all persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts, ... and to the full and equal benefit of all laws as is enjoyed by white citizens." (emphasis added) This right to contract subsequently has been interpreted to mean the right freely to contract for employment. The 1966 law has been applied in private sector cases dealing with racial discrimination. Section 1981 is found under Title 42 of the U.S. Code.

THE CIVIL RIGHTS ACT OF 1871 -- Section 1983

This measure was enacted to enforce the Fourteenth Amendment. It prohibits any person officially acting in behalf of a state or local government agency (i.e., acting under "color of state law") from depriving any citizen or other person "of any rights, privileges, or immunities secured by the Constitution and laws." Those violating this Act are liable to prosecution by the injured party.

Section 1983 is found under Title 42 of the U.S. Code.

THE EQUAL PAY ACT OF 1963

This Act prohibits wage discrimination based on sex. It supports the doctrine of equal pay for equal work. The Act covers employees in both the public and the private sector, and is administered by the Wage and Hour Division of the Department of Labor. This law was enacted in 1963 as an amendment to the Fair Labor Standards Act of 1938.

(For full text of the law and further discussion, see Tab C)

THE CIVIL RIGHTS ACT OF 1964

Title VI: Nondiscrimination in Federally Assisted Programs

This title precludes "discrimination under any program or activity receiving federal financial assistance." However, there are no provisions under this title which authorize cutting off of aid in respect of employment practices except when a primary objective of federal assistance is to provide employment (e.g., public works programs).

Title VI deals with more than employment discrimination. In general, the title prohibits discrimination against the beneficiaries of federal assistance programs. Thus, if a hospital receives federal assistance aimed at better care for patients (the beneficiaries), then the hospital may not discriminate in its care and treatment of patients. Similarly, if a program receives federal assistance, the aim being to benefit those employed by expanding job opportunity, then that program may not be discriminatory in its employment practices.

Title VI contains no language that adds to or subtracts from the President's authority to issue executive orders banning discrimination. Existing executive orders pertaining to antidiscrimination remain in force.

Sanctions for noncompliance consist of termination of funds. If a recipient of federal assistance "by way of grant, loan or contract other than a contract of insurance of guaranty" indulges in discriminatory employment practices, those funds may be halted or denied. "Recipient" of aid refers not to the beneficiary, but to "the person or entity to whom a federal grant or loan is made, or to whom a federal assistance contract flows" (generally state and local agencies, but also private persons or organizations).

The administrative agencies empowered to extend financial assistance are responsible for the enforcement of the antidiscrimination provisions of this title. The emphasis is on seeking compliance by voluntary means before taking more severe (cut-off) procedures. Any actions taken by an agency are subject to judicial review.

An important provision of this title which relates to sanctions against antidiscrimination violators is the "Pinpoint Proviso" (Section 602). Title VI is designed to limit any termination of federal assistance to the <u>particular</u> <u>offenders</u> in the <u>particular area</u> where the unlawful discrimination occurs. The "Pinpoint Proviso" explicitly limits the cut-off action to the particular political entity or other recipient involved in discriminatory benefits.

For instance, federal grants are made to "impacted area schools" -- those with large numbers of children of federal employees or members of the Armed Forces. If one school district were found to be in violation of prohibited employment practices, the other impacted districts in the state would not be threatened with termination of funds.

The cut-off procedure contains the following steps:

If a recipient has been found in violation of antidiscrimination guidelines, and the situation has not been corrected by voluntary means, the jurisdictional agency may not immediately cut off federal aid. The agency must first file a written report outlining the circumstances of the violation and the grounds for the halting of funds with those congressional committees having legislative jurisdiction over the program involved. The cut-off of funding may not actually occur until 30 days after the filing of that report. The interim period gives lawmakers time to review the agency's findings. If there is disagreement with those findings, Congress may pass a law to prohibit termination of funds. Its primary purpose is to give concerned Congressmen an opportunity to voice protest over the termination of funding. Judicial review is permitted in all situations involving termination of funds.

Title VII -- as amended by the Equal Employment Opportunity Act of 1972

This title prohibits all forms of employment discrimination on

the basis of race, color, religion, sex, or national origin. This prohibition covers both public and private sector employers, employment agencies, labor unions, and joint labor-management apprenticeship committees. It also makes it unlawful to discriminate against an individual because he/she files a Title VII complaint.

Title VII is administered by an independent agency, the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC).

Title VII became effective on July 2, 1965.

(For full text of the law and further discussion, see Tab D)

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

This act prohibits employment discrimination based on age. The law applies to both public and private sector employers, employment agencies, and labor unions. The protected age groups under the act are persons 40 through 64 years of age.

The act is administered by the Wage and Hour Division of the Department of Labor.

The Age Discrimination in Employment Act became effective June 12, 1968.

(For full text of the law and further discussion, see Tab F)

THE CIVIL RIGHTS ACT OF 1968

Title I: "Interference with Federally Protected Activities"

This law provides criminal penalties for interference with an individual's employment rights, among others, because of race, color, religion or national origin. The prescribed penalties include fines and jail sentences. The act does not preclude or supersede possible prosecution under existing state or federal law.

The Act is administered by the individual agencies with appropriate jurisdiction. Any actions taken are subject to judicial review.

The Act became effective on April 11, 1968.

INTERGOVERNMENTAL PERSONNEL ACT OF 1970 (IPA)

The Act, administered by the U.S. Civil Service Commission (CSC), was designed to improve the federal system by strengthening the personnel resources of state and local governments. To achieve this goal, the IPA provides for intergovernmental cooperation in the administration of grant-in-aid programs; grants for improvement in state and local personnel administration; federal assistance in training state and local employees; grants to state and local governments for training their employees, etc.

In order to qualify for such federal financial and technical assistance, the IPA requires that state and local governments

comply with the merit principles set forth in the act. One of the merit principles is the fair treatment principle, which requires

> assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, or religious creed and with proper regard for their privacy and constitutional rights as citizens....42 U.S. Code,

Additionally, the CSC is charged by the IPA with the administration of the Federal Merit System Standards, requiring that state employers administering certain federally aided programs be selected, promoted, and compensated according to a federally approved state-administered merit system.

These standards bar discrimination on the basis of race, national origin, color, sex, and age in more than 30 federally funded programs. In California, 18 counties and about 30 cities are covered under the standards, many of which receive federal funds for health, welfare, or civil defense programs. (Figures contained in Calif. FEPC pamphlet, "Affirmative Action Guidelines", Nov. 1974)

The standards require affirmative action to assure equal employment opportunity and appeal rights for persons alleging discrimination. Decisions are binding on the state and affected local jurisdictions.

(Section 70.4 of Rules and Regulations)

The Bureau of Intergovernmental Personnel Programs (BIPP) was established to discharge the Civil Service Commission's responsibilities under the IPA.

PUBLIC HEALTH SERVICES ACT OF 1943 - AS AMENDED IN 1971

This act prohibits federal funding or financial aid to any health or medical school or health-training facility unless the Department of Health, Education and Welfare receives satisfactory assurances that the facility will not or is not discriminating on the basis of sex in the employment of individuals or the admission of individuals to training programs.

Additionally, the act prohibits the providing of grants, loan guarantees or interest subsidies to, or for the benefit of, any school of nursing unless the applications for aid contain satisfactory assurances that the school will not discriminate on the basis of sex in the admission of individuals to its training programs. This constraint also applies to the granting of federal contracts.

The act is administered by agencies of the Department of Health, Education and Welfare (HEW). Agency actions are subject to judicial review.

Vietnam Era Veterans Act -- 1972

This act requires that special emphasis be given to the employment of qualified disabled veterans and veterans of the Vietnam Era

by those receiving federal funding or operating under federal contracts, or any subcontractor of a prime contractor.

Each contractor must list all employment openings with the appropriate local employment service office; and each such local office shall give veterans priority in referral for employment.

This act is administered by the Veterans Employment Service of the Department of Labor.

(This act was amended by the Vietnam Era Veterans' Readjustment Act of 1974)

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 (HIGHER EDUCATION ACT)

This act prohibits sex discrimination in three areas in all federally funded education programs: employment, admissions, and treatment of students. The provisions are applicable to all schools (pre-school through universities) receiving federal aid. All employees both full and part-time are covered.

Congress exempts military schools and religious schools where Title IX conflicts with the religious tenets of the school.

The act is administered by the Department of Health, Education and Welfare.

THE STATE AND LOCAL FISCAL ASSISTANCE ACT OF 1972 MORE COMMONLY KNOWN AS GENERAL REVENUE SHARING ACT (Title I provides for revenue sharing).

This law provides that "No person in the United States shall on the grounds of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with revenue sharing funds."

Inasmuch as discrimination is prohibited in any program or activity funded in whole or in part with revenue sharing funds, the Office of Revenue Sharing, U.S. Treasury Dept., is given broad jurisdiction in the application of antidiscrimination standards.

(For full text of Title I and further discussion see Tab G)

REHABILITATION ACT OF 1973 (Section 503)

The primary provision of this act is that, "No otherwise qualified handicapped individual in the U.S.... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

More specifically the act sets forth that, "any contract in excess of $2500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including

construction) for the United States shall contain a provision requiring that in employing persons to carry out such a contract the party contracting with the government shall take affirmative action to employ and advance in employment qualified handicapped individuals." It further provides that this requirement shall also "apply to any subcontract in excess of $2500 entered into by a prime contractor in carrying out any contract."

The Rehabilitation Act is enforced by the Office of Federal Contract Compliance, U.S. Department of Labor. (See Appendix to this Section for fact-sheet "Who Are the Handicapped?")

THE VIETNAM ERA VETERANS' READJUSTMENT ACT OF 1974

This law requires all federal government contractors with contracts over $10,000 to take affirmative action to employ and promote qualified disabled veterans and veterans of the Vietnam Era. The act strengthens and clarifies the Vietnam Era Veterans Act of 1972. Affirmative action is required of (1) government contractors and (2) of the federal government itself. (Title IV, Sections 402 & 403)

Provisions of the law apply to:

Veterans with a disability compensation of 30 percent or more.

Veterans discharged for disability incurred in the line of duty.

Vietnam era veterans who were not disabled but were discharged within 4 years of their application for employment. The Vietnam Era officially ended May 7, 1975.

The proposed regulations provide that any employer with a federal contract or subcontract of at least $50,000 and 50 or more employees must have a written affirmative action program for each establishment.

Proposed rules require, for example, active recruitment; review of the employment records of covered veterans to discover promotable veterans who may have been overlooked for upgrading; reasonable accommodations to the physical and mental disabilities of covered veterans.

Proposed regulations would also prohibit the establishment of compensation schemes which reduce veterans' pay because of a pension or disability compensation, and call for written standards where the job requires probing of the veterans' physical condition. Enforcement is based on a complaint-oriented procedure: complaints should be filed with Veterans' Employment Service, U.S. Department of Labor; complaint investigation is handled by the Department's Employment Standards Administration (ESA); affirmative action programs are monitored by the OFCC and ESA.

This law was passed over Presidential veto, December 3, 1974.

EXECUTIVE ORDERS

Executive Order 11141

Executive Order 11141 was issued by President Johnson on February 13, 1964. The Order prohibits contractors and subcontractors

engaged in the performance of Federal contracts from discriminating against persons because of their age "except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement," in connection with employment advancement, or discharge of employees, or in regard to the terms or conditions of their employment. Additionally, it is prohibited to specify in advertisements or solicitations a maximum age limit unless that limit is based on a bona fide occupational qualification, retirement plan, or statutory requirement.

The Order is administered and enforced by individual compliance agencies with appropriate jurisdiction.

Executive Order 11246 (as amended by EO 11375)

Executive Order 11246 was issued by President Johnson on September 24, 1965. As amended, the order prohibits discrimination by nonexempt government contractors and subcontractors on the grounds of race, color, religion, sex, or national origin.

Any contractor or subcontractor with a contract from the federal government of $10,000 or more must abide by the provisions of the required Equal Opportunity Clause. Additionally, any nonconstruction contractor or subcontractor with 50 or more employees and a contract of $50,000 or more, must undertake a written affirmative action program subject to annual reporting. However, a nonexempt contractor with a contract of less than a $50,000

must also have proof of affirmative action when requested by a compliance agency to show evidence of an affirmative action plan or program (compliance review). This order gave rise to the concept of affirmative action in meeting the public-policy goal of equal employment opportunity.

The prohibitions against discrimination apply to the following areas: hiring; upgrading and promotion; apprenticeship programs; testing procedures; wages and fringe benefits; company sponsored training programs; education; tuition assistance; transfers; layoffs and seniority practices; and other related conditions of employment.

Although not specifically covered by the Order, unions are affected by EO 11246, as amended. The section under Tab H, "Affirmative Action: Its Meaning and Application," covers this point in more detail.

Executive Order 11246 established the Office of Federal Contract Compliance (OFCC) within the Department of Labor to administer and enforce the Order. Enforcement is a cooperative effort between the OFCC and the compliance agencies and departments within the federal government. The compliance agency to which responsibility for enforcement is delegated in a given situation is not necessarily the agency which awarded the contract. Compliance agencies include: Department of Defense, NASA, Department of the Interior, Department of Commerce, Veterans Administration,

Atomic Energy Commission, Department of Agriculture, Department of Transportation, General Services Administration, AID, HEW, Treasury Department, Postal Service, Department of Justice, EPA, HUD, Small Business Administration, and Tennessee Valley Authority.

Under EO 11246 there is a choice of government enforcement agency sanctions: (1) may make public, through publication, the names of noncomplying contractors or unions; (2) may cancel the contract of a noncomplying employer; (3) may recommend suits by the Justice Department to compel compliance; (4) may recommend that action be taken by the Justice Department or EEOC under Title VII (of the Civil Rights Act of 1964, as amended) empowering the EEOC to file suit in federal district court; or (5) may "black-list" (debar) a noncomplying employer from receiving future government contracts until that employer shows a willingness to comply with the law. Usually, however, compliance is sought on a voluntary basis; contract cancellation or debarment from future contracts is sought only as a last resort.

(For further detail, see Affirmative Action under Tab H)

EXECUTIVE ORDER 11478

EO 11478 was issued by President Nixon on August 8, 1969. It provides for equal employment opportunity and affirmative action on the part of all federal government agencies as employers. EO 11478 specifically prohibits discriminatory practices in federal government employment, on the basis of race, color, religion, sex or national origin. Executive Order 11478 is administered and enforced by the U.S. Civil Service Commission.

CALIFORNIA LEGAL SOURCES

CALIFORNIA CONSTITUTION

The due process clause of the State Constitution (Article I, Sec. 7) is equivalent to the Fifth and Fourteenth Amendments in the U.S. Constitution. Section 7(a) provides that, "a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

The California State Constitution also includes a clause which specifically prohibits discrimination relating to employment. Article I, Section 8 provides that, "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color or national or ethnic origin."

CALIFORNIA LAWS

Fair Employment Practice Act--originally enacted as Part 4.5 of the State Labor Code in 1959; subsequently amended to its present form.

The law prohibits all forms of employment discrimination based on race, religious creed, color, national origin, ancestry, physical handicap, medical condition, age or sex. Medical condition pertaining to cancer victims was recently included as a prohibited basis of discrimination by Assembly Bill 1194.

The FEP Act covers any employment agency procuring employees or opportunities to work for compensation; any labor organization which exists for the purpose of collective bargaining or dealing with employers concerning grievances, terms or conditions of employment, of mutual aid or protection; and any employer regularly employing five or more persons (including any person acting as an agent of an employer; the state or any political or civil subdivision and cities).

Exempted are social clubs, fraternal, charitable, educational, or religious associations and corporations not organized for private profit.

The FEP Act created the Division of Fair Employment Practices and the Fair Employment Practices Commission. While the Commission is the policy-making authority, the law is unclear in setting forth the respective responsibilities of the two.

(For further discussion and full text of the Act see Tab E.)

Discrimination: Apprenticeship Programs

Discrimination prohibitions related to apprenticeship programs are found in Section 3095 of the Labor Code. This section, enacted in 1959, prohibits discrimination in any recruitment or apprenticeship program based on race, religion, creed, color, national origin, ancestry, or sex. It also provides for criminal penalties to be

levied against violators (misdemeanor punishable by not more than $1000, or (six months in jail, or both).

Section 3095 also prohibits the establishment of a maximum age for apprentices of less than 31 years of age at time of entry (not applicable to any apprenticeship program established as a result of a collective bargaining agreement entered into prior to the operative date of this section). This is not viewed as a violation of the age discrimination prohibitions of the FEP Act.

The Division of Apprenticeship Standards is vested with the power to obtain court injunctions against violators of the apprenticeship laws. (Sec. 3084.5).

Section 3096 of the Labor Code outlines the complaint procedure and its administration by the State Fair Employment Practice Commission with investigative support from the Division of Apprenticeship Standards.

Discrimination: Public Works

Discrimination because of race, color, national origin or ancestry, or religion is prohibited in the employment of persons on public works. Public works contractors violating this enactment are subject to penalties for each day the violation continues. (Sec. 1735).

Note: Age and sex are not listed as prohibited bases for discrimination.

A related section (1777.6) prohibits an employer from refusing to accept any otherwise qualified employee as an indentured apprentice

on any public works, solely on the basis of race, religious creed, color, national origin, ancestry, or sex (age not included).

EQUAL PAY ACT --(Chap. 1, Part 4, Sec. 1197.5 of the California Labor Code as amended).

This law which became effective November 13, 1968, is the equivalent at the state level of the federal Equal Pay Act. However, it covers only employees in the private sector.

Section 1197.5 states:

> "No employer shall pay any individual in his employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for the same quantity and quality of the same classification of work; provided that nothing herein shall prohibit a variation of rates of pay for male and female employees engaged in the same classification of work based upon a difference in seniority, length of service, ability, skill, difference in duties or services performed...difference in the shift or time of day worked, hours of work, or restrictions or prohibitions on lift or moving objects in excess of specified weight or other reasonable differentiation, factor or factors other than sex, when exercised in good faith."

Employers who violate the above section are liable to the affected employee for the amount of wages lost by the employee due to the violation.

All employers of male and female workers are required by this Act to keep full records of the wages, job classifications, and other terms and conditions of employment of their workers.

The provisions of this Act are administered and enforced by the

Division of Labor Standards Enforcement of the Department of Industrial Relations. This Division is authorized to receive complaints brought by any person or persons who feel they have been the victim of discriminatory practices. The Division is further authorized by this Act to investigate such complaints and, where warranted, take remedial action. Where a violation exists, "it may supervise the payment of any sums found to be due and unpaid to women employers." Additionally, when a violation is not rectified by voluntary means, the Division of Labor Standards Enforcement may "commence and prosecute a civil action to recover unpaid wages" against the violator on behalf of the employee.

This Act provides criminal penalties for violation of its discrimination prohibitions. Violation is deemed a misdemeanor punishable by a fine of not less than $50 or by imprisonment for 30 days, or both. (Section 1199).

FEDERAL LAWS/EXECUTIVE ORDERS .... AT A GLANCE

	Applies to: Public Sector	Private Sector	Administrative Agency	Provisions
Statutes*				
Equal Pay Act of 1963	Pending (awaiting Supreme Court decision)	Yes	Wage & Hour Div., Dept. of Labor (DOL)	Prohibits wage discrimination based on sex (equal pay for equal work)
Title VI, Civil Rights Act	Yes	Yes	Individual agencies with jurisdiction	Prohibits discrimination under any program receiving federal assistance. Cuts off aid to employment programs which discriminate. Also prohibits discrimination against beneficiaries of federal assistance. "Pinpoint Proviso" explicitly limits the cut-off action to particular political entity or other recipient involved in discriminatory action.
Title VII, Civil Rights Act of 1964, as amended in 1972	Yes	Yes	Equal Employment Opportunity Comm. except for federal employees --U.S. Civil Service Comm.	Prohibits all forms of employment discrimination based on race, color, religion, sex, national origin
Age Discrimination in Employment Act of 1967, as amended in 1974	Pending (awaiting Supreme Court decision)	Yes	W & H (DOL)	Prohibits discrimination based on age, 40-65
Civil Rights Act of 1968	Yes	Yes	Individual agencies with jurisdiction	Provides criminal penalties for interfering with employment based on race, color, sex, religion, national origin.

*Excludes Civil Rights Acts of 1866 and 1871 since no agency administers their enforcement. These acts are invoked through law suits by plaintiffs.

	Applies to: Public Sector	Private Sector	Administrative Agency	Provisions
Statutes: (cont'd)				
Intergovernmental Personnel Act, 1970	State Local	No	Bureau of Intergovernmental Personnel Programs (BIPP), U.S. Civil Service Comm.	Requires state and local governments receiving IPA grants or funds for certain programs to treat all applicants and employees without regard to race, color, religion, sex, national origin. Requires affirmative action.
Public Health Services '43- as amended 1971	Yes	Yes	Individual agencies within HEW	Prohibits sex discrimination in federally funded health training facilities
Vietnam Era Veterans Act, 1972	Yes	Yes	Veterans Employment Service (VES), DOL	Requires those receiving federal funds or under federal contract, to give special emphasis to qualified veterans.
Vietnam Era Veterans Readjustment, 1974	Yes	Yes	VES (DOL)	Requires all federal government contractors with contracts of $10,000 or more to take affirmative action to employ and promote veterans of Vietnam era.
Title IX,Education Amendments, 1972	Yes	Yes	HEW	Prohibits sex discrimination in all federally fundeded education projects.
General Revenue Sharing, 1972	Yes	No	Office Revenue Sharing (U.S. Treasury)	Prohibits discrimination based on race, color, sex, national origin in programs funded by General Revenue Sharing
Rehabilitation Act of 1973 (Section 503)	Yes	Yes	Office of Federal contract Compliance (DOL)	Prohibits discrimination against handicapped in federally funded contracts.

	Applies to: Public Sector	Private Sector	Administrative Agency	Provisions
Executive Orders				
Executive Order 11141 (1964)	Yes	Yes	Individual contracting agencies	Prohibits age discrimination by federal contractors except on the basis of a BFOQ.
Executive Order 11246 (1965) (as amended by EO 11375)	Yes	Yes	OFCC	Prohibits federal contractors/ subcontractors from discriminating based on race, color, sex, national origin, religion. Covers contracts for $10,000 or more.
Executive Order 11478 (1969)	Federal	No	Civil Service Comm.	Requires equal employment opportunity and affirmative action on part of Federal government agencies as employers.

CALIFORNIA LAWS .... AT A GLANCE

	Applies to: Public Sector	Private Sector	Administrative Agency	Provisions
Statutes:				
Fair Employment Practice Act, 1959, as amended	Yes	Yes	Div. of Fair Employment Practices/ FEP Commission	Prohibits all forms of employment discrimination based on race, religion, color, national origin, ancestry, physical handicap, sex, age, medical condition.
Equal Pay Act, 1968	No	Yes	Division of Labor Standards Enforcement, Department of Industrial Relations	Prohibits wage discrimination based on sex (equal pay for equal work)
Section 3095 Labor Code: Apprenticeship Program	No	Yes	Division of Apprenticeship Standards Dept. of Industrial Relations and FEPC.	Prohibits discrimination in any recruitment or apprenticeship program based on race, creed color, national origin, ancestry or sex.
Section 1735 Labor Code: Public Works	No	Yes	Division of Labor Standards Enforcement Department of Industrial Relations	Prohibits discrimination in employment in public works because of race, color, national origin or ancestry, or religion.

APPENDIX TO TAB B

AMENDMENT V

Criminal Proceedings and Condemnation of Property

[SECTION 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.

AMENDMENT XIV

Citizenship, Representation, and Payment of Public Debt

Citizenship

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Proposed June 13, 1866; ratified July 9, 1868; certified July 28, 1868.

CIVIL RIGHTS ACTS OF 1866 and 1871

Civil Rights Act of 1866 was enacted to enforce the 13th Amendment. Section 1981 (under Title 42 of the U.S. Code) was enacted as part of the 1866 law:

Section 1981. Equal Rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(The 13th Amendment, 1865, reads:
Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
Sec. 2. Congress shall have power to enforce this article by appropriate legislation.)

Civil Rights Act of 1871 was enacted to enforce the 14th Amendment. Section 1983 (under Title 42 of the U.S. Code) was enacted as part of the 1871 law:

Section 1983. Civil Action: Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

SEC. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

SEC. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

SEC. 603. Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 602, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

SEC. 604. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

SEC. 605. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

CIVIL RIGHTS ACT OF 1968

Public Law 90-284
90th Congress, H. R. 2516
April 11, 1968

An Act

To prescribe penalties for certain acts of violence or intimidation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Civil rights.

TITLE I—INTERFERENCE WITH FEDERALLY PROTECTED ACTIVITIES

SEC. 101. (a) That chapter 13, civil rights, title 18, United States Code, is amended by inserting immediately at the end thereof the following new section, to read as follows:

62 Stat. 696.
18 USC 241-244.

"§ 245. Federally protected activities

"(a) (1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General or the Deputy Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

"(2) Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

"(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

"(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

"(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;

"(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

"(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

"(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

"(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

"(2) any person because of his race, color, religion or national origin and because he is or has been—

82 STAT. 73
82 STAT. 74

"(A) enrolling in or attending any public school or public college;

"(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

"(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

"(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

"(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

"(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

"(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

"(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

"(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

"(B) affording another person or class of persons opportunity or protection to so participate; or

"(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

Penalty.

shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

82 STAT. 74
82 STAT. 75

"Participating lawfully in speech or peaceful assembly."

As used in this section, the term 'participating lawfully in speech or peaceful assembly' shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2)(F) or (4)(A) of this subsection shall apply to the proprietor of any establishment which provides

lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.

"(c) Nothing in this section shall be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. For purposes of the preceding sentence, the term 'law enforcement officer' means any officer of the United States, the District of Columbia, a State, or political subdivision of a State, who is empowered by law to conduct investigations of, or make arrests because of, offenses against the United States, the District of Columbia, a State, or a political subdivision of a State." "Law enforcement officer."

(b) Nothing contained in this section shall apply to or affect activities under title VIII of this Act. Post, p. 81.

(c) The provisions of this section shall not apply to acts or omissions on the part of law enforcement officers, members of the National Guard, as defined in section 101(9) of title 10, United States Code, members of the organized militia of any State or the District of Columbia, not covered by such section 101(9), or members of the Armed Forces of the United States, who are engaged in suppressing a riot or civil disturbance or restoring law and order during a riot or civil disturbance. 70A Stat. 4.

SEC. 102. The analysis of chapter 13 of title18 of the United States Code is amended by adding at the end thereof the following:

"245. Federally protected activities."

SEC. 103. (a) Section 241 of title 18, United States Code, is amended by striking out the final paragraph thereof and substituting the following: Penalties. Conspiracy against rights of citizens. 62 Stat. 696.

"They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

(b) Section 242 of title 18, United States Code, is amended by striking out the period at the end thereof and adding the following: "; and if death results shall be subject to imprisonment for any term of years or for life." Deprivation of rights.

(c) Subsections (a) and (c) of section 12 of the Voting Rights Act of 1965 (79 Stat. 443, 444) are amended by striking out the words "or (b)" following the words "11(a)". 42 USC 1973j.

SEC. 104. (a) Title 18 of the United States Code is amended by inserting, immediately after chapter 101 thereof, the following new chapter: 62 Stat. 795. 18 USC 2071-2076.

§ 4701. Congressional findings and declaration of policy.

The Congress hereby finds and declares—

That effective State and local governmental institutions are essential in the maintenance and development of the Federal system in an increasingly complex and interdependent society.

That, since numerous governmental activities administered by the State and local governments are related to national purpose and are financed in part by Federal funds, a national interest exists in a high caliber of public service in State and local governments.

That the quality of public service at all levels of government can be improved by the development of systems of personnel administration consistent with such merit principles as—

(1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;

(2) providing equitable and adequate compensation;

(3) training employees, as needed, to assure high-quality performance;

(4) retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected;

(5) assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, or religious creed and with proper regard for their privacy and constitutional rights as citizens; and

(6) assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.

That Federal financial and technical assistance to State and local governments for strengthening their personnel administration in a manner consistent with these principles is in the national interest. (Pub. L. 91–648, § 2, Jan. 5, 1971, 84 Stat. 1909.)

SHORT TITLE

Section 1 of Pub. L. 91–648 provided: "That this Act [which enacted this chapter and sections 3371–3376 of Title 5, amended section 1304(e)(1) of Title 5, repealed sections 1881–1888 of Title 7, section 869b of Title 20, and section 246(f) of this title, and enacted provisions set out as notes under section 3371 of Title 5] may be cited as the 'Intergovernmental Personnel Act of 1970'."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 4722, 4723, 4743 of this title.

§ 4702. Administration of authorities.

The authorities provided by this Act shall be administered in such manner as (1) to recognize fuly the rights, powers, and responsibilities of State and local governments, and (2) to encourage innovation and allow for diversity on the part of State and

local governments in the design, execution, and management of their own systems of personnel administration. (Pub. L. 91–648, § 3, Jan. 5, 1971, 84 Stat. 1909.)

REFERENCES IN TEXT

This Act, referred to in the text, is Pub. L. 91–648, the Intergovernmental Personnel Act of 1970, for classification of which in the Code see Short Title note set out under section 4701 of this title.

SUBCHAPTER I.—DEVELOPMENT OF POLICIES AND STANDARDS

§ 4711. Declaration of purpose.

The purpose of this subchapter is to provide for intergovernmental cooperation in the development of policies and standards for the administration of programs authorized by this Act. (Pub. L. 91–648, title I, § 101, Jan. 5, 1971, 84 Stat. 1910.)

REFERENCES IN TEXT

This Act, referred to in the text, is Pub. L. 91–648, the Intergovernmental Personnel Act of 1970, for classification of which in the Code see Short Title note set out under section 4701 of this title.

§ 4712. Advisory council on intergovernmental personnel policy.

(a) Appointment; termination.

Within one hundred and eighty days following January 5, 1971, the President shall appoint, without regard to the provisions of Title 5 governing appointments in the competitive service, an advisory council on intergovernmental personnel policy. The President may terminate the council at any time after the expiration of three years following its establishment.

(b) Membership; designation of Chairman and Vice Chairman.

The advisory council of not to exceed fifteen members, shall be composed primarily of officials of the Federal Government and State and local governments, but shall also include members selected from educational and training institutions or organizations, public employee organizations, and the general public. At least half of the governmental members shall be officials of State and local governments. The President shall designate a Chairman and a Vice Chairman from among the members of the advisory council.

(c) Duties regarding personnel policies.

It shall be the duty of the advisory council to study and make recommendations regarding personnel policies and programs for the purpose of—

(1) improving the quality of public administration at State and local levels of government, particularly in connection with programs that are financed in whole or in part from Federal funds;

(2) strengthening the capacity of State and local governments to deal with complex problems confronting them;

(3) aiding State and local governments in training their professional, administrative, and technical employees and officials;

(4) aiding State and local governments in developing systems of personnel administration that are responsive to the goals and needs of their programs and effective in attracting and retaining capable employees; and

(5) facilitating temporary assignments of personnel between the Federal Government and State and local governments and institutions of higher education.

(d) Compensation and travel expenses.

Members of the advisory council who are not regular full-time employees of the United States, while serving on the business of the council, including travel time, may receive compensation at rates not exceeding the daily rate for GS–18; and while so serving away from their homes or regular places of business, all members may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5 for individuals in the Government service employed intermittently. (Pub. L. 91–648, title I, § 102, Jan. 5, 1971, 84 Stat. 1910.)

§ 4713. Reports of advisory council.

(a) Reports to President and Congress.

The advisory council on intergovernmental personnel policy shall from time to time report to the President and to the Congress its findings and recommendations.

(b) Initial report.

Not later than eighteen months after its establishment, the advisory council shall submit an initial report on its activities, which shall include its views and recommendations on—

(1) the feasibility and desirability of extending merit policies and standards to additional Federal-State grant-in-aid programs;

(2) the feasibility and desirability of extending merit policies and standards to grant-in-aid programs of a Federal-local character;

(3) appropriate standards for merit personnel administration, where applicable, including those established by regulations with respect to existing Federal grant-in-aid programs; and

(4) the feasibility and desirability of financial and other incentives to encourage State and local governments in the development of comprehensive systems of personnel administration based on merit principles.

(c) Presidential report to Congress.

In transmitting to the Congress reports of the advisory council, the President shall submit to the Congress proposals of legislation which he deems desirable to carry out the recommendations of the advisory council. (Pub. L. 91–648, title I, § 103, Jan. 5, 1971, 84 Stat. 1910.)

SUBCHAPTER II.—STRENGTHENING STATE AND LOCAL PERSONNEL ADMINISTRATION

§ 4721. Declaration of purpose.

The purpose of this subchapter is to assist State and local governments to strengthen their staffs by improving their personnel administration. (Pub. L. 91–648, title II, § 201, Jan. 5, 1971, 84 Stat. 1911.)

PUBLIC HEALTH SERVICE ACT OF 1943, as amended, 1971

TITLE VII (Section 799A):

DISCRIMINATION ON BASIS OF SEX PROHIBITED

42 U.S.C. 295b-9

Sec. 799A. The Secretary may not make a grant, loan guarantee, or interest subsidy payment under this title to, or for the benefit of, any school of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry, or public health or any training center for allied health personnel unless the application for the grant, loan guarantee, or interest subsidy payment contains assurances satisfactory to the Secretary that the school or training center will not discriminate on the basis of sex in the admission of individuals to its training programs. The Secretary may not enter into a contract under this title with any such school or training center unless the school or training center furnishes assurances satisfactory to the Secretary that it will not discriminate on the basis of sex in the admission of individuals to its training programs.

TITLE VIII (Section 845):

PROHIBITION AGAINST DISCRIMINATION BY SCHOOLS ON THE BASIS OF SEX

Sec. 11. Part C of title VIII of the Public Health Service Act is amended by adding at the end thereof the following new section: 42 USC 298.

"PROHIBITION AGAINST DISCRIMINATION BY SCHOOLS ON THE BASIS OF SEX

"Sec. 845. The Secretary may not make a grant, loan guarantee, or interest subsidy payment under this title to, or for the benefit of, any school of nursing unless the application for the grant, loan guarantee or interest subsidy payment contains assurances satisfactory to the Secretary that the school will not discriminate on the basis of sex in the admission of individuals to its training programs. The Secretary may not enter into a contract under this title with any school unless the school furnishes assurances satisfactory to the Secretary that it will not discriminate on the basis of sex in the admission of individuals to its training programs."

"Chapter 42.—EMPLOYMENT AND TRAINING OF DISABLED AND VIETNAM ERA VETERANS

"§ 2011. Definitions

"As used in this chapter—

"(1) The term 'disabled veteran' means a person entitled to disability compensation under laws administered by the Veterans' Administration for a disability rated at 30 per centum or more, or a person whose discharge or release from active duty was for a disability incurred or aggravated in line of duty.

"(2) The term 'veteran of the Vietnam era' means a person (A) who (i) served on active duty for a period of more than 180 days, any part of which occurred during the Vietnam era, and was discharged or released therefrom with other than a dishonorable discharge, or (ii) was discharged or released from active duty for a service-connected disability if any part of such active duty was performed during the Vietnam era, and (B) who was so discharged or released within the 48 months preceding his application for employment covered under this chapter.

"(3) The term 'department and agency' means any department or agency of the Federal Government or any federally owned corporation.

"§ 2012. Veterans' employment emphasis under Federal contracts

"(a) Any contract entered into by any department or agency for the procurement of personal property and non-personal services (including construction) for the United States, shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall give special emphasis to the employment of qualified disabled veterans and veterans of the Vietnam era. The provisions of this section shall apply to any subcontract entered into by a prime contractor in carrying out any contract for the procurement of personal property and non-personal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within 60 days after the date of enactment of this

section, which regulations shall require that (1) each such contractor undertake in such contract to list immediately with the appropriate local employment service office all of its suitable employment openings, and (2) each such local office shall give such veterans priority in referral to such employment openings.

"(b) If any disabled veteran or veteran of the Vietnam era believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to giving special emphasis in employment to veterans, such veteran may file a complaint with the Veterans' Employment Service of the Department of Labor. Such complaint shall be promptly referred to the Secretary who shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant consistent with the terms of such contract and the laws and regulations applicable thereto.

"§ 2013. Eligibility requirements for veterans under certain Federal manpower training programs

"Any (1) amounts received as pay or allowances by any person while serving on active duty, (2) period of time during which such person served on such active duty, and (3) amounts received under chapters 11, 13, 31, 34, 35, and 36 of this title by a veteran (as defined in section 101(2) of this title) who served on active duty for a period of more than 180 days or was discharged or released from active duty for a service-connected disability, and any amounts received by an eligible person under chapters 13 and 35 of such title, shall be disregarded in determining the needs or qualifications of participants in any public service employment program, any emergency employment program, any job training program assisted under the Economic Opportunity Act of 1964, any manpower training program assisted under the Manpower Development and Training Act of 1962, or any other manpower training (or related) program financed in whole or in part with Federal funds."

38 USC 301, 401, 1501, 1651, 1700, 1770.
72 Stat. 1106.
78 Stat. 508.
42 USC 2701 note.
76 Stat. 23.
42 USC 2571 note.

(b) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part III of such title are each amended by adding at the end thereof a new item as follows:

"42. Employment and Training of Disabled and Vietnam Era Veterans.. 2011".

SEC. 504. The Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 U.S.C. App. 501 et seq.), is amended as follows:

54 Stat. 1179.

(1) Section 101(1) (50 U.S.C. App. 511(1)) is amended by striking out "The term 'persons in military service'" and inserting in lieu thereof "The term 'person in the military service', the term 'persons in military service',".

56 Stat. 777.
50 USC app. 590.

(2) The following new section is inserted after section 700:

"SEC. 701. (a) Notwithstanding any other provision of law, a power of attorney which—

80 Stat. 625.

"(1) was duly executed by a person in the military service who is in a missing status (as defined in section 551(2) of title 37, United States Code);

"(2) designates that person's spouse, parent, or other named relative as his attorney in fact for certain specified, or all, purposes; and

"(3) expires by its terms after that person entered a missing status, and before or after the effective date of this section;

shall be automatically extended for the period that the person is in a missing status.

"(b) No power of attorney executed after the effective date of this section by a person in the military service may be extended under subsection (a) if the document by its terms clearly indicates that the

power granted expires on the date specified even though that person, after the date of execution of the document, enters a missing status.

"(c) This section applies only to persons in military service who executed powers of attorney during the Vietnam era (as defined in section 101(29) of title 38, United States Code)." 81 Stat. 181.

SEC. 505. Section 3107 of title 38, United States Code, is amended by inserting after "title" the words "or that portion of the educational assistance allowance payable on account of dependents under chapter 34 of this title". 72 Stat. 1231.

TITLE VI—EFFECTIVE DATES AND SAVINGS PROVISIONS

SEC. 601. (a) The rate increases provided in Title I of this Act and the rate increases provided by the provisions of section 1787, title 38, United States Code (as added by section 316 of this Act) shall become effective October 1, 1972; except, for those veterans and eligible persons in training on the date of enactment, the effective date shall be the date of the commencement of the current enrollment period, but not earlier than September 1, 1972.

(b) The provisions of title V of this Act shall become effective 90 days after the date of enactment of this Act.

SEC. 602. (a) The provisions of section 1786 of title 38, United States Code (as added by section 316 of this Act), which apply to programs of education exclusively by correspondence, shall, as to those wives and widows made eligible for such training by that section, become effective January 1, 1973, and, as to eligible veterans, shall apply only to those enrollment agreements which are entered into on or after January 1, 1973.

(b) Notwithstanding the provisions of subsection (a) of this section, any enrollment agreement entered into by an eligible veteran prior to January 1, 1973, shall continue to be subject to the provisions of section 1682(c) of title 38, United States Code, prior to its repeal by section 303 of this Act.

SEC. 603. (a) The prepayment provisions of subsection (e) of section 1780 of title 38, United States Code (as added by section 201 of this Act), shall become effective on November 1, 1972.

(b) The advance payment provisions of section 1780 of title 38, United States Code (as added by section 201 of this Act), shall become effective on August 1, 1973, or at such time prior thereto as the Administrator of Veterans' Affairs shall specify in a certification filed with the Committees on Veterans' Affairs of the Congress.

SEC. 604. (a) Notwithstanding the provisions of section 1712(b) of title 38, United States Code, a wife or widow (1) eligible to pursue a program of education exclusively by correspondence by virtue of the provisions of section 1786 of such title (as added by section 316 of this Act) or (2) entitled to receive the benefits of subsection (a) of section 1733 of this title (as added by section 313 of this Act), shall have eight years from the date of the enactment of this Act in which to complete such a program of education or receive such benefits. 82 Stat. 1333.

(b) Notwithstanding the provisions of section 1712(a) or 1712(b) of title 38, United States Code, an eligible person, as defined in section 1701(a)(1) of such title, who is entitled to pursue a program of apprenticeship or other on-job training by virtue of the provisions of section 1787 of such title (as added by section 316 of this Act) shall have eight years from the date of the enactment of this Act in which to complete such a program of training, except that an eligible person defined in section 1701(a)(1)(A) of such title may not be afforded educational assistance beyond his thirty-first birthday. 72 Stat. 1194; 82 Stat. 1333. 84 Stat. 1575.

Approved October 24, 1972.

Public Law 92-318
92nd Congress, S. 659
June 23, 1972

Education Amendments of 1972

TITLE IX—PROHIBITION OF SEX DISCRIMINATION

SEX DISCRIMINATION PROHIBITED

SEC. 901. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that: Exceptions.

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act, nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine; and

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an

imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

Definition.

(c) For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

FEDERAL ADMINISTRATIVE ENFORCEMENT

SEC. 902. Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Report to congressional committees.

JUDICIAL REVIEW

SEC. 903. Any department or agency action taken pursuant to section 1002 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 902, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

80 Stat. 392.
5 USC 701.

Amendment to TITLE IX - PROHIBITION OF SEX DISCRIMINATION

Excerpt from Public Law 93-568 (signed by President on December 31, 1974)

Sec. 3. (a) Section 901(a) of the Education Amendments of 1972 is amended by striking out "and" at the end of clause (4) thereof and by striking out the period at the end of clause (5) thereof and inserting in lieu thereof ":and", by inserting at the end thereof the following new clause:

"(6) This section shall not apply to membership practices--

"(A) of a social fraternity or social sorority which is exempt from taxation under section 501 (a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at an institution of higher education, or

"(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age."

(b) The provisions of the amendment made by subsection (a) shall be effective on, and retroactive to, July 1, 1972.

TITLE V—MISCELLANEOUS

EFFECT ON EXISTING LAW

Repeal. 68 Stat. 652; 79 Stat. 1282; 32 Stat. 297.

SEC. 500. (a) The Vocational Rehabilitation Act (29 U.S.C. 31 et seq.) is repealed ninety days after the date of enactment of this Act and references to such Vocational Rehabilitation Act in any other provision of law shall, ninety days after such date, be deemed to be references to the Rehabilitation Act of 1973. Unexpended appropriations for carrying out the Vocational Rehabilitation Act may be made available to carry out this Act, as directed by the President. Approved State plans for vocational rehabilitation, approved projects, and contractual arrangements authorized under the Vocational Rehabilitation Act will be recognized under comparable provisions of this Act so that there is no disruption of ongoing activities for which there is continuing authority.

Unused funds.

Savings provision.

Appropriations, extension.

(b) The authorizations of appropriations in the Vocational Rehabilitation Act are hereby extended at the level specified for the fiscal year 1972 for the fiscal year 1973.

EMPLOYMENT OF HANDICAPPED INDIVIDUALS

Interagency Committee on Handicapped Employees. Establishment.

83 Stat. 864. 5 USC 5315 note.

SEC. 501. (a) There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Civil Service Commission, the Administrator of Veterans' Affairs, and the Secretaries of Labor and Health, Education, and Welfare. The Secretary of Health, Education, and Welfare and the Chairman of the Civil Service Commission shall serve as co-chairmen of the Committee. The resources of the President's Committees on Employment of the Handicapped and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of handicapped individuals, and to review, on a periodic basis, in cooperation with the Civil Service Commission, the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Civil Service Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Civil Service Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Civil Service Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

Committee functions.

Federal agencies, affirmative action program plans.

(b) Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after the date of enactment of this Act, submit to the Civil Service Commission

and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

Rehabilitated individuals, employment.

(c) The Civil Service Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for handicapped individuals, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

Report to congressional committees.

(d) The Civil Service Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of handicapped individuals by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Civil Service Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the Civil Service Commission's activities under subsections (b) and (c) of this section.

Unpaid Federal work experience.

(e) An individual who, as a part of his individualized written rehabilitation program under a State plan approved under this Act, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

Federal agency cooperation.

(f) (1) The Secretary of Labor and the Secretary of Health, Education, and Welfare are authorized and directed to cooperate with the President's Committee on Employment of the Handicapped in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of the Handicapped, special consideration shall be given to qualified handicapped individuals.

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Establishment; membership.

SEC. 502. (a) There is established within the Federal Government the Architectural and Transportation Barriers Compliance Board (hereinafter referred to as the "Board") which shall be composed of the heads of each of the following departments or agencies (or their designees whose positions are Executive Level IV or higher):

83 Stat. 864. 5 USC 5315 note.

(1) Department of Health, Education, and Welfare;
(2) Department of Transportation;
(3) Department of Housing and Urban Development;
(4) Department of Labor;

(5) Department of the Interior;
(6) General Services Administration;
(7) United States Postal Service; and
(8) Veterans' Administration.

(b) It shall be the function of the Board to: (1) insure compliance with the standards prescribed by the General Services Administration, the Department of Defense, and the Department of Housing and Urban Development pursuant to the Architectural Barriers Act of 1968 (Public Law 90-480), as amended by the Act of March 5, 1970 (Public Law 91-205); (2) investigate and examine alternative approaches to the architectural, transportation, and attitudinal barriers confronting handicapped individuals, particularly with respect to public buildings and monuments, parks and parklands, public transportation (including air, water, and surface transportation whether interstate, foreign, intrastate, or local), and residential and institutional housing; (3) determine what measures are being taken by Federal, State, and local governments and by other public or nonprofit agencies to eliminate the barriers described in clause (2) of this subsection; (4) promote the use of the International Accessibility Symbol in all public facilities that are in compliance with the standards prescribed by the Administrator of the General Services Administration, the Secretary of Defense, and the Secretary of Housing and Urban Development pursuant to the Architectural Barriers Act of 1968; (5) make to the President and to Congress reports which shall describe in detail the results to its investigations under clauses (2) and (3) of this subsection; and (6) make to the President and to the Congress such recommendations for legislation and administration as it deems necessary or desirable to eliminate the barriers described in clause (2) of this subsection.

82 Stat. 718; 84 Stat. 49. 42 USC 4151.

International Accessibility Symbol, promotion.

Reports to President and Congress.

Transportation barriers.

(c) The Board shall also (1) (A) determine how and to what extent transportation barriers impede the mobility of handicapped individuals and aged handicapped individuals and consider ways in which travel expenses in connection with transportation to and from work for handicapped individuals can be met or subsidized when such individuals are unable to use mass transit systems or need special equipment in private transportation, and (B) consider the housing needs of handicapped individuals; (2) determine what measures are being taken, especially by public and other nonprofit agencies and groups having an interest in and a capacity to deal with such problems, (A) to eliminate barriers from public transportation systems (including vehicles used in such systems), and to prevent their incorporation in new or expanded transportation systems and (B) to make housing available and accessible to handicapped individuals or to meet sheltered housing needs; and (3) prepare plans and proposals for such further actions as may be necessary to the goals of adequate transportation and housing for handicapped individuals, including proposals for bringing together in a cooperative effort, agencies, organizations, and groups already working toward such goals or whose cooperation is essential to effective and comprehensive action.

(d) In carrying out its functions under this section, the Board shall conduct investigations, hold public hearings, and issue such orders as it deems necessary to insure compliance with the provisions of the Acts cited in subsection (b). The provisions of subchapter II of chapter 5. and chapter 7 of title 5, United States Code, shall apply to procedures under this section, and an order of compliance issued by the Board shall be a final order for purposes of judicial review.

5 USC 551, 701.

(e) The Board is authorized to appoint as many hearing examiners as are necessary for proceedings required to be conducted under this section. The provisions applicable to hearing examiners appointed under section 3105 of title 5, United States Code, shall apply to hearing examiners appointed under this subsection. 80 Stat. 415.

(f) The departments or agencies specified in subsection (a) of this section shall make available to the Board such technical, administrative, or other assistance as it may require to carry out its functions under this section, and the Board may appoint such other advisers, technical experts, and consultants as it deems necessary to assist it in carrying out its functions under this section. Special advisory and technical experts and consultants appointed pursuant to this subsection shall, while performing their functions under this section, be entitled to receive compensation at rates fixed by the Secretary, but not exceeding the daily pay rate, for a person employed as a GS–18 under section 5332 of title 45, United States Code, including traveltime, and while serving away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of such title 5 for persons in the Government service employed intermittently. Technical assistance. 5 USC 5332 note. 80 Stat. 499; 83 Stat. 190.

(g) The Board shall, at the end of each fiscal year, report its activities during the preceding fiscal year to the Congress. Such report shall include an assessment of the extent of compliance with the Acts cited in subsection (b) of this section, along with a description and analysis of investigations made and actions taken by the Board, and the reports and recommendations described in clauses (5) and (6) of subsection (b) of this section. The Board shall prepare two final reports of its activities under subsection (c). One such report shall be on its activities in the field of transportation barriers to handicapped individuals, and the other such report shall be on its activities in the field of the housing needs of handicapped individuals. The Board shall, prior to January 1, 1975, submit each such report, together with its recommendations, to the President and the Congress. The Board shall also prepare for such submission an interim report of its activities in each such field within 18 months after the date of enactment of this Act. Report to Congress. Report to the President and Congress.

(h) There are authorized to be appropriated for the purpose of carrying out the duties and functions of the Board under this section $1,000,000 each for the fiscal years ending June 30, 1974, and June 30, 1975. Appropriation.

EMPLOYMENT UNDER FEDERAL CONTRACTS

SEC. 503. (a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons, to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 7(6). The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after the date of enactment of this section. *Ante*, p. 361.

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals,

such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

Waiver authority.

(c) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which he shall prescribe, when he determines that special circumstances in the national interest so require and states in writing his reasons for such determination.

NONDISCRIMINATION UNDER FEDERAL GRANTS

SEC. 504. No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Ante, p. 361.

Approved September 26, 1973.

FACT SHEET: WHO ARE THE HANDICAPPED?

U.S. Department of Labor
Employment Standards Administration
Washington, D.C. 20210

What is the universe of handicapped people? The world handicapped population is estimated at over 300 million. The known handicapped population of the United States is over 20 million. A conservative estimate places the number of handicapped persons of work force age (16 through 64) at 5½ million. This probably doesn't include people with cancer, heart disease, diabetes and many other diseases which are barriers to employment.

What are the handicaps of work force age Americans?

Handicap	No. of people
Paralysis (muscular-skeletal)	5,400,000
Mentally retarded	3,500,000
Mentally restored	250,000
Hearing loss (not total)	2,000,000
Total deafness	250,000
Epileptic	2,000,000
Blind	700,000
Kidney failure	450,000
Amputee	200,000

What percentage of the handicapped are working? A far greater portion of the nonhandicapped than of the handicapped are in the labor force. Of our total population, 53 percent are employed; only 42 percent of the handicapped are employed. Seventy percent of all males have jobs while 58 percent of handicapped males are employed. Thirty-eight percent of all women are employed while only 24 percent of handicapped women are employed.

How can the U.S. Department of Labor help qualified handicapped workers? The Employment Standards Administration administers Section 503 of the Rehabilitation Act of 1973. Section 503 requires any employer with a federal government contract or subcontract of more than $2,500 to take affirmative action to hire and advance the handicapped.

For more information contact the U.S. Department of Labor, Employment Standards Administration office nearest you.

(over)

Where are the handicapped found?

Region	In Labor Force	NOT in Labor Force (Able to Work)	Total Handicapped
I (R.I.,Conn., Mass.,N.H., Vt.,Maine)	313,536	76,452	389,988
II (N.J.,N.Y., Canal Zone, P.R.,V.I.)	622,733	173,430	796,163
III (Va.,W. Va., D.C.,Md.,Del., Pa.)	600,497	177,704	778,201
IV (Ala.,Miss., Fla.,Ga.,S.C., N.C.,Ky.,Tenn.)	917,775	288,036	1,205,811
V (Ill.,Ind., Mich.,Minn., Ohio, Wis.)	1,212,603	363,876	1,576,479
VI (La.,Ark., Okla.,Tex., N.M.)	576,646	174,541	751,187
VII (Iowa,Kan., Mo.,Neb.)	324,176	86,871	411,047
VIII (Mont.,N.D., S.D.,Colo.,Wyo., Utah)	158,061	44,241	202,302
IX (Ariz.,Nev., Calif.,Hawaii)	661,770	216,551	878,321
X (Alaska,Wash. Ore.,Idaho)	207,673	67,459	275,132
TOTALS	5,595,470	1,669,161	7,264,631

Statistical sources: 1970 U.S. Census, the President's Committee on Employment of the Handicapped, National Easter Seals and Lawrence Berkley Laboratory

TITLE IV—VETERANS, WIVES, AND WIDOWS EMPLOYMENT ASSISTANCE AND PREFERENCE AND VETERANS' REEMPLOYMENT RIGHTS

SEC. 401. Chapter 41 of title 38, United States Code, is amended as follows:

(a) Section 2001 is amended by redesignating paragraph (2) as paragraph (3) and adding after paragraph (1) a new paragraph (2) as follows:

"Eligible person."

"(2) the term 'eligible person' means—

"(A) the spouse of any person who died of a service-connected disability,

"(B) the spouse of any member of the Armed Forces serving on active duty who, at the time of application for assistance under this chapter, is listed, pursuant to section 556 of title 37 and regulations issued thereunder, by the Secretary concerned in one or more of the following categories and has been so listed for a total of more than ninety days: (i) missing in action, (ii) captured in line of duty by a hostile force, or (iii) forcibly detained or interned in line of duty by a foreign government or power, or

"(C) the spouse of any person who has a total disability permanent in nature resulting from a service-connected disability or the spouse of a veteran who died while a disability so evaluated was in existence.".

38 USC 2002. (b) Section 2002 is amended by (1) inserting "and eligible persons" after "eligible veterans" and (2) inserting "and persons" after "such veterans".

38 USC 2003. (c) Section 2003 is amended by—

(1) striking out in the first sentence "250,000 veterans" and inserting in lieu thereof "250,000 veterans and eligible persons";

(2) striking out in the fourth sentence "veterans' " and inserting in lieu thereof "veterans' and eligible persons' ";

(3) inserting in clauses (1), (2), (4), (5), and (6) of the fifth sentence "and eligible persons" after "eligible veterans" each time the latter term appears in such clauses;

(4) inserting in clause (3) of the fifth sentence "or an eligible person's" after "eligible veteran's"; and

(5) inserting in clause (4) of the fifth sentence "and persons" after "such veterans".

38 USC 2005. (d) Section 2005 is amended by inserting "and eligible persons" after "eligible veterans".

(e) The last sentence of section 2006(a) is amended by striking out "veterans" and inserting in lieu thereof "eligible veterans and eligible persons".

38 USC 2007. (f) Section 2007 is amended by—

(1) inserting in subsection (a)(1) "and each eligible person" after "active duty,";

(2) redesignating subsection (b) as subsection (c) and inserting the following new subsection (b):

"(b) The Secretary of Labor shall establish definitive performance standards for determining compliance by the State public employment service agencies with the provisions of this chapter and chapter 42 of this title. A full report as to the extent and reasons for any noncompliance by any such State agency during any fiscal year, together with the agency's plan for corrective action during the succeeding year, shall be included in the annual report of the Secretary of Labor required by subsection (c) of this section."; and

Performance standards.

38 USC 2011.

(3) striking out in the second sentence of subsection (c) (as redesignated by clause (2) of this subsection) "and other eligible veterans" and inserting in lieu thereof "other eligible veterans, and eligible persons".

SEC. 402. Chapter 42 of title 38, United States Code, is amended as follows:

(1) by inserting in the first sentence of section 2012(a) "in the amount of $10,000 or more" after "contract" where it first appears, by striking out ", in employing persons to carry out such contract," in such sentence, and by striking out "give special emphasis to the employment of" and inserting in lieu thereof "take affirmative action to employ and advance in employment" in such sentence;

Employment under Federal contracts.

38 USC 2012.

(2) by striking out in the third sentence of section 2012(a) "The" and inserting in lieu thereof "In addition to requiring affirmative action to employ such veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the"; and

(3) by striking out in the first sentence of section 2012(b) "giving special emphasis in employment to" and inserting in lieu thereof "the employment of".

SEC. 403. (a) Chapter 42 of title 38, United States Code, is amended by adding at the end thereof the following new section:

"§ 2014. Employment within the Federal Government

"(a) It is the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for qualified disabled veterans and veterans of the Vietnam era.

"(b) To further this policy, veterans of the Vietnam era shall be eligible, in accordance with regulations which the Civil Service Commission shall prescribe, for veterans readjustment appointments up to and including the level GS–5, as specified in subchapter II of chapter 51 of title 5, and subsequent career-conditional appointments, under the terms and conditions specified in Executive Order Numbered 11521 (March 26, 1970), except that in applying the one-year period of eligibility specified in section 2(a) of such order to a veteran or disabled veteran who enrolls, within one year following separation from the Armed Forces or following release from hospitalization or treatment immediately following separation from the Armed Forces, in a program of education (as defined in section 1652 of this title) on more than a half-time basis (as defined in section 1788 of this title), the time spent in such program of education (including customary periods of vacation and permissible absences) shall not be counted. The eligibility of such a veteran for a readjustment appointment shall continue for not less than six months after such veteran first ceases to be enrolled therein on more than a half-time basis. No veterans readjustment appointment may be made under authority of this subsection after June 30, 1978.

Veterans readjustment appointments, eligibility.

5 USC 5332 and note.

5 USC 3302 note.

38 USC 1652, Ante, p. 1581.

38 USC 1788.

Termination date.

88 STAT. 1594

Disabled veterans.

"(c) Each department, agency, and instrumentality in the executive branch shall include in its affirmative action plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality as required by section 501(b) of Public Law 93-112 (87 Stat. 391), a separate specification of plans (in accordance with regulations which the Civil Service Commission shall prescribe in consultation with the Administrator, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, consistent with the purposes, provisions, and priorities of such Act) to promote and carry out such affirmative action with respect to disabled veterans in order to achieve the purpose of this section.

29 USC 791.

Review and evaluation.

"(d) The Civil Service Commission shall be responsible for the review and evaluation of the implementation of this section and the activities of each such department, agency, and instrumentality to carry out the purpose and provisions of this section. The Commission shall periodically obtain and publish (on at least a semiannual basis) reports on such implementation and activities from each such department, agency, and instrumentality, including specification of the use and extent of appointments made under subsection (b) of this section and the results of the plans required under subsection (c) thereof.

Reports, publication.

Report to Congress.

"(e) The Civil Service Commission shall submit to the Congress annually a report on activities carried out under this section, except that, with respect to subsection (c) of this section, the Commission may include a report of such activities separately in the report required to be submitted by section 501(d) of such Public Law 93-112, regarding the employment of handicapped individuals by each department, agency, and instrumentality.

"Veteran" and "disabled veteran."

"(f) Notwithstanding section 2011 of this title, the terms 'veteran' and 'disabled veteran' as used in this section shall have the meaning provided for under generally applicable civil service law and regulations.".

(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof

"2014. Employment within the Federal Government.".

38 USC 2011.

SEC. 404. (a) Part III of title 38, United States Code, is amended by adding at the end thereof a new chapter as follows:

"Chapter 43—Veterans' Reemployment Rights

"Sec.
"2021. Right to reemployment of inducted persons; benefits protected.
"2022. Enforcement procedures.
"2023. Reemployment by the United States, territory, possession, or the District of Columbia.
"2024. Rights of persons who enlist or are called to active duty; Reserves.
"2025. Assistance in obtaining reemployment.
"2026. Prior rights for reemployment.

"§ 2021. Right to reemployment of inducted persons; benefits protected

"(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

50 USC app. 451.

50 USC app. 459.

"(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall— U.S. Government employment.

"(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

"(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

"(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall— State or private employment.

"(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

"(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be offered employment and, if such person so requests, be employed by such employer or his successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter. Noncompliance of employer.

"(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

"(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in his employment as he would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment. Status rights.

Reserve component members.

"(3) Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

State employee.

"(c) The rights granted by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.

"§ 2022. Enforcement procedures

"If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021 (a), (b) (1), or (b) (3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to any proceedings under this chapter.

Ante, p. 1594.
Post, p. 1598.

Hearing.

"§ 2023. Reemployment by the United States, territory, possession, or the District of Columbia

"(a) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 2021(a) and who was employed, immediately before entering the Armed Forces, by any agency in the executive branch of the Government or by any territory or possession, or political subdivision thereof, or by the District of Columbia, shall be so restored or reemployed by such agency or the successor to its functions, or by such territory, possession, political subdivision, or the District of Columbia. In any case in which, upon appeal of any person who was employed, immediately before entering the Armed Forces, by any agency in the executive branch of the Government or by the District of Columbia, the United States Civil Service Commission finds that—

Ante, p. 1594.

"(1) such agency is no longer in existence and its functions have not been transferred to any other agency; or

"(2) for any reason it is not feasible for such person to be restored to employment by such agency or by the District of Columbia.

the Commission shall determine whether or not there is a position in any other agency in the executive branch of the Government or in the government of the District of Columbia for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the Commission determines that there is such a position, such person shall be offered employment and, if such person so requests, be employed in such position by the agency in which such position exists or by the government of the District of Columbia, as the case may be. The Commission is authorized and directed to issue regulations giving full force and effect to the provisions of this section insofar as they relate to persons entitled to be restored to or employed in positions in the executive branch of the Government or in the government of the District of Columbia, including persons entitled to be reemployed under the last sentence of subsection (b) of this section. The agencies in the executive branch of the Government and the government of the District of Columbia shall comply with such rules, regulations, and orders issued by the Commission pursuant to this subsection. The Commission is authorized and directed whenever it finds, upon appeal of the person concerned, that any agency in the executive branch of the Government or the government of the District of Columbia has failed or refuses to comply with the provisions of this section, to issue an order specifically requiring such agency or the government of the District of Columbia to comply with such provisions and to compensate such person for any loss of salary or wages suffered by reason of failure to comply with such provisions, less any amounts received by such person through other employment, unemployment compensation, or readjustment allowances. Any such compensation ordered to be paid by the Commission shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions, and shall be paid by the head of the agency concerned or by the government of the District of Columbia out of appropriations currently available for salary and expenses of such agency or government, and such appropriations shall be available for such purpose. As used in this chapter, the term 'agency in the executive branch of the Government' means any department, independent establishment, agency, or corporation in the executive branch of the United States Government (including the United States Postal Service and the Postal Rate Commission).

Regulations.

Compliance order; compensation for loss of wages.

"Agency in the executive branch of the Government."

"(b) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 2021(a), and who was employed, immediately before entering the Armed Forces, in the legislative branch of the Government, shall be so restored or employed by the officer who appointed such person to the position which such person held immediately before entering the Armed Forces. In any case in which it is not possible for any such person to be restored to or employed in a position in the legislative branch of the Government and such person is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(c) of title 5, the United States Civil Service Commission shall, upon appeal of such person, determine

Restoration to legislative position.

Ante, p. 1594.

Transfer to executive position.

whether or not there is a position in the executive branch of the Government for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the Commission determines that there is such a position, such person shall be offered employment and, if such person so requests, be employed in such position by the agency in which such position exists.

Restoration to judicial position. Ante, p. 1594.

"(c) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 2021(a) and who was employed, immediately before entering the Armed Forces, in the judicial branch of the Government, shall be so restored or reemployed by the officer who appointed such person to the position which such person held immediately before entering the Armed Forces.

"§ 2024. Rights of persons who enlist or are called to active duty; Reserves

"(a) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enlists in the Armed Forces of the United States (other than in a Reserve component) shall be entitled upon release from service under honorable conditions to all of the reemployment rights and other benefits provided for by this section in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such person's service performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any service, additional or otherwise, performed by such person after August 1, 1961, does not exceed five years, and if the service in excess of four years after August 1, 1961, is at the request and for the convenience of the Federal Government (plus in each case any period of additional service imposed pursuant to law).

50 USC app. 451.

"(b)(1) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enters upon active duty (other than for the purpose of determining physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon such person's relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided for by this chapter in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which such person was unable to obtain orders relieving such person from active duty).

"(2) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for

reemployment rights under subsection (b)(1) of this section extended by such member's period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component. With respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended, the provisions of this subsection shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

Additional active duty.

"(c) Any member of a Reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than three consecutive months shall, upon application for reemployment within thirty-one days after (1) such member's release from such active duty for training after satisfactory service, or (2) such member's discharge from hospitalization incident to such active duty for training, or one year after such member's scheduled release from such training, whichever is earlier, be entitled to all reemployment rights and benefits provided by this chapter for persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), except that (A) any person restored to or employed in a position in accordance with the provisions of this subsection shall not be discharged from such position without cause within six months after that restoration, and (B) no reemployment rights granted by this subsection shall entitle any person to retention, preference, or displacement rights over any veteran with a superior claim under those provisions of title 5 relating to veterans and other preference eligibles.

Duty for less than three months.

50 USC app. 451.

Six-month discharge period.

5 USC 101 et seq.

"(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty training, whichever is earlier. If an employee

Leave of absence for active or inactive duty training.

Ante, p. 1594.

covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or his successor in interest, such employee shall be offered employment and, if such person so requests, be employed by that employer or his successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.

Induction period considered as leave of absence.

"(e) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall be considered as having been on leave of absence during the period required to report for the purpose of being inducted into, entering, or determining, by a preinduction or other examination, physical fitness to enter the Armed Forces. Upon such employee's rejection, upon completion of such employee's preinduction or other examination, or upon such employee's discharge from hospitalization incident to such rejection or examination, such employee shall be permitted to return to such employee's position in accordance with the provisions of subsection (d) of this section.

Ante, p. 1594.

Active and inactive duty training.

"(f) For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under section 316, 503, 504, or 505 of title 32, is considered active duty for training; and for the purpose of subsection (d) of this section, inactive duty training performed by that member under section 502 of title 32 or section 206, 301, 309, 402, or 1002 of title 37, is considered inactive duty training.

"§ 2025. Assistance in obtaining reemployment

"The Secretary of Labor, through the Office of Veterans' Reemployment Rights, shall render aid in the replacement in their former positions or reemployment of persons who have satisfactorily completed any period of active duty in the Armed Forces or the Public Health Service. In rendering such aid, the Secretary shall use existing Federal and State agencies engaged in similar or related activities and shall utilize the assistance of volunteers.

"§ 2026. Prior rights for reemployment

"In any case in which two or more persons who are entitled to be restored to or employed in a position under the provisions of this chapter or of any other law relating to similar reemployment benefits left the same position in order to enter the Armed Forces, the person who left such position first shall have the prior right to be restored thereto or reemployed on the basis thereof, without prejudice to the reemployment rights of the other person or persons to be restored or reemployed.".

(b) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part III of such title are each amended by adding at the end thereof

"43. Veterans' Reemployment Rights..... 2021".

50 USC app. 459.

SEC. 405. Section 9 of the Military Selective Service Act is amended by—

Repeal.

(1) repealing subsections (b) through (h); and

(2) redesignating subsections (i) and (j) as subsections (b) and (c), respectively.

Executive Order 11141 Declaring Policy Against Discrimination Based on Age

Text of Executive Order 11141 signed by President Johnson February 13, 1964.

WHEREAS the principle of equal employment opportunity is now an established policy of our Government and applies equally to all who wish to work and are capable of doing so; and

WHEREAS discrimination in employment because of age, except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement, is inconsistent with that principle and with the social and economic objectives of our society; and

WHEREAS older workers are an indispensable source of productivity and experience which our Nation can ill afford to lose; and

WHEREAS, President Kennedy, mindful that maximum national growth depends on the utilization of all manpower resources, issued a memorandum on March 24, 1963, reaffirming the policy of the Executive Branch of the Government of hiring and promoting employees on the basis of merit alone and emphasizing the need to assure that older people are not discriminated against because of their age and receive fair and full consideration for employment and advancement in Federal employment; and

WHEREAS, to encourage and hasten the acceptance of the principle of equal employment opportunity for older persons by all sectors of the economy, private and public, the Federal Government can and should provide maximum leadership in this regard by adopting that principle as an express policy of the Federal Government not only with respect to Federal employees but also with respect to persons employed by contractors and subcontractors engaged in the performance of Federal contracts;

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States and as President of the United States, I hereby declare that it is the policy of the Executive Branch of the Government that (1) contractors and subcontractors engaged in the performance of Federal contracts shall not, in connection with the employment, advancement, or discharge of employees, or in connection with the terms, conditions, or privileges of their employment, discriminate against persons because of their age except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement, and (2) that contractors and subcontractors, or persons acting on their behalf, shall not specify, in solicitations or advertisements for employees to work on Government contracts, a maximum age limit for such employment unless the specified maximum age limit is based upon a bona fide occupational qualification, retirement plan, or statutory requirement. The head of each department and agency shall take appropriate action to enunciate this policy, and to this end the Federal Procurement Regulations and the Armed Services Procurement Regulation shall be amended by the insertion therein of a statement giving continuous notice of the existence of the policy declared by this order.

E.O. 11478 on Nondiscrimination in Federal Government

Text of Executive Order 11478, signed by President Nixon August 8, 1969, prohibiting discrimination in federal employment on account of race, color, religion, sex, or national origin. These provisions supersede Part I of Executive Order 11246, as amended by Executive Order 11375.

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Sec. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in acordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

Sec. 3. The Civil Service Commission shall provide leadership and guidance to departments and agencies in the conduct of equal employment opportunnity programs for the civilian employees of and applicants for employment within the executive departments and agencies in order to assure that personnel operations in Government departments and agencies carry out the objective of equal opportunity for all persons. The Commission shall review and evaluate agency program operations periodically, obtain such reports from departments and agencies as it deems necessary, and report to the President as appropriate on overall progress. The Commission will consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal

program and realizing the objectives of this Order.

Sec. 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

Sec. 5. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out this Order and assure that the executive branch of the Government leads the way as an equal opportunity employer, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Order.

Sec. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

Sec. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

EQUAL PAY ACT OF 1963

(Full text is found in appendix under this tab)

I. INTRODUCTION

Legislation of a controversial nature, if to be enacted at all, requires compromise. The Equal Pay Act of 1963 therefore was enacted with the usual attributes of congressional compromise; ambiguous language is left to the courts to resolve. (The same holds true for Title VII of the Civil Rights Act of 1964.)

In a precedent-setting decision, the U.S. Court of Appeals, Third Circuit stated:

> The (Equal Pay) Act was the culmination of many years of striving to eliminate discrimination in pay because of sex. Similar bills were before Congress for many years before the Act ultimately was adopted, and in its final form it bears evidence of the competing tendencies which surrounded its birth. There are problems of construction which leap up from the reading of its language.... a study of its legislative history and the bills which preceded it yields little guidance in the construction of its provisions in concrete circumstances.

This Court held:

> ... Congress in prescribing "equal" work did not require that the jobs be identical, but only that they must be substantially equal. Any other interpretation would destroy the remedial purposes of the Act (underscore added).
> (Shultz v. Wheaton Glass Co., 421 F. 2d 259, 1970. Review denied by U.S. Supreme Court, 398 US 905, 1970.)

The law provides that wage differentials based on sex must be eliminated by raising the pay of the lower-rated employees, not by reducing the pay of the higher-rated employee.

The EPA was incorporated into an existing law, Section 6 (d) of the Fair Labor Standards Act of 1938 (FLSA)--(federal minimum wage-overtime protection law). The federal equal pay law is enforced by the Wage and Hour Division of the Employment Standards Division, Department of Labor.

II. COVERAGE

Employee coverage under the equal pay act is based on coverage under the Fair Labor Standards Act.

If an employee is covered under the federal minimum wage law (FLSA), then that employee is automatically covered under the Equal Pay Act.

There have always been four job categories exempted from FLSA coverage: professional, executive, administrative, and outside salesperson. However, they are now covered under the Equal Pay Law. Title IX of the Education Amendments of 1972 amended the FLSA to include them under the EPA. They still remain exempt under the federal minimum wage and overtime requirements.

Before 1966, the Equal Pay Act covered only private sector employees. In 1966, certain public employees came under FLSA and EPA coverage: employees of hospitals, nursing homes or schools operated by states or political subdivisions, and local transit systems. This inclusion of these public employees survived a constitutional challenge.

Subsequently, in 1974, the amendments to the FLSA provided for equal pay coverage of most federal employees and those non-supervisory state and local employees who were not covered in 1966. Excluded from coverage:

(1) elected officials and their personal staff;

(2) appointees on the policy-making level;

(3) immediate advisors with respect to the exercise of the constitutional or legal powers of the office.

The FLSA, and consequently the equal pay provisions, for state and local government employees brought under 1974 coverage has not been applied as a result of a constitutional challenge. The Supreme Court granted a stay of application until it comes down with a decision as to whether the Federal Government can regulate state and local governments in this area.

III. DEFINITIONS

A. Meaning of "Establishment"

Wage comparisons are made only between employees of the opposite sex within the same establishment. Rates paid in different establishments are not compared. The term "establishment" refers to a "distinct physical place of business or enterprise" which may include several plants, offices or stores. For example, the Wage-Hour Administrator found two divisions which were "semi-autonomous" -- i.e., had their own building, management and payroll -- to be separate establishments when:

(a) each is physically separated from the other's activities.

(b) they are functionally operated as separate units, having separate records and bookkeeping.

(c) there is no interchange of employees between the units - except on a minimal or emergency basis. Wage-Hour opinion letter, June 17, 1966)

B. Meaning of "Wages"

In comparing wages paid male and female employees, the term "wages" is considered to have the same meaning it has elsewhere in the FLSA. In general, wages will include "all payments made to or on behalf of the employee as remuneration for employment." It includes all rates whether calculated on a time, price of job, incentive or other basis, as well as the rate at which overtime is compensated. In the case of overtime, the Wage-Hour Administrator stated that although the use of different methods to compute overtime pay for men and women would not in itself be a violation of the EPA, the results must provide equal pay for equal work. (Wage-Hour Opinion Letter, December 14, 1964)

Vacation and holiday pay and premium pay are also considered "remuneration for employment" and must be considered in applying the equal pay provisions of the EPA.

1. Pension and Insurance Benefits

If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the EPA will result from such payments, even though the

benefits which accrue to the employees in question are greater for one sex than for the other. Or, if the employer makes unequal contributions for employees of opposite sexes, there is no violation of the equal pay provisions if the resulting benefits are equal for all employees.

2. Maternity Benefits

Payments related to maternity which are made by an employer to an employee do not constitute remuneration for employment and are beyond the scope of the equal pay provisions of the EPA. (Wage-Hour Opinion Letter, June 29, 1966)

IV. TESTS FOR DETERMINING THE EQUALITY OF JOBS

A. Equal Work

The EPA expressly forbids wage discrimination on the basis of sex when male and female employees perform equal work on jobs within the same establishment requiring "equal skill, effort and responsibility, and which are performed under similar working conditions."

The U.S. Court of Appeals (Third Circuit) has ruled that the term "equal work" does not require that jobs be identical, but that they be substantially equal in terms of skill, effort and responsibility. The court found the employer in violation of the EPA for basing wage differentials on an artificially created job classification apparently established to keep women in a subordinate role. (Schultz v. Wheaton Glass Co., 421 F. 2d. 259, cert. denied, 398 U.S. 905, 1970).

The decisions in Wheaton Glass and American Can have been influential in subsequent court decisions involving the equal work requirement.

B. Equal Skill

The criterion of equal skill has been specified to include such factors as experience, training, education, and ability. Skill applies only to performance requirements of the positions under consideration and not to skills which the employee may have, but which are not necessary to perform the job.

In hospital cases, the courts generally have found the work of female nursing aids and male orderlies to be equal within the meaning of the EPA since the additional duties, responsibilities or weight-lifting of the orderlies were not substantial. (Brennar v. Owensboro-Daviess County Hospital CA 6 (1975), 22 WH Cases 513; Brennan v. Prinie William Hospital CA 4 (1974), 21 WH Cases 1017, Brennan v. St. Luke Hospital USDC ED Kennedy (1973) 21 WH Cases 392).

The Fifth Circuit Court of Appeals has noted that the issue of equal skill should be decided on a case-by-case basis. In one case the court found that a wage differential between aides and orderlies was justified because the jobs were not equal (Hodgson v. Golden Isle Nursing Home, Inc., 20 WH cases 951, 1973). In another case the same court found that the two jobs were equal (Hodgson v. Brookhaven General Hospital, 70 WH Cases 991, 1972).

C. Equal Effort

Equal effort deals with the measurement of the physical or mental exertion needed for the performance of a job. Two jobs may require equal effort even though the effort may be exerted in different ways. Also, jobs do not involve equal effort under the EPA, even though they include most of the same routine duties,

if the more highly paid job involves additional tasks that:

(1) require extra effort;

(2) consume a significant amount of the time of all those whose pay differentials are to be justified in terms of them;

(3) and are of an economic value commensurate with the pay differential (Hodgson v. Brookhaven General Hospital CA 5 1970, 19 WH Cases 822).

Further, the occasional sporadic performance of an activity which may require extra exertion is not alone sufficient to justify a finding of unusual effort.

Example:

A supermarket may pay more to male clerks who spend 20 percent of their time as clerks, while women do clerking the entire time. If the women spend 20 percent of their time performing "light cleaning and light stocking work" while men do the heavy lifting, the difference in effort would have to be proved to be "so substantially different as to render the jobs as a whole unequal," in order to justify a wage differential. (Wage and Hour Opinion Letter, June 3, 1964)

D. Equal Responsibility

This criterion has been interpreted as the degree of accountability required in the performance of the job with emphasis on the importance of the job obligation. If jobs are otherwise equal, a minor or insignificant difference in the degree of responsibility does not make them unequal.

Examples

A wage differential may be justified for:

(1) an employee who is required to assume supervisory responsibilities in the absence of the regular supervisor;
(2) a sales clerk who is authorized to accept customers' personal checks. But minor differences such as the responsibility for turning out lights or locking up at the end of the day do not justify a wage differential.

E. Similar Working Conditions

In applying the test on similar working conditions, a practical judgment is required as to whether the differences are the kind customarily considered in setting wage levels. The fact that jobs are being performed in different departments does not establish dissimilarity of working conditions.

Example:

Working conditions would apparently be dissimilar when some employees do the majority of their work outside the establishment while others do most of their work on the inside.

The U.S. Supreme Court's first direct review of the EPA was concerned with the definition of working conditions under the EPA. The Court found that "working conditions" encompass physical surroundings and hazards, but not the time of day worked, i.e., shift work. However, the Court pointed out that it was not questioning the right to establish "nondiscriminatory shift differentials" as long as they did not operate as an "added payment based on sex." A night rate differential would not of itself violate the EPA, but in the present case the pay differential "arose simply because men would not work at the low rates paid women inspectors," and therefore it violated the Act. (Corning Glass Works v. Brennan, 21 WH Cases 767, 1974).

V. EXCEPTIONS TO THE EQUAL PAY STANDARD

The Act specifically provides that there are circumstances under which unequal wages may be paid. Unequal wages can be justified when they are based on:

(1) a bona fide seniority system;

(2) a merit system;

(3) a system which measures earnings by quantity or quality of production;

(4) any factor other than sex.

The employer bears the burden of proof to show that the unequal wages were the result of one of these factors.

The first three exceptions are not restricted to, although they include, formal systems or plans that are reduced to writing. Formal plans may, of course, provide better evidence of the actual factors which establish a basis for a wage differential, but informal or unwritten systems and plans may qualify under the EPA if it can be demonstrated that the standards or criteria upon which the wage differential is based are applied pursuant to an established plan, the essential terms and conditions of which have been communicated to the affected employees.

To qualify for the exceptions, however, the plans or systems must not base the wage differentials in any way on sex. Any plan that establishes separate and different "male" and "female" rates

without regard to job content will be carefully scrutinized by the Wage and Hour Division of the Department of Labor to determine if the rate differentials are sex-based and in violation of the law.

When applied without distinction to employees of both sexes, shift differentials, incentive payments, production bonuses, performance and longevity raises and the like will not result in equal pay violations. The same is true for "red circle" rates, rates paid on temporary reassignments, entrance rates paid under training programs, and rates paid to part-time employees.

Application of Exceptions to the Equal Pay Standard

A. "Red Circle" Rates

The term "red circle" rates describes certain higher than normal wage rates which are maintained for many reasons. For example, when a company decides to replace its separate male-female wage scales with a single rate for all workers. A number of males would be downgraded to lower pay scales, but to avoid wage reductions the company would "red circle" the rates of the downgraded male workers. Job content would be the controlling factor in determining the legality of the new wage scale. If the work involved under the former, separate pay scales wasn't comparable, the new wage rate would be valid because the differential was based on a factor other than sex. But if the work is and has been comparable, "red circling" male rates to accommodate an original wage disparity based on sex would violate the EPA. Policies contrary to the EPA will not be upheld merely because they appear in a union contract or have been established by past practice.

B. Training Programs

Employees in a bona fide training program may, in the furtherance of their training, be assigned to various types of work. For example, the trainee may be performing equal work with nontrainees of the opposite sex whose wages are higher than those of the trainee. Such a wage differential would be attributable to a factor other than sex and there would be no violation of the equal pay standard. Training programs which appear to be available only to employees of one sex will be carefully examined to determine whether they are, in fact, bona fide. Where a differential is paid to employees of one sex because, traditionally, only they have been considered eligible for promotion to executive positions, such a practice in the absence of a bona fide training program would be sex-based discrimination and hence unlawful.

C. Head of Household Differentials

Higher wages for heads of households may be lawful, but only if females have the same opportunity as males to qualify for the designation. Such a differential bears no relationship to job requirements or job performance. Therefore, the head-of-household status does not automatically qualify as a "factor other than sex" on which a pay differential may be based. According to the Wage and Hour Division, wage differentials based on this factor tend to be paid to males only, even though women may bear equal or greater financial responsibility as "head of household."

D. Part-time employees

Part-time workers do not have to be paid the same wage as full-time workers of the opposite sex so long as the difference in working time is the basis for the pay differential or the pay practice is applied uniformly to both sexes. Different rates for part-time work are usually based on workweeks of 20 hours or less.

E. Employment Cost Factors

A wage differential based on claimed differences between the average cost of employing women workers as a group and the average cost of employing men as a group does not qualify as a differential based on any "factor other than sex," and would violate the EPA. To group employees solely on the basis of sex for purposes of comparing costs necessarily rests on the assumption that the sex factor alone may justify the wage differential, and such an assumption is contrary to the terms and purpose of the Equal Pay Act.

VI. ENFORCEMENT

The Wage and Hour Division of the Department of Labor (DOL) is responsible for the administration and enforcement of the EPA. Equal pay enforcement policies are contained in the DOL's Interpretative Bulletin. The DOL has no jurisdiction under the Act to find a violation before a person is actually employed. (Under Title VII of The Civil Rights Act, the EEOC would have jurisdiction over applicant complaints reporting unequal pay.)

Power of Investigation and Civil Remedies

The DOL has three broad powers under the EPA. The Secretary of Labor and his or her designated representatives are empowered to investigate possible violations of the Act; conciliate or negotiate a settlement where violations are found; and litigate cases where efforts to secure compliance have failed.

The most basic power is that of investigation. The DOL may examine and take copies of documents such as payrolls, records of employment, personnel evaluations, and any other employee records that may bear on an investigation. If necessary, such records may be subpoenaed. The DOL may also interview any and all employees. If a violation is found and voluntary compliance cannot be achieved, the Secretary of Labor may file one of two types of civil suits to collect back wages:

1. A suit to collect "liquidated damages" -- in effect, double damages. Requires a jury trial. (Section 216 (c))
2. A suit to collect actual amount of back wages and to prevent future violation of the Act. Does not require a jury trial. (Section 217)

Employees may also file (Section 216 (b)). They may sue without providing notice to the Secretary of Labor, exhausting the DOL administrative remedies or even filing a complaint. Employee suits may be filed at any time to recover unpaid back wages and to seek liquidated damages. The employee's right to sue, however, is terminated when the Secretary files suit.

The statute of limitations for back pay is two years. However, if the violation is found to be a willful one, the statute is extended to three years. The courts have defined the action of an employer to "willful" when:

> ...there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA. Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture? (Coleman v. Jiffy June Farms, Inc., 458 F. 2d 1139 (5th Circuit), 1971)).

APPENDIX TO TAB C

THE FEDERAL EQUAL PAY ACT OF 1963
(Section 6(d) of the Fair Labor Standards Act of 1938, as amended)

Section 800.100.—Section 6(d) of the Act.

The Equal Pay Act of 1963 amended section 6 of the Fair Labor Standards Act by adding thereto a new subsection (d) as follows:

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

TITLE VII

(Full text of Title VII is in Appendix under this Tab.)

I. INTRODUCTION

The Civil Rights Act of 1964 is an omnibus law covering multiple aspects of discrimination (e.g., voting rights, public accommodations, etc.). It contains eleven Titles, one of which is Title VII.

Title VII, outlawing all forms of employment discrimination, was the culmination of a 20-year federal legislative effort to enact fair employment practices legislation.

The enactment of Title VII has changed the vocabulary of antidiscrimination law -- the term "fair employment practices" has given way in conversation and in writings to "equal employment opportunity" (EEO).

Title VII, effective July 2, 1965, outlaws employment discrimination based on race, color, sex, religion, and national origin. These five bases are usually referred to by the generic term of "protected classes".

In 1972, Title VII was materially amended by the Equal Employment Opportunity Act. Among the specific changes were:

1) The public sector was brought under coverage.
2) The 1964 exemptions for educational institutions were lifted.

3) The EEOC was granted power to litigate cases in the private sector. The Department of Justice retains this power in cases involving state and local governments.

II. COVERAGE OF TITLE VII

A. Employers - Section 701(b)

Title VII defines employer as "a person engaged in an industry affecting commerce, who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." As a result of the 1972 amendments, state and local governments, governmental agencies and political subdivisions are included under Title VII coverage.

Exceptions under Section 701(b)

Bona fide private membership clubs, other than a labor organization in the capacity of an employer.

Departments of the District of Columbia which are subject to competitive service.

Employers employing aliens outside any state or territory of the United States.

Religious corporations, associations, educational institutions or societies with respect to employing those of a particular religion to perform work connected with the carrying on of their activities.

B. Employees - Section 701(f)

Employee is defined as "an individual employed by an employer". Included under coverage are individuals, employees, applicants for employment, union members, applicants for union membership, apprentices and apprentice applicants.

Exceptions under Section 701(f)

Elected officials in any state or political subdivision of any state

Personal staff members of elected officials

Appointees of elected officials who are on the policy-making level

Immediate advisors of elected officials who advise on the exercise of the constitutional or legal powers of the office

Federal employees are not within the jurisdiction of the EEOC, but are covered by Title VII provisions. The 1972 amendments gave enforcement power to the U.S. Civil Service Commission (Section 717).

Section 703(f) excludes individuals who are members of the Communist Party or of any other organization required to register by the Subversive Activities Control Board.

C. Labor Organizations - Section 701(d)

A labor organization is defined as "any organization...in which employees participate and which exists for the purpose, in whole or part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, or joint council so engaged which is subordinate to a national or international labor organization."

A labor organization will be considered to be engaged in "an industry affecting commerce" if:

(1) it maintains or operates a hiring hall

(2) has fifteen or more members.

If it meets one of these requirements the labor organization is covered under Title VII if:

(1) it is certified as a bargaining representative under the National Labor Relations Act or the Railway Labor Act;

(2) although not certified, is recognized as the representative of employees of an employer covered under Title VII;

(3) has chartered a local labor organization which is representing or seeking to represent employees of employers covered by Title VII;

(4) has been chartered by a labor organization representing or seeking to represent employees or as the local body or subordinate body through which the employees may become members of the labor organization;

(5) is a conference, general committee, joint or system board, or joint council subordinate to a labor organization within the meaning of Title VII.

This means that local, national, and international unions, intermediate and collateral bodies, such as joint boards, and state and local central labor bodies are covered.

D. Joint Labor Management Committees - Section 703(d)

Joint labor management committees controlling apprenticeship or other training or retraining programs are forbidden to discriminate in the admission to or employment in such programs.

E. Employment Agencies - Section 701(c)

The Act defines employment agency as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person." Private employment agencies are included, as well as the

United States Employment Service and state and local employment services that receive federal assistance.

III. UNLAWFUL EMPLOYMENT PRACTICES UNDER TITLE VII

A. Discrimination by Employers - Section 703(a)

Title VII makes it unlawful for an employer to discriminate with respect to hiring, firing, compensation, terms, conditions or privileges of employment on the basis of race, color, religion, sex or national origin. It also forbids employers to limit, segregate, or classify employees in any way that tends to deprive any individual of employment oportunities or adversely affects his employment status because of his race, color, religion, sex or national origin.

Section 703(d) prohibits discrimination on any of these five bases in apprenticeship, training or retraining. Section 704(b) makes it unlawful to indicate a preference based on race, color, religion, sex or national origin in notices or advertisements relating to employment.

Title VII includes many exceptions and exemptions to these general prohibitions. These will be discussed in another section.

1. Examples of Prohibited Acts

a. Segregation, classification

Such practices as separate seniority rosters for male and female or white and Negro employees are violations

of the Act, as are the designation of certain jobs as "male", "female", "white", or "Negro".

Any physical segregation of employees by race, with respect to working area, toilet or locker facilities, or recreational activities violates the law.

b. Recruiting and Hiring

Determinations by the courts and EEOC as to whether employer recruiting and hiring practices are racially discriminatory are usually based on the U.S. Supreme Court's decision in Griggs v. Duke Power Company (401 U.S. 424 (1971)). In that case the Court stated:

> Under the Act, practices, procedures or tests, neutral in terms of intent cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. 401 U.S. at 430.

The Court also stated:

> If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. 401 U.S. at 431.

Applying the Griggs test the courts and EEOC have found unlawful recruitment and hiring practices in the following cases:

--A company's refusal to hire job applicants because of their arrest record. But such a refusal to hire was upheld where it involved a hotel bellman who would have access to luggage and rooms.

--Word-of-mouth recruiting or recruiting at only predominantly white educational institutions where there is an existing racial imbalance in the work force.

--A requirement that applicants have a high school education where is no showing that the requirement is sufficiently related to the job performance.

Although the Supreme Court in Griggs indicated that a policy that has a discriminatory impact might be justified on grounds of business necessity, this exception has been narrowly construed by the courts and EEOC.

c. Employment conditions

Title VII forbids discrimination with respect to "compensation, terms, conditions or privileges of employment." This phrase has been broadly construed by the courts and EEOC to include such subjects as training and promotion opportunities; apprenticeship programs; work environment; work assignments; enforcement of a discriminatory contract; employer reprisal against employees who initiate Title VII proceedings and repeated incidents of disparate treatment of minority group or women employees.

d. Advertising Job Notices

Under Title VII it is illegal to indicate a preference,

limitation, specification, or discrimination based on race, color, religion, sex or national origin in printing or publishing employment notices or advertising unless based on a bona fide occupational qualification (sex, religion or national origin). Under the 1964 Act this applied to employers, employment agencies and labor unions. The 1972 Act extended this prohibition to joint labor-management committees operating apprenticeship and other training programs.

e. Employee Selection Procedure (Testing) Section 703(h)

Title VII states that it shall not be an unlawful employment practice "for an employer to give and to act upon the results of any professionally developed ability test provided such test, its administration or action upon the results, is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

The EEOC has issued Guidelines on Employment Selection Procedures.

Employment testing is discussed under Tab J.

f. Seniority - Section 703(h)

"Notwithstanding any other provisions of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system...

provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin...."

Seniority is discussed under Tab A.

B. Discrimination by Unions

When a union is acting as an employer it must not violate any of the prohibitions imposed on employers generally. As a union, it may not do any of the following:

--exclude or expel from its membership or otherwise discriminate against any individual because of his race, color, religion, sex or national origin. Section 703(c) (1)

--limit, segregate or classify its membership or applicants for membership or fail or refuse to refer any individual for employment in any way that would deprive or tend to deprive him of employment opportunities or would limit such employment opportunities or otherwise affect his status as an employee or as applicant for employment because of such individual's race, color, religion, sex or national origin. (Section 703(c) (2)

--cause or attempt to cause an employer to discriminate against an individual in violation of Section 703

--discriminate against any individual on the basis of race, color, religion, sex or national origin in the operation of apprenticeship training or other training, including on-the-job-training programs. Section 703(d).

In addition to refraining from these discriminatory practices, the unions are responsible for challenging the discriminatory practices of employers with whom they bargain. The existence of a collective bargaining agreement does not shield the union from its Title VII obligations.

C. Discrimination by Employment Agencies

Under Section 703(b) employment agencies are forbidden to:

--fail or refuse to refer for employment, or otherwise discriminate against any individual because of his race, color, religion, sex or national origin.

--classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin.

The Act applies to private employment agencies as well as the U.S.Employment Service and state and local employment services that receive federal money.

D. Preferential Treatment Forbidden

Section 703(j) of Title VII specifically forbids any "employer, employment agency, labor organization, or joint labor-management committee to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed... in any comparison with the total number or percentage in any community, state

section or other area, or in the available work force in any community."

This means that employers are not required to grant preferential treatment of minority group members or women in order to "balance" the work force. But EEOC may consider that a serious imbalance indicates that a company's employment practices need to be examined and corrected.

E. List of Exceptions Under Title VII

The following are exceptions to Title VII prohibitions and thus do not constitute an unlawful employment practice:

1. Religious organizations may discriminate on the basis of religion in all their activities, e.g., business enterprise. But they may not discriminate on the basis of race, color, sex or national origin.

2. Indian tribes and industries located on or near reservations may grant preferential hiring to Indians.

3. Employers may classify employees on the basis of religion, sex, or national origin when such classifications are based on a bona fide occupational qualification necessary to the normal operation of business.

4. Employers may also classify employees on the basis of a bona fide seniority or merit system, as long as the intent of such systems are not to discriminate.

5. Bona fide, tax exempt private clubs are not included under the definition of "employer" and therefore their employment practices need not comply with the Act.

6. Employers do not have to apply the equal employment opportunity requirements of Title VII to the following employees:

   a) members of the Communist Party or of any other organization required to register by the Subversive Activities Control Board;

   b) elected officials, their personal staff members, and their appointees who are on a policy-making level;

   c) aliens who are employed outside of the United States and its territories;

   d) individuals who do not meet security requirements imposed on certain positions by law or executive order.

IV. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Organization and Responsibilities

The Equal Employment Opportunity Commission is the Federal agency responsible for enforcing the provisions of Title VII. It is composed of five commissioners, not more than three of whom, according to the Act, may be members of the same political party. The Commissioners are appointed by the President with the advice and consent of the Senate, for five year terms, with one term ending each year. The President designates one member as Chairman and another as Vice Chairman. The Chairman presides over meetings and proceedings of the Commissioners and manages and directs the Commission.

EEOC's basic functions are carried out in its field offices, which consist of seven regional offices and 32 district offices. The major function of the regional centers is to supervise the district offices within their jurisdiction. The district offices are responsible for investigating, deciding and attempting to conciliate charges of discrimination.

In California, San Francisco has been designated a regional litigation center. District offices are located in Los Angeles and San Francisco.

EEOC Power to Litigate

EEOC's primary responsibilities are to investigate charges of employment discrimination, to attempt to resolve them through conciliation, and to initiate court action when conciliation is unsuccessful.

Under the 1964 Act, EEOC could only attempt conciliation, and had no court enforcement powers. When EEOC determined that a class action suit was warranted, it referred cases to the Department of Justice for action. In individual cases, the EEOC would send a "right to sue" letter to the complainant. The 1972 Amendments granted authority to the EEOC to sue in federal district courts to seek remedies for unlawful employment practices. The Department of Justice retains the sole power to bring suits against state and local governments.

Other Functions

In addition to responding to complaints, EEOC functions in other areas. Title VII gives the Commissioners the authority to conduct hearings to investigate instances of employment discrimination and any Commissioner may file a charge when there is reasonable cause to believe that unlawful discrimination exists.

Through its Voluntary Programs Office, EEOC provides technical assistance to employers who want to take affirmative action to overcome the effects of past discrimination. The Commission also attempts to negotiate voluntary affirmative action agreements with interested employers and labor organizations.

EEOC Reporting Requirements

EEOC also has the responsibility of prescribing the record keeping requirements for those subject to the Act.

The following EEOC forms require information on the racial, ethnic and sex make-up of the work force:

1) Employer Information Report Form EEO-1 developed jointly by EEOC and the Office of Federal Contract Compliance, must be filed annually by employers covered under Title VII who have 100 or more employees and government contractors covered by Executive Order 11246 who have 100 or more employees.

2) Apprenticeship Information Report EEO-2 must be filed annually by joint labor management apprenticeship committees which have five or more apprentices in the program and have at least

one employer and one union covered by Title VII sponsoring the program.

3) Apprenticeship Information Report EEO-2-E must be filed annually by employers with at least 100 employees who conduct and control apprenticeship programs with five or more apprentices.

4) Local Union Report EEO-3 must be filed annually by all local unions with 100 or more members. A national or international union is not required to file EEO-3 unless it operates a local union under an arrangement such as a trusteeship. Referral and non-referral unions file separate report schedules.

5) State and Local Government Report EEO-4 must be filed annually by all states and all political jurisdictions which have 100 or more employees. A random sample of jurisdictions which have 15-99 employees must also file Report EEO-4. States must file separate forms for each Standard Metropolitan Statistical Area (SMSA). Employees not working in a SMSA are combined into state-wide reports.

6) Elementary-Secondary Staff Information EEO-5 developed jointly by EEOC, and the Office for Civil Rights and the Office of Education in the Department of Health, Education and Welfare, must be filed annually by all public elementary and school systems with 100 or more employees. Schools with 15 or more employees must keep all records necessary for completing and filing the report EEO-5, even though they may not be required to file the report in any particular year.

7) Higher Education Staff Information Report EEO-6 was developed jointly by EEOC, the Office of Federal Contract Compliance in the Department of Labor and the Office for Civil Rights in the Department of Health, Education and Welfare. It requires all institutions of higher education, both public and private, with 15 or more employees to file biennial reports. Record-keeping is excluded for students who are employed on a part-time or temporary basis.

EEOC is forbidden by law to make public any information obtained from these reports. But the reports can be used by EEOC to initiate an investigation when data from them indicate systemic discriminatory employment practices.

V. EEOC DEFERRAL TO "706 AGENCIES"

Section 706(c) requires EEOC to defer its jurisdiction over charges it receives to approved state and local fair employment practice agencies where the agencies are empowered to provide relief from similar discriminatory practices. These deferral agencies are called "706 agencies." California's Fair Employment Practice Commission is a "706 agency." The state and local agencies are given 60 days to resolve the deferred charges, after which, if unresolved, they are returned to EEOC.

The EEOC provides financial assistance to deferral agencies. (Section 709(b))

VI. STEPS IN FILING CHARGES WITH EEOC

Charges of employment discrimination may be filed by an individual, class of individuals, a third party on behalf of others, or a commisioner.

The steps for filing a charge with EEOC, set forth in Section 706, are:

1. A charge must be filed within 180 days after the alleged unlawful employment practice occurred, where there is no state or local agency.

2. Where there is a state deferral agency the charge must be filed with EEOC within 300 days, but must be deferred to the state agency (a "706 agency") for 60 days. EEOC cannot take jurisdiction until the end of the 60-day deferral period or until final action has been taken by the state agency, whichever is earlier.

   Where there is a "706 agency" the charging party can file in one of two ways, keeping in mind the 300 day limitation:

   a) A charge may be filed first with the state agency, but should be done within 240 days after the alleged discriminatory act in order to allow for the 60-day deferral time. Also, the charge must be filed with EEOC within 30 days after the state agency has terminated its action, even if earlier than the 300 day limit.

   b) A charge may be filed first with EEOC. The Commission automatically defers to the state or local agency for

60 days and automatically assumes jurisdiction of the charge after 60 days. In practice, EEOC has assumed jurisdiction over cases on the 299th day even if the 60-day deferral period has not elapsed.

If the discriminatory act is found to be a "continuing" one, rather than a one-time specific act, the courts have held that the time limitations are not binding.

3. EEOC must serve notice of a charge of discrimination to the party charged within ten days after a charge is filed.

4. EEOC must investigate the charge to determine whether there is reasonable cause to believe that a violation has occurred. The Commission must accord substantial weight to any decisions of state and local agencies. A determination must be made as promptly as possible and, so far as practicable, within 120 days.

   a) If the Commission finds no reasonable cause, the charge is dismissed. The aggrieved is notified and still has a right to file suit within 90 days of EEOC notification.

   b) If there is a finding of reasonable cause to believe a violation has occurred, the Commission will attempt conciliation.

5. If conciliation fails, the Commission makes a determination whether to file suit in a federal district court. (If it is a suit involving a state or local government, the Attorney General must file suit, since EEOC litigation authority is

confined to the private sector.)

6. An individual is not deprived of seeking his or her own remedy under any of the following circumstances:
   a) After filing, the EEOC is not able to process the charge with satisfactory speed.
   b) The individual does not accept the terms of a conciliation agreement between the EEOC and the party charged in the complaint.
   c) EEOC dismisses the charge
   d) Within 180 days of the filing of the charge, EEOC has neither issued a complaint nor entered into a conciliation agreement acceptable to both the EEOC and the aggrieved party.

See Title VII Procedure Chart in appendix under this tab.

VII. THE ROLE OF THE COURTS

Title VII provisions provide the federal district courts broad discretionary powers in providing a remedy upon a finding of employment discrimination (Section 706(g)):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) or any other equitable relief as the court deems appropriate.... (underscore added)

The word "intentionally" should not be taken literally, since the courts look at the "consequences" of an employment practice... the

Supreme Court has made it clear that "good faith" or "good intentions" is no defense when the effect of a policy or practice results in a discriminatory act.

The Back Pay Award Remedy

Where the court finds a back pay award to be an appropriate remedy, Title VII limits recovery of back pay to a date no earlier than two years before the filing of a discrimination charge with the EEOC (Section 706(g)):

> Back pay shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

Back pay is a statutory equitable remedy and hence must be determined by the court, not a jury. The idea behind back pay as a remedy is to make the victim of discrimination "whole," not to punish the wrong-doer through the imposition of punitive damages.

VIII. EEOC GUIDELINES

There are Guidelines on

- -- Testing (See Tab J)
- -- Sex Discrimination (See Tab K)
- -- National Origin (See Tab M)
- -- Religion (See Tab N)

APPENDIX TO TAB D

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972

TITLE VII OF CIVIL RIGHTS ACT

as amended by

Equal Employment Opportunity Act of 1972

DEFINITIONS

Sec. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers (As amended)

(b The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers. (As amended)

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person. (As amended)

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of of such labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, or (B) fifteen or more thereafter. (As amended)

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. (As amended)

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity. (As amended)

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Island, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. (As amended)

EXEMPTION

Sec. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational insititution, or society of its activities. (As amended)

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (As amended)

(b) It shall be a unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor, organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment

agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge an individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938 as amended (29 USC 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or precentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. (As amended)

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. (As amended)

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preference, limitation, specification, or discrimination, based on race, color religion sex or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment. (As amended)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sec. 705 (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b), shall appoint, in accordance with the provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchnapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.

(b)(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title. (As amended)

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the middle and at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 706 by an aggrieved party against a respondent other than a government, governmental agency or political subdivision. (As amended)

(h) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(i) All officers, agents, attorneys and employees of the Commission, including the members of the Commission, shall be subject to the pro-

visions of section 9 of the act of August 2, 1939, as amended (Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

Sec. 706. (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawawful employment practice as set forth in section 703 or 704 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding

shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved

and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purpose of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a). (As amended)

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section the Commission may commence proceedings to compel compliance with such order. (As amended)

(j) Any civil action brought under this section and any proceedings brought under subsection (j) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code. (As amended)

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Sec. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public impor-

tance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act. (As last amended)

EFFECT OF STATE LAWS

Sec. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

Sec. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commisssion in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State of locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this sub-

section fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a governmental agency or political subdivision, have jurisdiction to issue to such person an order requring him to comply.

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection. (As amended)

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

Sec. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply. (As amended)

NOTICES TO BE POSTED

Sec. 711. (a) Every employer, employment agency and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

Sec. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

Sec. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act of omission

complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

Sec. 714. The provisions of sections 111 and 1114, title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life. (As amended)

SPECIAL STUDY BY SECRETARY OF LABOR

Sec. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section. (As amended)

EFFECTIVE DATE

Sec. 716. (a) This title shall become effective one year after the date of its enactment. (The effective date thus is July 2, 1965.)

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) rep-

resentatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

NON DISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

Sec. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semi-annual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complant of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities grant-

ed in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706 (f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government. (As amended)

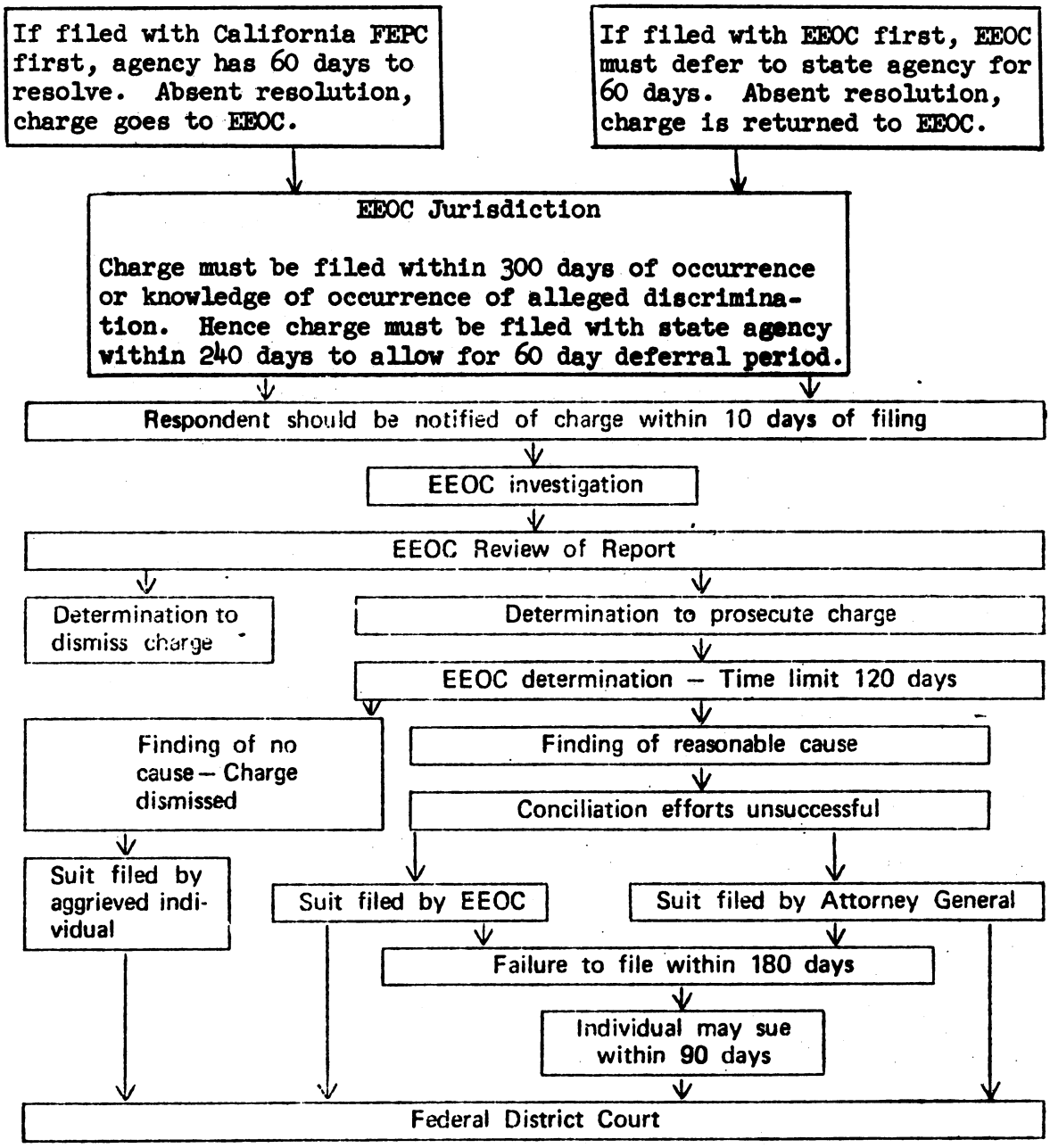
SPECIAL PROVISION WITH RESPECT TO DENIAL, TERMINATION AND SUSPENSION OF GOVERNMENT CONTRACTS

Sec. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan. (As added)

* GPO 691 041

TITLE VII - PROCEDURE CHART

Time limitations for filing a charge in a state with Approved Deferral Agency*



*California FEPC is an approved deferral agency. Filing of a charge may occur simultaneously with filing of a grievance under a Memorandum of Understanding or contract and a suit under other laws (e.g., Civil Rights Act of 1866) which protect against discrimination.

THE CALIFORNIA FAIR EMPLOYMENT PRACTICE ACT

The act was originally passed in 1959 as Part 4.5 of the California Labor Code. It was enacted 14 years after the first state FEP law was passed in New York. The law was subsequently amended to its present form.

I. COVERAGE

The following groups or individuals are covered:

1. Employers

   Any person or organization "regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities."

2. Labor Organizations

   Any organization which is formed and exists "for the purpose...of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection."

3. Employment Agencies

   "Any person undertaking for compensation to procure employees or opportunities to work" (this provision is more limited than Title VII which defines employment agencies as persons regularly procuring employees for employers with or without compensation).

In addition, the Division of Fair Employment Practices, the administrative agency, may engage in affirmative action with employers, labor organizations and employment agencies. The term "affirmative action" applies to "any educational activity for the purpose of

securing greater employment opportunities for members of racial, religious, or nationality minority groups and any promotional activity designed to secure greater employment opportunities for the members of such groups on a voluntary basis." Furthermore, "every contractor performing a public works contract in excess of two hundred thousand dollars ($200,000) awarded by the state...shall submit to the commission [State Fair Employment Practice Commission] an equal employment opportunity program for approval and certification by the commission."

Exemptions from Coverage:

Certain organizations are exempted from coverage: social clubs, fraternal, charitable, educational or religious associations or corporations not organized for private profit.

II. DISCRIMINATION PROHIBITIONS

The Fair Employment Practice Act (FEPA) prohibits employment discrimination based on race, religious creed, color, national origin, ancestry, age, physical handicap, medical condition, or sex. The prohibition applies to all aspects of employment such as hiring, promotions, wage rates, transfers, etc.

Section 1420 provides that it is unlawful (unless based on a bona fide occupational qualification or applicable security regulations):

For an employer to refuse to hire or employ an individual or refuse to select him/her for a training program leading to employment, or to bar or discharge such person from employment, or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment because of his/her race, religious creed, color, national origin, ancestry, physical handicap, medical condition or sex.

For a labor organization to exclude, expel, or restrict a person from membership, or to provide only second-class or segregated membership, or to discriminate against a person in the election of officers or selection of staff, or to discriminate in any way against any of its members or against any employer based on race, religious creed, color, national origin, ancestry, physical handicap, medical condition or sex.

For any person to discriminate against a person in selection for apprenticeship training program based upon race, religious creed, color, national origin, ancestry, physical handicap, medical condition or sex.

For an employer or employment agency to print or circulate any publication, or to make any non-job-related inquiry (verbal or through an application form), which expresses any limitation specification, or discrimination as to race, religious creed, etc., or any intent to make such limitations.

For an employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has filed a complaint, testified or assisted in any proceedings under the Act, or because he has opposed any practices forbidden under the Act.

Under Section 1420.1 it is also an unlawful employment practice "to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual between the ages of 40 and 64 solely on the ground of age, except in cases in which the law compels or provides for such action." Exceptions: a bfoq; promotions within existing staff or hiring or promoting on the basis of experience and training or rehiring on the basis of seniority and prior service

and hiring under established recruiting programs from high schools, colleges, universities or trade schools are not, in and of themselves, unlawful. This section does not limit an employer, employment agency or labor union from selecting or referring the better qualified person. The burden of proving a violation is upon the claimant.

The inclusion of "medical condition" as a prohibited basis for discrimination resulted from the passage of Assembly Bill 1194, on March 18, 1975, due to concerns over employment discrimination against persons who are cancer victims. "Medical condition" here is defined as "any health impairment related to or associated with a diagnosis of cancer for which a person has been rehabilitated or cured, based on competent medical evidence."

III. POLICY-MAKING AND ADMINISTRATIVE AGENCIES

The Fair Employment Practice Act established a Division of Fair Employment Practices, and within it the State Fair Employment Practice Commission.

The duties and responsibilities of these two bodies are ill-defined in the law. The Act's ambiguous draftsmanship results in some confusion over the operational roles and interface between the two.

The Division of Fair Employment Practices is composed of civil service employees who perform the day to day administrative and enforcement activities. It is the support and operational unit for the implementation of fair employment policy.

The FEP Commission is composed of seven members appointed by the Governor. The Commission is the policy-making body under the FEPA. It formulates policies to effectuate the purposes of the Act and "makes recommendations to agencies and officers of the state and local governments in aid of such policies and purposes". Among the functions, powers, and duties of the Commission:

> to obtain, upon request, and utilize the services of all governmental departments and agencies;
>
> to adopt, amend, and rescind suitable rules and regulations to carry out the provisions of the FEP Act;
>
> to receive, investigate and decide complaints alleging discrimination in employment because of race, religious creed, color, national origin, ancestry, age, physical handicap, medical condition, or sex;
>
> to hold hearings, subpoena witnesses, administer oaths, and require the production of books and papers relating to any matter under investigation;
>
> to create advisory agencies and conciliation councils that aid in implementation of this Act.
>
> to investigate, approve and certify equal employment opportunity programs proposed by contractors;
>
> to submit annually to the Governor and biennially to the Legislature a written report of its activities and recommendations.

The law also provides that the Commission may assist communities and their members in resolving disputes or problems involving discriminatory practices. This assistance is limited to conference, conciliation, and persuasion.

The FEPC is also empowered to initiate investigations and proceedings.

IV. COMPLAINT PROCEDURE AND ENFORCEMENT

The State FEPA provides for correction of discriminatory practices through a complaint procedure. The FEPC has the authority to investigate violations and take remedial actions upon receipt of a complaint by an alleged victim of discrimination.

The law provides that "any person (or groups) claiming to be aggrieved by an alleged unlawful employment practice may file with the commission a verified complaint in writing". The complaint names the accused person or organization and states the particulars of the violation. The law also provides that the Attorney General may file a complaint in like manner. However, "No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful employment practice or refusal to cooperate occurred; except that this period may be extended for not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved...first obtained knowledge of the facts of the alleged unlawful employment practice after the expiration of one year from the date of occurrence".

The Commission serves the complaint upon the employer within 45 days of its receipt, and it must notify the employer that he is under investigation. If there has been a violation, the Commission issues a cease-and-desist order, and it may also order the employer to take such remedial actions as "hiring, reinstatement or up-grading of employees, with or without back pay, or restoration to membership in any respondent labor organization."

If the Commission finds there has been no violation, it will notify all parties concerned and the case is closed.

Every decision or final order of the FEPC is subject to judicial review.

If there is evidence (following the Commission's decision) that remedial action has not or will not be taken, the Commission may bring action in State Superior Court.

V. RELATIONSHIP TO TITLE VII

When a Title VII complaint is filed, it is required that it be deferred to a state approved FEP agency for 60 days. The California FEPC is such an agency, and is known as a "706 agency" -- Section 706 of Title VII sets forth the deferral procedure.

If, after 60 days, the matter is not satisfactorily resolved, the complaint goes to the EEOC.

It should be understood, however, that the FEP Act stands on its own. A party still has the option of filing under the state law rather than under Title VII when either law is applicable.

VI. FEP GUIDELINES

The FEPC has issued guidelines to aid employers and others in complying with the Act's discrimination prohibitions.

These guidelines include:

. Lawful and Unlawful Pre-Employment Inquiries

. Fair Employment Checklist

. Guide for Promoting Equal Job Opportunity

. Guidelines for Testing and Selecting Minority Job Applicants

. Guidelines for Evaluating Job Applicants with Police Records.

For copies of these guidelines contact:

The Fair Employment Practice Commission

State and Northern California Office:	455 Golden Gate Avenue P.O. Box 603 San Francisco, CA 94101
Southern California Office:	322 West First Street Los Angeles, CA 90012
District Offices:	2550 Mariposa Street Fresno, CA 93721
	1350 Front Street San Diego, CA 92101
	926 J Street Sacramento, CA 95814
	303 W. Third Street San Bernardino, CA 92401

APPENDIX TO TAB E

State of California

FAIR EMPLOYMENT PRACTICE ACT

(Chapter 121, Part 4.5, Division 2, Labor Code)

State of California
EDMUND G. BROWN JR., *Governor*

Agriculture and Services Agency
Department of Industrial Relations
Division of Fair Employment Practices

The People of the State of California have created a State Commission on Fair Employment Practices designed to prevent and eliminate practices of discrimination in employment and otherwise against persons because of race, religious creed, color, national origin, ancestry, or sex.

SECTION 1. Part 4.5 (commencing with Section 1410) is added to Division 2 of the Labor Code, to read:

PART 4.5. FAIR EMPLOYMENT PRACTICES

1410. This part may be referred to as the "California Fair Employment Practice Act."

1411. It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, or sex.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interests of employees, employers, and the public in general.

This part shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health, and peace of the people of the State of California.

1412. The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, or sex is hereby recognized as and declared to be a civil right.

1413. As used in this part:

(a) "Person" includes one or more individuals, partnerships, associations or corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(b) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(c) "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(d) "Employer," except as hereinafter provided, includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities.

"Employer" does not include a social club, fraternal, charitable, educational or religious association or corporation not organized for private profit.

(e) "Employee" does not include any individual employed by his parents, spouse, or child, or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(f) "Commission," unless a different meaning clearly appears from the context, means the State Fair Employment Practice Commission created by this part.

(g) "Affirmative actions" means any educational activity for the purpose of securing greater employment opportunities for members of racial, religious, or nationality minority groups and any promotional activity designed to secure greater employment opportunities for the members of such groups on a voluntary basis.

(h) "Physical handicap" includes impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services.

(i) "Medical condition" means any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence.

1414. There is in the Division of Fair Employment Practices the State Fair Employment Practice Commission. Such commission shall consist of seven members, to be known as commissioners, who shall be appointed by the Governor, by and with the advice and consent of the Senate, and one of whom shall be designated as chairman by the Governor. The term of office of each member of the commission shall be for four years; provided, however, that of the commissioners first appointed two shall be appointed for a term of one year, one for a term of two years, one for a term of three years, and one for a term of four years. The term of office of each member of the commission appointed pursuant to the 1963 amendments to this section shall also be for four years; provided, however, that of the two commissioners first appointed pursuant to the said amendments, one shall be appointed for a term which shall expire September 18, 1966, and one for a term which shall expire September 18, 1967.

1415. Any member chosen to fill a vacancy occurring otherwise than by expiration of terms shall be appointed for the unexpired term of the member whom he is to succeed. Three members of the commission shall constitute a quorum for the purpose of conducting the business thereof.

The Governor shall also appoint a Chief of the Division of Fair Employment Practices, who shall be the principal executive officer of the commission.

1415.5. Proceedings conducted pursuant to this part are within the meaning of Section 11126 of the Government Code and the commission may conduct executive sessions subject to the provisions of Article 9 (commencing with Section 11120), of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code.

1416. Each member of the commission shall serve without compensation but shall receive fifty dollars ($50) for each day actually spent in the performance of his duties under this part and shall also be entitled to his expenses actually and necessarily incurred by him in the performance of his duties.

1417. Any member of the commission may be removed by the Governor for inefficiency, for neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard thereon.

1418. The commission shall formulate policies to effectuate the purposes of this part and may make recommendations to agencies and officers of the state and local governments in aid of such policies and purposes.

1419. The commission shall have the following functions, powers and duties:

(a) To establish and maintain a principal office and such other offices within the state as the Legislature authorizes.

(b) To meet and function at any place within the state.

(c) To appoint an attorney, and such clerks and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(d) To obtain upon request and utilize the services of all governmental departments and agencies.

(e) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this part.

(f) To receive, investigate and pass upon complaints alleging discrimination in employment because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, or sex.

(g) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the commission.

(h) To create such advisory agencies and conciliation councils, local or otherwise, as in its judgment will aid in effectuating the purposes of this part, and may empower them to study the problems of discrimination in all or specific fields of human relationships or in specific instances of discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition or sex, and to foster through community effort or otherwise good will, cooperation, and conciliation among the groups and elements of the population of the state and to make recommendations to the commission for the development of policies and procedures in general. Such advisory agencies and conciliation councils shall be composed of representative citizens, serving without pay.

(i) To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, or sex.

(j) To investigate, approve, and certify equal employment opportunity programs proposed by a contractor to be engaged in pursuant to subdivision (b) of Section 1431, and to fix and collect such fees as are necessary for the cost of the investigation, approval or certification. The fees collected shall be paid into the General Fund of the State Treasury.

(k) To render annually to the Governor and biennially to the Legislature a written report of its activities and of its recommendations.

1419.5. The commission is empowered to prevent discrimination in housing as provided in Part 5 (commencing with Section 35700) of Division 24 of the Health and Safety Code.

1419.7. The commission may also provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties

relating to discriminatory practices based on race, religious creed, color, national origin, or ancestry which impair the rights of persons in such communities under the Constitution or laws of the United States or of this state. The services of the commission may be made available in cases of such disputes, disagreements, or difficulties only when, in its judgment, peaceful relations among the citizens of the community involved are threatened thereby. The commission's services are to be made available only upon the request of an appropriate state or local public body, or upon the request of any person directly affected by any such dispute, disagreement, or difficulty.

The assistance of the commission pursuant to this section shall be limited to endeavors at conference, conciliation, and persuasion.

1419.9. (a) The commission shall, whenever possible, in performing its functions, seek and utilize the cooperation of appropriate state or local, public, or private agencies, and may cooperate in such endeavors with the Federal Community Relations Service.

(b) The Legislature recognizes that the avoidance of discriminatory practices in the employment of disabled persons is most effectively achieved through the ongoing efforts of state agencies involved in the vocational rehabilitation and job placement of the disabled. The commission may utilize the efforts and experience of the Department of Rehabilitation in the development of job opportunities for the disabled by requesting the Department of Rehabilitation to foster goodwill and to conciliate on employment policies with employers who, in the judgment of the commission, have employment practices or policies that discriminate against disabled persons. Nothing contained in this paragraph shall be construed to transfer any of the functions, powers, or duties from the commission to the Department of Rehabilitation.

(c) The activities of all commissioners and employees of the commission in providing conciliation assistance shall be conducted in confidence and without publicity, and the commission shall hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held. No commissioner or employee of the commission shall engage in the performance of investigative or prosecuting functions of any department or agency in any litigation arising out of a dispute in which he acted on behalf of the commission. Any commissioner or other employee of the commission, who makes public in any manner whatever any information in violation of this subdivision, is guilty of a misdemeanor and, if a member of the state civil service, shall be subject to disciplinary action under the State Civil Service Act.

1420. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, or sex of any person, to refuse to hire or employ him or to refuse to select him for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

Nothing in this part shall prohibit an employer from refusing to hire or discharging a physically handicapped employee, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of a physically handicapped employee, where the employee, because of his physical handicap, is unable to perform his duties, or he cannot perform such duties in a manner which would not endanger his health or safety or the health and safety of others.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, or sex of any person, to exclude, expel, or restrict from its membership such person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, or sex of such person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, or sex of the person discriminated against.

(d) For any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical handicap, medical condition, or sex, or any intent to make any such limitation, specification or discrimination. Nothing in this subdivision shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this part.

(f) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

1420.1. (a) It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual between the ages of 40 and 64 solely on the ground of age, except in cases where the law compels or provides for such action. This section shall not be construed to make unlawful the rejection or termination of employment where the individual applicant or employee failed to meet bona fide requirements for the job or position sought or held, or to affect bona fide retirement or pension programs; nor shall this section preclude such physical and medical exam-

inations of applicants and employees as an employer may make or have made to determine fitness for the job or position sought or held.

Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, and trade schools shall not, in and of themselves, constitute a violation of this section.

(b) This section shall not limit the right of an employer, employment agency, or labor union to select or refer the better qualified person from among all applicants for a job. The burden of proving a violation of this section shall be upon the person or persons claiming that the violation occurred.

(c) The age limitations of the apprenticeship programs in which the state participates shall not be deemed to violate this section.

1420.5. The Division of Fair Employment Practices shall maintain liaison with the human relations commissions of cities, counties, and any city and county, and shall provide any information not designated by law as confidential to such commissions on request.

1421. The commission is empowered to prevent unlawful employment practices. When it shall appear to it that an unlawful employment practice may have been committed, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith. If such commissioner determines after such investigation that further action is warranted, he shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has transpired in the course of such endeavors.

Every member of the commission or its staff who discloses information in violation of the requirements of this section is guilty of a misdemeanor. Such disclosure by an employee subject to civil service shall be cause for disciplinary action under the State Civil Service Act.

1421.1. When contacted by the commission or its staff, employers, unions or employment agencies shall be informed whether a particular discussion, or portion thereof, constitutes either: (a) endeavors at conference, conciliation and persuasion which may not be disclosed by the commission or received in evidence in any formal hearing or court action; or (b) investigative processes, which are not so protected.

1422. Any person claiming to be aggrieved by an alleged unlawful employment practice may file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful employment practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The Attorney General may, in like manner, make, sign and file such complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this part may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful employment practice or refusal

to cooperate occurred; except that this period may be extended for not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful employment practice first obtained knowledge of the facts of the alleged unlawful employment practice after the expiration of one year from the date of their occurrence.

Complaints alleging a violation of subdivision (c) of Section 1420 of this code shall be filed as provided in Section 3096 of this code.

1422.1. The commission shall cause any verified complaint filed under the provisions of this part to be served, either personally or by certified mail with return receipt requested, upon the person, employer, labor organization, or employment agency alleged to have committed the unlawful employment practice complained of. Service shall be made at the time of initial contact with said person, employer, labor organization, or employment agency or the agents thereof, or within 45 days, whichever first occurs.

1422.2. (a) The commission shall notify in writing a person, employer, labor organization, or employment agency, or the agents thereof, that they are being investigated under Section 1421, either at the time of initial contact or within 45 days, whichever first occurs.

(b) After a verified complaint has been filed under Section 1422 or a Section 1421 investigation has been commenced, and the preliminary investigation thereof has been carried out, or a 45-day period has elapsed from the filing of the verified complaint or the commencement of the Section 1421 investigation, if the preliminary investigation has not then been completed, an appropriate superior court may, upon motion of the respondent or party under investigation, order the commission to give to the respondent or party under investigation, within a specified time, a copy of any book, document, or paper, or any entries therein, in the possession or under the control of the commission, containing evidence relating to the merits of the verified complaint or the Section 1421 investigation, or to a defense thereto. The commission shall comply with such an order.

1423. After the filing of any complaint alleging facts sufficient to constitute a violation of any of the provisions of Section 1420, an investigation shall be made as provided in Section 1421 and, where warranted by the evidence, an attempt to eliminate such practice shall be made as provided in Section 1421, unless such attempt has previously been made.

In case of failure to eliminate such practice, or in advance thereof if in the judgment of the commissioner making the investigation, circumstances warrant, the latter shall cause to be issued and served in the name of the commission, a written accusation, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such accusation, hereinafter referred to as "respondent," to answer the charges of such accusation at a hearing.

1424. The written accusation, hearings, and all matters pertaining thereto shall be in accordance with the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1, Division 3, Title 2 of the Government Code, and the commission shall have all the powers granted therein.

1425. The case in support of the accusation shall be presented before the commission by one of its attorneys or agents, and the commissioner

who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearings except as a witness and shall not give his opinion of the merits of the case nor shall he participate in the deliberations of the commission in such case; and the aforesaid endeavors at conciliation shall not be received in evidence.

1426. If the commission finds that a respondent has engaged in any unlawful employment practice as defined in this part, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice and to take such action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part, and including a requirement for report of the manner of compliance. If the commission finds that a respondent has not engaged in any such unlawful employment practice, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said accusation as to such respondent. A copy of its order shall be delivered in all cases to the Attorney General, and such other public officers as the commission deems proper.

Any order issued by the commission shall have printed on its face references to the provisions of the Administrative Procedure Act which prescribe the rights of appeal of any party to the proceeding to whose position the order is adverse.

1426.5. If, at any time during the proceedings described in this part, after a complaint has been served on a respondent, the complaint is withdrawn by the complainant or dismissed by the commission, or an investigation is terminated or closed by the commission, notice of this fact shall be given to the respondent and the complainant without undue delay.

1427. The commission shall establish rules of practice not incomsistent with law to govern the foregoing procedure and its own actions thereunder.

1428. Every final order or decision of the commission is subject to judicial review in accordance with law.

1429. Whenever the commission believes, on the basis of evidence presented to it, that any person is violating or is about to violate any final order or decision issued by it pursuant to this part, the commission may bring an action in the Superior Court of the State of California against such person to enjoin him from continuing the violation or engaging therein or in doing anything in furtherance thereof. In such action an order or judgment may be entered awarding such temporary restraining order or such preliminary or final injunction as may be proper.

1430. Any person who shall willfully resist, prevent, impede or interfere with any member of the commission or any of its agents or agencies in the performance of duties pursuant to this part, or who shall in any manner willfully violate an order of the commission, shall be guilty of a misdemeanor, punishable by imprisonment in a county jail, not exceeding six (6) months, or by a fine not exceeding five hundred dollars ($500), or both.

1431. (a) The Division of Fair Employment Practices may engage in affirmative actions with employers, employment agencies, and labor organizations in furtherance of the purposes of this part as expressed in Section 1411.

(b) Every contractor performing a public work contract in excess of two hundred thousand dollars ($200,000) awarded by the state under Chapter 3 (commencing with Section 14250) of Part 5 of Division 3 of Title 2 of the Government Code or Chapter 14 (commencing with Section 25200) of Division 18 of the Education Code shall submit to the commission an equal employment opportunity program for approval and certification by the commission. Every such contractor whose program is approved and certified by the commission shall immediately effectuate it.

1432. The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, or sex.

Nothing contained in this part shall be deemed to repeal or affect the provisions of any ordinance relating to such discrimination in effect in any city, city and county, or county at the time this part becomes effective, insofar as proceedings theretofore commenced under such ordinance or ordinances remain pending and undetermined. The respective administrative bodies then vested with the power and authority to enforce such ordinance or ordinances shall continue to have such power and authority, with no ouster or impairment of jurisdiction, until such pending proceedings are completed, but in no event beyond one year after the effective date of this part.

Nothing contained in this part relating to discrimination on account of sex or medical condition shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided such terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices.

1432.5. Nothing in this part shall be construed to require an employer to alter his premises to accommodate employees who have a physical handicap, as defined in Section 1413, beyond safety requirements applicable to other employees.

1433. If any clause, sentence, paragraph, or part of this part or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this part and the application thereof to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved.

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967
(Full Text in Appendix Under This Tab)

I. BACKGROUND

The Age Discrimination in Employment Act of 1967 (ADEA) was a result of a growing concern in the 1960s about the employment problems of middle-aged workers, generally between 40 and 60 years old. By 1964, 19 states and Puerto Rico had passed laws to prohibit discriminatory age discrimination. In 1964, Executive Order 11141 declared it to be a public policy that there should be no age discrimination by federal government contractors, but the order included no enforcement procedures.

In drafting the Civil Rights Act of 1964, Congress added the following provision:

> The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected.

The provision also called for a full report of the Secretary's findings, including recommendations for any legislation to prevent age discrimination in employment. The report, submitted on June 30, 1965, recommended comprehensive federal legislation which would eliminate arbitrary age discrimination and promote the employment of older workers.

A bill to prohibit age discrimination in employment was introduced in Congress in January 1967 and enacted on December 15, 1967. It became effective on June 12, 1968, and was amended in 1974.

II. BASIC PROVISIONS

A. Purpose

The ADEA forbids employment discrimination against persons between 40 and 65 years of age. It's stated purpose is "to promote the employment of older workers based on ability rather than age, to prohibit arbitrary age discrimination in employment, and to help employers and employees to find ways of meeting problems arising from the impact of age on employment."

B. Coverage

Labor force data from the U.S. Bureau of Labor Statistics indicate that approximately 37 million persons, or 40 percent of the 91 million persons 16 years of age and older who were in the civilian labor force in September 1974, were in the 40-65 age bracket. As originally enacted, the ADEA did not cover the public sector. However, the Fair Labor Standards amendments, effective May 1, 1974, broadened the scope of the law to include federal, state and local government employees. Elected officials, their policymaking appointees, and certain immediate advisors are not covered by the Act, but employees subject to the civil service laws of the states or their political subdivisions are included.

The age discrimination standards for federal employees are administered by the U.S. Civil Service Commission. The Wage and Hour Division administers the ADEA in private and state and local government employment.

SCOPE OF COVERAGE

Private employers who have 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

Public employers (federal, state or local government units) regardless of the number of employees in the employing unit.

Public and private employment agencies serving covered employers. The Department of Labor has taken the position that employment agencies are subject to the ADEA, regardless of size, if they regularly procure employees for at least one covered employer. The Department also contends that employment agencies are prohibited from discriminatory recruiting for their own employment needs, even though they have fewer employees than required for a covered employer (20).

Labor organizations with 25 or more members, or which refer applicants for employment to covered employers, or which represent the employees of employers covered by the Act.

C. Prohibitions of the Act

1. Employers

It is unlawful for an employer to:

fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of age

limit, segregate or classify workers in any way which would deprive or tend to deprive any individual of job opportunities or otherwise adversely affect his or her status as an employee because of age

reduce the wage rate of any worker in order to comply with the Act.

2. Employment Agencies

It is unlawful for an employment agency to:

fail or refuse to refer for employment, or in any other way discriminate against anyone due to age

classify or refer anyone for employment on the basis of age.

3. Labor Organizations

It is unlawful for a labor organization to:

exclude or expel from its membership, or otherwise discriminate against, any individual because of age

limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment, any individual in any way which would deprive the individual of job opportunities, limit job opportunities, or otherwise affect his or her status as an employee or job applicant because of the individual's age

cause or attempt to cause an employer to discriminate against an individual because of age.

4. Classified Ads

Employers, employment agencies, and labor organizations under the Act's jurisdiction are not permitted to use printed or published notices or advertisements relating to employment which indicate any preference, limitations specification or discrimination based on age.

D. Exceptions to the Act

Jobs are exempt from the Act's application in the following instances:

where age is a bona fide occupational qualification (bfoq) reasonably necessary to the normal operation of a particular business

where a differentiation is based on reasonable factors other than age

where a differentiation is based on the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a pretext to evade the purposes of the Act. However, no employee benefit plan can be used as excuse for not hiring an individual

where an individual is discharged or otherwise disciplined for good cause

where an individual is an apprentice in a bona fide registered apprenticeship program.

III. ENFORCEMENT

The ADEA is administered and enforced by the U.S. Department of Labor's Wage-Hour Division, which has approximately 900 compliance officers located throughout the country to help enforce the Act. The Wage-Hour Administrator has published interpretations of the Act which are intended to be a practical guide for employers and employees. The administrator also issues administrative opinions which interpret specific questions on the Act. Guidelines on record and reporting requirements are also available from the Wage-Hour Division.

A. Procedural Requirements

The ADEA, like Title VII, imposes a number of procedural requirements prior to filing private suits. The first requirement: an aggrieved individual must give the Department of Labor 60 days' notice of his or her intent to file suit. Such notice must be filed within 180 days of the alleged unlawful practice, or, if the practice occurred in a state which has an agency authorized

to seek relief under a state age discrimination statute, within either 300 days of the alleged unlawful practice or 30 days from the receipt of a notice of the termination of any state proceedings, whichever is earlier.

When an alleged age discrimination occurred in a state having a law prohibiting discrimination in employment because of age an aggrieved individual must first invoke the available state remedies. No action may be brought under the ADEA "before the expiration of sixty days after proceedings have been commenced under the State Law." Section 14(b).

In California, age discrimination in employment is prohibited under Section 1420(f) of the Fair Employment Practice Act, as amended. The State law applies to employers, state and local governments, labor organizations, and employment agencies and prohibits them from discriminating against individuals aged 40 to 64. Prohibited practices include the refusal to hire, or to discharge, dismiss, reduce, suspend or demote any individual in the protected age bracket, solely on the basis of age. The State Fair Employment Practice Commission is responsible for enforcement of the law.

B. Compliance Effort

Enforcement provisions of the ADEA specifically provide that the Secretary of Labor must first attempt to achieve voluntary compliance through informal methods of conciliation, conference,and persuasion.

Conciliation includes the resolution of specific problems and is the means by which relatively fast resolution can be given to individual complaints. Compliance contacts involve situations that require minimal investigative efforts since they concern easily determined and uncontested compliance problems in which the employer agrees to correct specified discriminatory employment practices and pay the amounts determined to be due as damages.

Limited investigations go beyond compliance contacts and are regular fact-finding investigations, but are limited to specific practices being investigated. Full investigations are regular fact-finding investigations of the entire establishment. In recent years, the thrust of the Act's enforcement has shifted to full fact-finding because such investigations tend to disclose patterns of age discrimination affecting large numbers of older workers.

The Department of Labor also conducts noncomplaint compliance investigations, where there is some reason, other than a complaint or notice of intent to sue, to believe that a firm is not complying with the ADEA.

C. Legal Remedy

When voluntary compliance efforts fail, the Department of Labor or the aggrieved individual can resort to court action for compliance. Courts are authorized to grant any relief appropriate to effectuate the Act's purposes, including judgments which compel

employment, reinstatement or promotion, and the enforcement of liability for back wages found due. The statute of limitations for back pay is generally two years, but if there is a willful violation of the ADEA, the statute is extended by one year. Liquidated damages, which are in effect double damages equivalent to the back wages found due plus an additional amount equal to the back wages, are awarded only in cases of a willful violation of the Act.

A 1975 District Court decision ruled that a person who is discriminated against under the ADEA may recover damages for pain and suffering as well as for "out-of-pocket losses." An employee who had been forced to retire at age sixty was awarded $200,000 to compensate him for physical ailments which developed after his forced retirement and which were found to be the result of the employer's illegal age discrimination. The court pointed out that the award was not intended to be punitive , but was awarded for the sole purpose of compensating the victim for his injuries. (Rogers, et al v. Exxon Research and Engineering Co., U.S. District Court of New Jersey, November 5, 1975).

IV. SUBSTANTIVE ISSUES AND DEVELOPMENTS

The Secretary of Labor's report covering activities under the ADEA during 1974 disclosed that illegal advertising was the most prevalent discriminatory practice, followed by refusals to hire and illegal discharges. The purpose of this section is to

discuss developments in these three areas, and in other areas of employment where widespread age discrimination has occurred.

A. Help-Wanted Notices or Advertisements

Section 4(e) of the Act prohibits "an employer, labor organization, or employment agency" from using printed or published notices or advertisements indicating any preference, limitation, specification, or discrimination based on age.

The Wage and Hour Administrator's Interpretive Bulletin, in Section 860.92, provides the following explanation of this section:

> When help-wanted notices on advertisements contain terms and phrases such as "age 25 to 35," "young," "boy," "girl," "college student," "recent college graduate," or others of a similar nature, such a term or phrase discriminates against the employment of older persons and will be considered in violation of the Act. Such specifications as "age 40 to 50," "age over 50," or "age over 65" are also considered to be prohibited. Where such specifications as "retired person" or "supplement your pension" are intended and applied so as to discriminate against others within the protected group, they too are prohibited, unless one of the exceptions applies.
>
> However, advertisements which include a phrase such as "college graduate" or other educational requirement, or specify a minimum age less than 40, such as "not under 18" are not prohibited under the ADEA.
>
> The use of the phrase "state age" in help-wanted advertisements is not, in itself, a violation of the statute. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate a discrimination based on age,

employment advertisements which include the phrase "state age" or any similar term will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes prohibited by the statute.

There is no provision in the statute which prohibits an individual seeking employment through advertising from specifying his own age.

B. Hiring

The Department of Labor has taken the position that pre-employment inquiries which request age information are not prohibited by the Act. However, because such an inquiry may indicate a preference or discrimination based on age, inquiries as to an applicant's age will be carefully scrutinized to assure that such a request is for a permissible purpose and not for purposes prohibited by the Act.

The intent of a request for age information may be made known to the applicant by a reference to the Act on the application form to the following effect: "The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 but less than 65 years of age." (Wage and Hour Opinion Letter, July 5, 1968). An employer, employment agency, or labor organization is not prohibited from indicating a hiring preference for an individual in the 40-65 age bracket. However, it is a

violation of the Act when an individual within the same age bracket is discriminated against solely on the basis of age. For example, if two men apply for employment to which the Act applies, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age. He must make his decision on the basis of other factors, such as the capabilities and experience of the two individuals. The Act, however, does not restrain age discrimination between two individuals 25 and 35 years of age. (Interpretive Bulletin, Section 860.91) However, there may be bona fide occupational qualifications which permit employers to base decisions to hire on the applicant's age. The following section discusses some bfoq situations.

C. Bona Fide Occupational Qualifications

The ADEA provides that an employer, employment agency or labor organization can take any action otherwise prohibited where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." However, this exception has been narrowly construed.

Some examples of possible bona fide occupational qualifications, found in Section 860.102 of the Interpretive Bulletin are:

> Federal statutory and regulatory requirements which provide compulsory age limitations for hiring or

> retirement, without reference to the individual's actual physical condition at the terminal age, when such conditions are imposed for the safety and convenience of the public. This exception would apply to airline pilots within the jurisdiction of the Federal Aviation Agency, whose regulations set a ceiling of age 60 for the pilots.
>
> Actors required for youthful or elderly characterizations of roles
>
> Persons used to advertise or promote the sale of products designed for, and directed to appeal to, either youthful or elderly consumers.

Several administrative opinions have ruled that employer practices based on bfoqs are in violation of the Act:

> Bfoq's based on physical requirements have generally been rejected by the Administrator on the basis that an employer cannot assume that every individual over a certain age becomes physically unable to perform a job. In a case dealing with an age limit on construction workers the Wage-Hour Administrator ruled that "the fact that many or even most, individuals may be so disqualified does not make a case for application of this exemption (bfoq) for it is the arbitrary and unreasonable age discrimination against the others, who are physically qualified notwithstanding their age, which is the essence of the wrong prohibited by this Act." (Wage-Hour Opinion Letter, Aug. 30, 1968).
>
> Stores catering to youth may not specify an age description in advertising for clerks. The Administrator found it incorrect "to assume that every individual above a chosen age is unable to perform the duties of sales personnel satisfactorily in such shops." (Wage-Hour Opinion, Jan. 8, 1969)

However, the Seventh Circuit Court recently handed down a decision upholding a bfoq. In 1973 the Department of Labor brought suit against the Greyhound and Trailways bus lines to enjoin them from refusing to consider

applications for employment from bus drivers over the age of 40 (or 35 in the case of Greyhound), and from publishing advertisements stating such restrictions. The Trailways case is still pending, but in the Greyhound case the Seventh Circuit Court reversed the district court decision and upheld the company's contention that its maximum age limitations for new drivers is a bona fide occupational qualification. In reaching this decision, the court held that it was sufficient for the company merely to "demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers." (Hodgson v. Greyhound Lines, Inc., 499 F. 2d. 859, 1974. Cert. denied, Jan. 20, 1975)

D. Factors Other Than Age

The ADEA also provides an exception to prohibited discriminatory practices "where the differentiation is based on reasonable factors other than age." These exceptions are to be narrowly construed and the employer, employment agency, or labor organization has the burden of proving the validity of the exemption.

The Interpretive Bulletin in Section 860.103 and 860.104, describes some situations that may be valid as supporting a differentiation based on reasonable factors other than age:

> Physical fitness requirements based upon pre-employment or periodic physical exams relating to reasonable

minimum standards for employment. Such standards must be necessary for the specific work to be performed and must be uniformly applied to all applicants for the particular job category, regardless of age. A claim for a differentiation based on physical fitness cannot be based on an employer's assumption that every employee over a certain age in a particular job becomes physically unable to perform the duties of that job.

Evaluation factors such as quantity or quality of production, or educational level, where the factors have a valid relationship to the job requirements and are applied uniformly to all employees, regardless of age.

Although younger persons generally have more "test sophistication" than individuals in the 40-65 age bracket, the use of validated employee tests is not a violation of the Act when such tests are related to the requirements of the job and are administered and evaluated in good faith and without discrimination on the basis of age.

Where a job applicant under age 65 is unwilling to accept the number or schedule of hours required by an employer as a condition for a particular job, because he is receiving Social Security benefits and is limited in the amount of wages he may earn without losing such benefits, failure to employ him would not violate the Act. An employer's condition as to the number or schedule of hours may be "a reasonable factor other than age" on which to base a differentiation.

E. Discharge

Compliance investigations, particularly in large nation-wide corporations, have shown that reductions in force have an adverse impact on the older worker. There have been several significant class-action suits over age-based discriminatory discharges. In a case involving Pan American Airways, which was settled before trial, the compliance investigation disclosed that a disproportionate number of older employees was discharged. Pan American agreed to

pay $250,000 in damages to 29 employees. A case involving the Anaconda Aluminum Company also concerning an allegedly discriminatory reduction in force was settled by a consent decree and the payment of back wages to 12 former employees.

As of January 1975, the largest court settlement was the Department of Labor's suit against a Division of Standard Oil of California, Western Operations Inc., which was settled on the basis of offers of reinstatement to 120 former employees, and the payment of $2 million to 160 former employees. The 40 who were not offered reinstatement were those who were 64 years of age and who received instead additional compensation from the date of the judgment to their 65th birthday; those with serious medical problems; and those whose discharges appeared to result from age discrimination, but whose job performance had been deficient.

According to the Secretary of Labor's 1974 annual report on the ADEA, there are also several major suits pending which have not been concluded. The biggest suit was filed by the Department against the Baltimore and Ohio Railroad Company and the Chesapeake and Ohio Railway Company, where the Department is seeking more than $20 million for some 300 present and former railroad employees. This suit seeks the reinstatement of employees who were unfairly

discharged or demoted and, also, the abolition of a provision in the company's amended pension plan for mandatory retirement at age 62.

F. Mandatory Retirement

An area of continuing concern is the question of mandatory retirement before age 65. The Department of Labor has generally taken the position that such retirements are unlawful unless the mandatory retirement provision is:
(1) contained in a bona fide pension or retirement plan;
(2) required by the terms of the plan and is not optional;
(3) essential to the plan's economic survival or to some other legitimate purpose - that is, is not in the plan for the sole purpose of moving out older workers, which has now been made unlawful by the ADEA.

The Department of Labor's first test case on mandatory retirement occurred in Brennan v. Taft Broadcasting Co. In this case an employee was forced to retire at age 60. Subsequently, the company advertised the identical job and the former employee applied. The Department argued that the meaning of the provision in the Act that "no employee benefit plan shall excuse the failure to hire any individual" prohibits an employer from rejecting an application for new employment from an employee who was forced to retire if he is the most qualified applicant.

The lawsuit also challenged the validity of the plan since it was not the bona fide type specified in the Act, and because its compulsory retirement provisions had never been communicated to the employees. The district court dismissed the complaint, holding that the plan was bona fide, that the employee was retired pursuant to the plan, and that the company was not legally required to rehire the retired employee. The Department of Labor appealed the decision. In 1974 the Fifth Circuit held that the benefit plan, which makes no reference to mandatory retirement at age 60 and which is financed by profit sharing contributions not geared to the age of participating employees, could be used as a basis for terminating a 60-year-old employee, despite the fact that his job performance had been outstanding. Although the court agreed that the retirement was not required by any cost factor, it held that the Act permits involuntary retirement so long as the retirement provision is part of a bona fide employee benefit plan, and so long as the plan is not a subterfuge to evade the purposes of the Act. Since the plan was in effect before the effective date of the ADEA, the court held that it could not possibly have been a subterfuge. (Brennan v. Taft Broadcasting Co., 500 Fed. 2d. 212, 1974).

The issue of mandatory retirement is still unresolved and the Department of Labor has several suits pending in district courts.

V. TITLE VII IMPACT ON ADEA

The Fifth Circuit court, in a suit brought by a private individual, has upheld the Department of Labor's position that a prima facie case of age discrimination is established if the criteria set forth in McDonnell Douglas Corp. v. Green, 411 US. 792 (a Title VII case), are met: (1) the aggrieved individual is in the protected age group; (2) he or she was forced to retire (or was discharged, or not hired); (3) he or she was apparently performing satisfactorily (or was apparently qualified for the job), (4) he or she was replaced by a younger person (or the employer continued to look for other applicants). (Wilson v. Sealtest Foods Division of Kraftco Corp. 501 F. 2d. 84 (C.A. 5),1974).

APPENDIX TO TAB F

Age Discrimination in Employment Act of 1967

Text of the Age Discrimination in Employment Act of 1967, P.L. 90-202, effective June 12, 1968. The Act reads as last amended by P.L. 93-259, effective May 1, 1974.

STATEMENT OF FINDINGS AND PURPOSE

Sec. 2. (a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce of arbitrary discrimination in employment because of age burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

EDUCATION AND RESEARCH PROGRAM

Sec. 3. (a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this Act, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures:

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster, through the public employment service system and through cooperative effort, the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) Sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this Act, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 12.

PROHIBITION OF AGE DISCRIMINATION

Sec. 4. (a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual member, or applicant for membership, has opposed any practice made unlawful by this section, or because such individual, member, or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employee or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause.

STUDY BY SECRETARY OF LABOR

Sec. 5. The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress.

ADMINISTRATION

Sec. 6. The Secretary shall have the power—

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee-for-service basis, as he deems neces-

sary to assist him in the performance of his functions under this Act;

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act.

RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

Sec. 7 (a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209 and 211).

(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217) and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to an individual as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Any aggrieved individual may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any individual to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such individual under this Act.

(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 13(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

NOTICES TO BE POSTED

Sec. 8. Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as

the Secretary deems appropriate to effectuate the purposes of this Act.

RULES AND REGULATIONS

Sec. 9. In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this Act, and may establish such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest.

CRIMINAL PENALTIES

Sec. 10. Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with a duly authorized representative of the Secretary while he is engaged in the performance of duties under this Act shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

DEFINITIONS

Sec. 11. For the purposes of this Act—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency but such term does not include the United States, or a corporation wholly owned by the Government of the United States. (as amended effective May 1, 1974)

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States. (as amended effective May 1, 1974)

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relation Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy-making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. (as amended effective May 1, 1974)

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States, or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States, or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act.

LIMITATION

Sec. 12. The prohibitions in this Act shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.

ANNUAL REPORT

Sec. 13. The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum ages established by this Act, together with his recommendation to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the Act upon workers not covered by its provisions, and such other factors as he may deem pertinent.

FEDERAL-STATE RELATIONSHIP

Sec. 14. (a) Nothing in this Act shall affect the jurisdiction of any agency

of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of an action under this Act such action shall supersede any State action.

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

Sec. 15. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules and regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination

that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law. (as amended effective May 1, 1974)

EFFECTIVE DATE

Sec. 16. This Act shall become effective one hundred and eighty days after enactment (except (a) that the Secretary of Labor may extend the delay in effective date of any provision of this Act up to an additional ninety days thereafter if he finds that such time is necessary in permitting adjustments to the provisions hereof, and (b) that on or after the date of enactment the Secretary of Labor is authorized to issue such rules and regulations as may be necessary to carry out its provisions).

APPROPRIATIONS

Sec. 17. There are hereby authorized to be appropriated such sums, not in excess of $5,000,000 for any fiscal year, as may be necessary to carry out this Act.

THE STATE AND LOCAL FISCAL ASSISTANCE ACT OF 1972
more commonly known as
THE GENERAL REVENUE SHARING ACT
(Title I provides for Revenue Sharing)
(Full text of Title I is in the Appendix under this Tab)

I. THE LAW IN GENERAL

The General Revenue Sharing Act became law on October 20, 1972. Its intent and purpose is to provide state and local government units with an increased amount of financial resources to deal with problems and needs at the state and local levels. It is administered and enforced by the Office of Revenue Sharing (ORS)--in the U.S. Treasury Department.

The total allocation under this Act is $30.2 billion, to be distributed over a 5-year period (Jan. 1, 1972 to Dec. 31, 1976) to approximately 38,000 government units. One-third of the money goes to state governments, the remaining two-thirds go to government units below the state level.

All state governments are eligible for revenue sharing funds, as are counties, townships, and municipalities. The Act states:

> The government must be a general government. In particular, it must not be a special-purpose unit. This definition excludes school districts, special utility districts, library districts, and agencies of local governments, even though these agencies may be relatively autonomous.

Although special purpose governments do not qualify as direct recipients of funds, they may receive revenue sharing funds transferred from the counties and municipalities which they serve if they perform services included in the "priority expenditure categories" for local governments. The primary recipient of funding must make the decision whether to transfer funds to a special district or districts. (Such transfers remain dependent on local laws regulating these transactions.)

The guidelines issued under the General Revenue Sharing Act set forth the uses to which funds may be applied. Governmental units may use their funding to pay for operating and maintenance costs in the following "priority expenditure catagories":

(1). public safety (e.g., police, courts and fire protection;

(2) environmental protection (e.g., smoke regulation);

(3) public transportation (e.g., highways, bridges and transit systems);

(4) health;

(5) recreation;

(6) libraries;

(7) social services for the poor and aged; and

(8) financial administration.

In addition to operating and maintenance expenditures, the Act provides for the use of funds for any necessary and ordinary capital expenditure which is authorized under state and local law (e.g., police patrol cars).

II. THE LAW AS IT APPLIES TO EMPLOYMENT DISCRIMINATION

The act prohibits employment discrimination based on race, color, national origin or sex. In addition, the law provides for community participation on a nondiscriminatory basis in determining the use of funds; for example, where public libraries are to be built.

Within the General Revenue Sharing Act there is a clear statement prohibiting discrimination (Sec. 122(a)): ...no person in the United States shall on the grounds of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with [revenue sharing funds]". It should be noted that the Act is not restricted to U.S. citizens, nor does it prohibit discrimination based on age, religion, or handicapped status.

Inasmuch as discrimination is prohibited in "any activity funded in whole or in part" with revenue sharing funds, the Office of Revenue Sharing (ORS) is given broad jurisdiction in enforcing the discrimination prohibitions. For example, if a state or local government were to use revenue sharing funds for a capital expenditure such as a police vehicle, the ORS has authority to review the employment policies and practices of the entire police department to insure they are not discriminatory.

The nondiscrimination provisions also apply to secondary recipients of funds. Violation of the provisions by a secondary recipient constitutes a violation by the primary recipient. The primary recipient (e.g., a city) is obligated to make this known to the secondary recipient (e.g., a library district).

III. RELATION TO TITLE VII: DUPLICATION?

The question "Why the need for EEO provisions in this law since Title VII covers state and local governments?" may well come to mind. The answer: Of the 38,000 government units which come under coverage, only 10,000 are covered under Title VII by virtue of having 15 or more employers. Thus the General Revenue Sharing Act affords state and local government employees in the protected classes from employment discrimination in activities funded by revenue sharing in some 28,000 units of government not protected by Title VII.

IV. AFFIRMATIVE ACTION

All recipients of revenue sharing funds must provide for percentages of minorities and women in their work force in proportion to the composition of minorities and women in the surrounding population. That is, if there is no discrimination an employer's work force is proportionately representative of the population composition of the area from which it is drawn. Where the work force does not meet this standard, the recipient of funds is obligated to take affirmative action to correct the work force imbalance. When it is

determined that a recipient has engaged in discriminatory practices, the ORS may require the adoption of goals and timetables for the hiring of qualified minorities and women to offset such past discriminatory practices.

V. RULES AND REGULATIONS

Under the Rules and Regulations of the General Revenue Sharing Act, individuals and groups have a legitimate right to be informed of the plans for, and use of, revenue sharing funds, and are guaranteed protection should they become the victims of discriminatory employment practices. Local residents have a right to information about the expenditure of revenue sharing funds in their area. Regulations mandate the publication of required reports involving planned and actual use of funds, publicity, and public inspection of revenue sharing reports and documents.

Individuals or groups who feel they are victims of discrimination, either in the use of revenue sharing funds or in employment under projects or activities funded by such funds, have access to a complaint procedure. The victim of discrimination may make a written complaint against a recipient, which is submitted to ORS for investigation. If the complaint is found to be justified, the ORS will take remedial action.

VI. THE OFFICE OF REVENUE SHARING

The act is administered by the Office of General Revenue Sharing. The ORS functions within the Department of the Treasury. The Director of ORS reports directly to the Secretary of the Treasury. The enforcement staff consists of a deputy director, attorneys, economists, accountants,compliance specialists, and other specialists.

ORS duties include: management and control of data for allocating revenue sharing monies; dissemination of information to improve understanding of the program; and monitoring the use of revenue sharing funds by recipients. The ORS also offers help to local governments to aid their understanding of the application of the law.

To supplement its own staff, the ORS makes use of those systems already involved in civil rights compliance: other federal agencies and independent organizations such as the NAACP, the Urban League, the Lawyers' Committee for Civil Rights, and NOW, to name a few.

VII. ORS INVESTIGATIVE AND COMPLAINT REVIEW PROCESS

(1) A complaint letter is written and sent to the ORS alleging discriminatory activities (this may be done by an individual or a group).

(2) The ORS must acknowledge the complaint. The affected government and the state governor are notified of the complaint.

(3) The ORS conducts a preliminary investigation. A complaint found to be without merit is "closed" and all interested parties are notified. If the complaint has merit the procedure continues to the next step.

(4) The ORS begins a "field investigation" which includes a "civil rights" review conducted by civil rights "specialists" and financial audit of the recipient concerned.

(5) The ORS determines, based on its investigation, whether the recipient is in compliance with the Act. If no violation can be found, the case is closed and all parties are notified. If there is a violation, an official notice of noncompliance is issued and the compliant goes to the next step.

(6) The recipient government may voluntarily develop an acceptable plan for correcting the violation (usually within 60 days).

(7) If an acceptable plan is developed, it is implemented by the recipient government. If not, the ORS Director seeks a Justice Department civil court action, a hearing before an administrative law judge, or other legal remedy.

(8) When the plan is properly implemented, the recipient government is returned to a compliance status; the case is closed and all parties are notified.

Voluntary remedial action on the part of the recipient government is encouraged and usually forthcoming. The penalties of losing a legal action are considerable: not only may all the illegally spent revenue sharing monies be recovered, but all future revenue sharing monies may be witheld until satisfactory compliance with the law is achieved.

The ORS does not limit itself to the specific allegations in a complaint with an investigation is conducted. Each activity is investigated in which revenue sharing funds are used to determine whether discrimination exists. It is out of this practice that the ORS determines if a "pattern" of discrimination exists; e.g., a pattern or practice of promotions that excludes members of a protected class (systemic discrimination).

The ORS has discretion to initiate an investigation. The Rules and Regulations specifically state that: "The Secretary shall monitor and determine compliance of recipient governments with the requirements of this section and of the Act. Compliance reviews will be undertaken from time to time, as appropriate, at the discretion of the Secretary."

Monitoring by the ORS is supposed to be an ongoing process. The aim is to prevent as well as eliminate discriminatory practices. In cases of discrimination, the policy is to redress grievances rather than to find guilty parties.

As an aid to compliance the ORS has published an Audit Guide. This guide is meant to aid recipients in auditing their revenue sharing activities and requires auditors to report extensively on civil rights. The recipient government must forward a copy of the audit to the ORS in instances of noncompliance in which remedial actions may be taken.

If the ORS receives a violation complaint which is not under this jurisdiction, it will refer the complaint to the proper authority.

Compliance efforts are coordinated between the ORS and the Civil Rights Division of the Department of Justice. Additionally, under the General Revenue Sharing Act, the Attorney General has independent authority to initiate a law suit in revenue sharing cases which involve a "pattern" of discrimination.

Case in Point: "Pattern" of Discrimination

Indicative of the possible results of "pattern" discrimination was a class action suit brought against the City of Chicago. Judge John L. Smith of the U.S. District Court ordered that payment of revenue sharing funds to the City of Chicago be stopped, pending settlement of a racial discrimination complaint against the Chicago Police Department.

The Afro-American Patrolmen's League of Chicago filed suit charging that the departments' hiring and promotional practices discriminate against blacks, women, and persons of Spanish surname.

The Court's decision followed an earlier court ruling which established that the police department's test for hiring patrol-persons discriminated against women and minorities. The department had been ordered to create a new and nondiscriminatory testing system, and it agreed to do so. However, Chicago, which had been paying its police officers and firefighters with most of its $76 million in revenue sharing funds, had to wait for its final quarterly payment of over $19 million (1974) pending implement-ation of the new system. This ruling is particularly significant because it is the first time the ORS and the Treasury Department have been ordered not to pay out money under the Revenue Sharing Program to governments which discriminate.

APPENDIX TO TAB G

Public Law 92-512

AN ACT

October 20, 1972
[H. R. 14370]

To provide fiscal assistance to State and local governments, to authorize Federal collection of State individual income taxes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Federal State revenue sharing.

TITLE I—FISCAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS

Subtitle A—Allocation and Payment of Funds

SEC. 101. SHORT TITLE.

Citation of title.

This title may be cited as the "State and Local Fiscal Assistance Act of 1972".

SEC. 102. PAYMENTS TO STATE AND LOCAL GOVERNMENTS.

Except as otherwise provided in this title, the Secretary shall, for each entitlement period, pay out of the Trust Fund to—

(1) each State government a total amount equal to the entitlement of such State government determined under section 107 for such period, and

(2) each unit of local government a total amount equal to the entitlement of such unit determined under section 108 for such period.

In the case of entitlement periods ending after the date of the enactment of this Act, such payments shall be made in installments, but not less often than once for each quarter, and, in the case of quarters ending after September 30, 1972, shall be paid not later than 5 days after the close of each quarter. Such payments for any entitlement period may be initially made on the basis of estimates. Proper adjustment shall be made in the amount of any payment to a State government or a unit of local government to the extent that the payments previously made to such government under this subtitle were in excess of or less than the amounts required to be paid.

SEC. 103. USE OF FUNDS BY LOCAL GOVERNMENTS FOR PRIORITY EXPENDITURES.

(a) IN GENERAL.—Funds received by units of local government under this subtitle may be used only for priority expenditures. For purposes of this title, the term "priority expenditures" means only—

"Priority expenditures."

(1) ordinary and necessary maintenance and operating expenses for—

(A) public safety (including law enforcement, fire protection, and building code enforcement),

(B) environmental protection (including sewage disposal, sanitation, and pollution abatement),

(C) public transportation (including transit systems and streets and roads),

(D) health,

(E) recreation,

(F) libraries,

(G) social services for the poor or aged, and

(H) financial administration; and

(2) ordinary and necessary capital expenditures authorized by law.

(b) CERTIFICATES BY LOCAL GOVERNMENTS.—The Secretary is authorized to accept a certification by the chief executive officer of a unit of local government that the unit of local government has used

the funds received by it under this subtitle for an entitlement period only for priority expenditures, unless he determines that such certification is not sufficiently reliable to enable him to carry out his duties under this title.

SEC. 104. PROHIBITION ON USE AS MATCHING FUNDS BY STATE OR LOCAL GOVERNMENTS.

(a) IN GENERAL.—No State government or unit of local government may use, directly or indirectly, any part of the funds it receives under this subtitle as a contribution for the purpose of obtaining Federal funds under any law of the United States which requires such government to make a contribution in order to receive Federal funds.

(b) DETERMINATIONS BY SECRETARY OF THE TREASURY.—If the Secretary has reason to believe that a State government or unit of local government has used funds received under this subtitle in violation of subsection (a), he shall give reasonable notice and opportunity for hearing to such government. If, thereafter, the Secretary of the Treasury determines that such government has used funds in violation of subsection (a), he shall notify such government of his determination and shall request repayment to the United States of an amount equal to the funds so used. To the extent that such government fails to repay such amount, the Secretary shall withhold from subsequent payments to such government under this subtitle an amount equal to the funds so used.

(c) INCREASED STATE OR LOCAL GOVERNMENT REVENUES.—No State government or unit of local government shall be determined to have used funds in violation of subsection (a) with respect to any funds received for any entitlement period to the extent that the net revenues received by it from its own sources during such period exceed the net revenues received by it from its own sources during the one-year period beginning July 1, 1971 (or one-half of such net revenues, in the case of an entitlement period of 6 months).

(d) DEPOSITS AND TRANSFERS TO GENERAL FUND.—Any amount repaid by a State government or unit of local government under subsection (b) shall be deposited in the general fund of the Treasury. An amount equal to the reduction in payments to any State government or unit of local government which results from the application of this section (after any judicial review under section 143) shall be transferred from the Trust Fund to the general fund of the Treasury on the day on which such reduction becomes final.

Post, p. 935.

(e) CERTIFICATES BY STATE AND LOCAL GOVERNMENTS.—The Secretary is authorized to accept a certification by the Governor of a State or the chief executive officer of a unit of local government that the State government or unit of local government has not used any funds received by it under this subtitle for an entitlement period in violation of subsection (a), unless he determines that such certification is not sufficiently reliable to enable him to carry out his duties under this title.

SEC. 105. CREATION OF TRUST FUND; APPROPRIATIONS.

(a) TRUST FUND.—

(1) IN GENERAL.—There is hereby established on the books of the Treasury of the United States a trust fund to be known as the "State and Local Government Fiscal Assistance Trust Fund" (referred to in this subtitle as the "Trust Fund"). The Trust Fund shall remain available without fiscal year limitation and shall consist of such amounts as may be appropriated to it and deposited in it as provided in subsection (b). Except as provided in this title,

amounts in the Trust Fund may be used only for the payments to State and local governments provided by this subtitle.

(2) TRUSTEE.—The Secretary of the Treasury shall be the trustee of the Trust Fund and shall report to the Congress not later than March 1 of each year on the operation and status of the Trust Fund during the preceding fiscal year. Report to Congress.

(b) APPROPRIATIONS.—

(1) IN GENERAL.—There is appropriated to the Trust Fund, out of amounts in the general fund of the Treasury attributable to the collections of the Federal individual income taxes not otherwise appropriated—

(A) for the period beginning January 1, 1972, and ending June 30, 1972, $2,650,000,000;

(B) for the period beginning July 1, 1972, and ending December 31, 1972, $2,650,000,000;

(C) for the period beginning January 1, 1973, and ending June 30, 1973, $2,987,500,000;

(D) for the fiscal year beginning July 1, 1973, $6,050,000,000;

(E) for the fiscal year beginning July 1, 1974, $6,200,000,000;

(F) for the fiscal year beginning July 1, 1975, $6,350,000,000; and

(G) for the period beginning July 1, 1976, and ending December 31, 1976, $3,325,000,000.

(2) NONCONTIGUOUS STATES ADJUSTMENT AMOUNTS.—There is appropriated to the Trust Fund, out of amounts in the general fund of the Treasury attributable to the collections of the Federal individual income taxes not otherwise appropriated—

(A) for the period beginning January 1, 1972, and ending June 30, 1972, $2,390,000;

(B) for the period beginning July 1, 1972, and ending December 31, 1972, $2,390,000;

(C) for the period beginning January 1, 1973, and ending June 30, 1973, $2,390,000;

(D) for each of the fiscal years beginning July 1, 1973, July 1, 1974, and July 1, 1975, $4,780,000; and

(E) for the period beginning July 1, 1976, and ending December 31, 1976, $2,390,000.

(3) DEPOSITS.—Amounts appropriated by paragraph (1) or (2) for any fiscal year or other period shall be deposited in the Trust Fund on the later of (A) the first day of such year or period, or (B) the day after the date of enactment of this Act.

(c) TRANSFERS FROM TRUST FUND TO GENERAL FUND.—The Secretary shall from time to time transfer from the Trust Fund to the general fund of the Treasury any moneys in the Trust Fund which he determines will not be needed to make payments to State governments and units of local government under this subtitle.

SEC. 106. ALLOCATION AMONG STATES.

(a) IN GENERAL.—There shall be allocated to each State for each entitlement period, out of amounts appropriated under section 105(b)(1) for that entitlement period, an amount which bears the same ratio to the amount appropriated under that section for that period as the amount allocable to that State under subsection (b) bears to the sum of the amounts allocable to all States under subsection (b).

(b) DETERMINATION OF ALLOCABLE AMOUNT.—

(1) IN GENERAL.—For purposes of subsection (a), the amount allocable to a State under this subsection for any entitlement period shall be determined under paragraph (2), except that such amount shall be determined under paragraph (3) if the amount allocable to it under paragraph (3) is greater than the sum of the amounts allocable to it under paragraph (2) and subsection (c).

(2) THREE FACTOR FORMULA.—For purposes of paragraph (1), the amount allocable to a State under this paragraph for any entitlement period is the amount which bears the same ratio to $5,300,000,000 as—

(A) the population of that State, multiplied by the general tax effort factor of that State, multiplied by the relative income factor of that State, bears to

(B) the sum of the products determined under subparagraph (A) for all States.

(3) FIVE FACTOR FORMULA.—For purposes of paragraph (1), the amount allocable to a State under this paragraph for any entitlement period is the amount to which that State would be entitled if—

(A) ⅓ of $3,500,000,000 were allocated among the States on the basis of population,

(B) ⅓ of $3,500,000,000 were allocated among the States on the basis of urbanized population,

(C) ⅓ of $3,500,000,000 were allocated among the States on the basis of population inversely weighted for per capita income,

(D) ½ of $1,800,000,000 were allocated among the States on the basis of income tax collections, and

(E) ½ of $1,800,000,000 were allocated among the States on the basis of general tax effort.

(c) NONCONTIGUOUS STATES ADJUSTMENT.—

(1) IN GENERAL.—In addition to amounts allocated among the States under subsection (a), there shall be allocated for each entitlement period, out of amounts appropriated under section 105(b)(2), an additional amount to any State (A) whose allocation under subsection (b) is determined by the formula set forth in paragraph (2) of that subsection and (B) in which civilian employees of the United States Government receive an allowance under section 5941 of title 5, United States Code.

80 Stat. 512.

(2) DETERMINATION OF AMOUNT.—The additional amount allocable to any State under this subsection for any entitlement period is an amount equal to a percentage of the amount allocable to that State under subsection (b)(2) for that period which is the same as the percentage of basic pay received by such employees stationed in that State as an allowance under such section 5941. If the total amount appropriated under section 105(b)(2) for any entitlement period is not sufficient to pay in full the additional amounts allocable under this subsection for that period, the Secretary shall reduce proportionately the amounts so allocable.

SEC. 107. ENTITLEMENTS OF STATE GOVERNMENTS.

(a) DIVISION BETWEEN STATE AND LOCAL GOVERNMENTS.—The State government shall be entitled to receive one-third of the amount allocated to that State for each entitlement period. The remaining portion of each State's allocation shall be allocated among the units of local government of that State as provided in section 108.

(b) STATE MUST MAINTAIN TRANSFERS TO LOCAL GOVERNMENTS.—

(1) GENERAL RULE.—The entitlement of any State government for any entitlement period beginning on or after July 1, 1973, shall be reduced by the amount (if any) by which—

(A) the average of the aggregate amounts transferred by the State government (out of its own sources) during such period and the preceding entitlement period to all units of local government in such State, is less than,

(B) the similar aggregate amount for the one-year period beginning July 1, 1971.

For purposes of subparagraph (A), the amount of any reduction in the entitlement of a State government under this subsection for any entitlement period shall, for subsequent entitlement periods, be treated as an amount transferred by the State government (out of its own sources) during such period to units of local government in such State.

(2) ADJUSTMENT WHERE STATE ASSUMES RESPONSIBILITY FOR CATEGORY OF EXPENDITURES.—If the State government establishes to the satisfaction of the Secretary that since June 30, 1972, it has assumed responsibility for a category of expenditures which (before July 1, 1972) was the responsibility of local governments located in such State, then, under regulations prescribed by the Secretary, the aggregate amount taken into account under paragraph (1)(B) shall be reduced to the extent that increased State government spending (out of its own sources) for such category has replaced corresponding amounts which for the one-year period beginning July 1, 1971, it transferred to units of local government.

(3) ADJUSTMENT WHERE NEW TAXING POWERS ARE CONFERRED UPON LOCAL GOVERNMENTS.—If a State establishes to the satisfaction of the Secretary that since June 30, 1972, one or more units of local government within such State have had conferred upon them new taxing authority, then, under regulations prescribed by the Secretary, the aggregate amount taken into account under paragraph (1)(B) shall be reduced to the extent of the larger of—

(A) an amount equal to the amount of the taxes collected by reason of the exercise of such new taxing authority by such local governments, or

(B) an amount equal to the amount of the loss of revenue to the State by reason of such new taxing authority being conferred on such local governments.

No amount shall be taken into consideration under subparagraph (A) if such new taxing authority is an increase in the authorized rate of tax under a previously authorized kind of tax, unless the State is determined by the Secretary to have decreased a related State tax.

(4) SPECIAL RULE FOR PERIOD BEGINNING JULY 1, 1973.—In the case of the entitlement period beginning July 1, 1973, the preceding entitlement period for purposes of paragraph (1)(A) shall be treated as being the one-year period beginning July 1, 1972.

(5) SPECIAL RULE FOR PERIOD BEGINNING JULY 1, 1976.—In the case of the entitlement period beginning July 1, 1976, and ending December 31, 1976, the aggregate amount taken into account under paragraph (1)(A) for the preceding entitlement period and the aggregate amount taken into account under paragraph (1)(B) shall be one-half of the amounts which (but for this paragraph) would be taken into account.

(6) REDUCTION IN ENTITLEMENT.—If the Secretary has reason to believe that paragraph (1) requires a reduction in the entitlement of any State government for any entitlement period, he shall give reasonable notice and opportunity for hearing to the State. If, thereafter, he determines that paragraph (1) requires the reduction of such entitlement, he shall also determine the amount of such reduction and shall notify the Governor of such State of such determinations and shall withhold from subsequent payments to such State government under this subtitle an amount equal to such reduction.

(7) TRANSFER TO GENERAL FUND.—An amount equal to the reduction in the entitlement of any State government which results from the application of this subsection (after any judicial review under section 143) shall be transferred from the Trust Fund to the general fund of the Treasury on the day on which such reduction becomes final.

Post, p. 935.

SEC. 108. ENTITLEMENTS OF LOCAL GOVERNMENTS.

(a) ALLOCATION AMONG COUNTY AREAS.—The amount to be allocated to the units of local government within a State for any entitlement period shall be allocated among the county areas located in that State so that each county area will receive an amount which bears the same ratio to the total amount to be allocated to the units of local government within that State as—

(1) the population of that county area, multiplied by the general tax effort factor of that county area, multiplied by the relative income factor of that county area, bears to

(2) the sum of the products determined under paragraph (1) for all county areas within that State.

(b) ALLOCATION TO COUNTY GOVERNMENTS, MUNICIPALITIES, TOWNSHIPS, ETC.—

(1) COUNTY GOVERNMENTS.—The county government shall be allocated that portion of the amount allocated to the county area for the entitlement period under subsection (a) which bears the same ratio to such amount as the adjusted taxes of the county government bear to the adjusted taxes of the county government and all other units of local government located in the county area.

(2) OTHER UNITS OF LOCAL GOVERNMENT.—The amount remaining for allocation within a county area after the application of paragraph (1) shall be allocated among the units of local government (other than the county government and other than township governments) located in that county area so that each unit of local government will receive an amount which bears the same ratio to the total amount to be allocated to all such units as—

(A) the population of that local government, multiplied by the general tax effort factor of that local government, multiplied by the relative income factor of that local government, bears to

(B) the sum of the products determined under subparagraph (A) for all such units.

(3) TOWNSHIP GOVERNMENTS.—If the county area includes one or more township governments, then before applying paragraph (2)—

(A) there shall be set aside for allocation under subparagraph (B) to such township governments that portion of the amount allocated to the county area for the entitlement period which bears the same ratio to such amount as the sum

of the adjusted taxes of all such township governments bears to the aggregate adjusted taxes of the county government, such township governments, and all other units of local government located in the county area, and

(B) that portion of each amount set aside under subparagraph (A) shall be allocated to each township government on the same basis as amounts are allocated to units of local government under paragraph (2).

If this paragraph applies with respect to any county area for any entitlement period, the remaining portion allocated under paragraph (2) to the units of local government located in the county area (other than the county government and the township governments) shall be appropriately reduced to reflect the amounts set aside under subparagraph (A).

(4) INDIAN TRIBES AND ALASKAN NATIVE VILLAGES.—If within a county area there is an Indian tribe or Alaskan native village which has a recognized governing body which performs substantial governmental functions, then before applying paragraph (1) there shall be allocated to such tribe or village a portion of the amount allocated to the county area for the entitlement period which bears the same ratio to such amount as the population of that tribe or village within that county area bears to the population of that county area. If this paragraph applies with respect to any county area for any entitlement period, the amount to be allocated under paragraph (1) shall be appropriately reduced to reflect the amount allocated under the preceding sentence. If the entitlement of any such tribe or village is waived for any entitlement period by the governing body of that tribe or village, then the provisions of this paragraph shall not apply with respect to the amount of such entitlement for such period.

(5) RULE FOR SMALL UNITS OF GOVERNMENT.—If the Secretary determines that in any county area the data available for any entitlement period are not adequate for the application of the formulas set forth in paragraphs (2) and (3)(B) with respect to units of local government (other than a county government) with a population below a number (not more than 500) prescribed for that county area by the Secretary, he may apply paragraph (2) or (3)(B) by allocating for such entitlement period to each such unit located in that county area an amount which bears the same ratio to the total amount to be allocated under paragraph (2) or (3)(B) for such entitlement period as the population of such unit bears to the population of all units of local government in that county area to which allocations are made under such paragraph. If the preceding sentence applies with respect to any county area, the total amount to be allocated under paragraph (2) or (3)(B) to other units of local government in that county area for the entitlement period shall be appropriately reduced to reflect the amounts allocated under the preceding sentence.

(6) ENTITLEMENT.—

(A) IN GENERAL.—Except as otherwise provided in this paragraph, the entitlement of any unit of local government for any entitlement period shall be the amount allocated to such unit under this subsection (after taking into account any applicable modification under subsection (c)).

(B) MAXIMUM AND MINIMUM PER CAPITA ENTITLEMENT.—Subject to the provisions of subparagraphs (C) and (D), the per capita amount allocated to any county area or any unit of local government (other than a county government) within a

State under this section for any entitlement period shall not be less than 20 percent, nor more than 145 percent, of two-thirds of the amount allocated to the State under section 106, divided by the population of that State.

(C) LIMITATION.—The amount allocated to any unit of local government under this section for any entitlement period shall not exceed 50 percent of the sum of (i) such government's adjusted taxes, and (ii) the intergovernmental transfers of revenue to such government (other than transfers to such government under this subtitle).

(D) ENTITLEMENT LESS THAN $200, OR GOVERNING BODY WAIVES ENTITLEMENT.—If (but for this subparagraph) the entitlement of any unit of local government below the level of the county government—

(i) would be less than $200 for any entitlement period ($100 for an entitlement period of 6 months), or

(ii) is waived for any entitlement period by the governing body of such unit,

then the amount of such entitlement for such period shall (in lieu of being paid to such unit) be added to, and shall become a part of, the entitlement for such period of the county government of the county area in which such unit is located.

(7) ADJUSTMENT OF ENTITLEMENT.—

(A) IN GENERAL.—In adjusting the allocation of any county area or unit of local government, the Secretary shall make any adjustment required under paragraph (6) (B) first, any adustment required under paragraph (6) (C) next, and any adjustment required under paragraph (6) (D) last.

(B) ADJUSTMENT FOR APPLICATION OF MAXIMUM OR MINIMUM PER CAPITA ENTITLEMENT.—The Secretary shall adjust the allocations made under this section to county areas or to units of local governments in any State in order to bring those allocations into compliance with the provisions of paragraph (6) (B). In making such adjustments he shall make any necessary adjustments with respect to county areas before making any necessary adjustments with respect to units of local government.

(C) ADJUSTMENT FOR APPLICATION OF LIMITATION.—In any case in which the amount allocated to a unit of local government is reduced under paragraph (6) (C) by the Secretary, the amount of that reduction—

(i) in the case of a unit of local government (other than a county government), shall be added to and increase the allocation of the county government of the county area in which it is located, unless (on account of the application of paragraph (6)) that county government may not receive it, in which case the amount of the reduction shall be added to and increase the entitlement of the State government of the State in which that unit of local government is located; and

(ii) in the case of a county government, shall be added to and increase the entitlement of the State government of the State in which it is located.

(c) SPECIAL ALLOCATION RULES.—

(1) OPTIONAL FORMULA.—A State may by law provide for the allocation of funds among county areas, or among units of local government (other than county governments), on the basis of the population multiplied by the general tax effort factors of such areas or units of local government, on the basis of the population

multiplied by the relative income factors of such areas or units of local government, or on the basis of a combination of those two factors. Any State which provides by law for such a variation in the allocation formula provided by subsection (a), or by paragraphs (2) and (3) of subsection (b), shall notify the Secretary of such law not later than 30 days before the beginning of the first entitlement period to which such law is to apply. Any such law shall—

(A) provide for allocating 100 percent of the aggregate amount to be allocated under subsection (a), or under paragraphs (2) and (3) of subsection (b);

(B) apply uniformly throughout the State; and

(C) apply during the period beginning on the first day of the first entitlement period to which it applies and ending on December 31, 1976.

(2) CERTIFICATION.—Paragraph (1) shall apply within a State only if the Secretary certifies that the State law complies with the requirements of such paragraph. The Secretary shall not certify any such law with respect to which he receives notification later than 30 days prior to the first entitlement period during which it is to apply.

(d) GOVERNMENTAL DEFINITIONS AND RELATED RULES.—For purposes of this title—

(1) UNITS OF LOCAL GOVERNMENT.—The term "unit of local government" means the government of a county, municipality, township, or other unit of government below the State which is a unit of general government (determined on the basis of the same principles as are used by the Bureau of the Census for general statistical purposes). Such term also means, except for purposes of paragraphs (1), (2), (3), (5), (6)(C), and (6)(D) of subsection (b), and, except for purposes of subsection (c), the recognized governing body of an Indian tribe or Alaskan native village which performs substantial governmental functions.

(2) CERTAIN AREAS TREATED AS COUNTIES.—In any State in which any unit of local government (other than a county government) constitutes the next level of government below the State government level, then, except as provided in the next sentence, the geographic area of such unit of government shall be treated as a county area (and such unit of government shall be treated as a county government) with respect to that portion of the State's geographic area. In any State in which any county area is not governed by a county government but contains two or more units of local government, such units shall not be treated as county governments and the geographic areas of such units shall not be treated as county areas.

(3) TOWNSHIPS.—The term "township" includes equivalent subdivisions of government having different designations (such as "towns"), and shall be determined on the basis of the same principles as are used by the Bureau of the Census for general statistical purposes.

(4) UNITS OF LOCAL GOVERNMENT LOCATED IN LARGER ENTITY.—A unit of local government shall be treated as located in a larger entity if part or all of its geographic area is located in the larger entity.

(5) ONLY PART OF UNIT LOCATED IN LARGER ENTITY.—If only part of a unit of local government is located in a larger entity, such part shall be treated for allocation purposes as a separate unit of

local government, and all computations shall, except as otherwise provided in regulations, be made on the basis of the ratio which the estimated population of such part bears to the population of the entirety of such unit.

(6) BOUNDARY CHANGES, GOVERNMENTAL REORGANIZATION, ETC.—If, by reason of boundary line changes, by reason of State statutory or constitutional changes, by reason of annexations or other governmental reorganizations, or by reason of other circumstances, the application of any provision of this section to units of local government does not carry out the purposes of this subtitle, the application of such provision shall be made, under regulations prescribed by the Secretary, in a manner which is consistent with such purposes.

SEC. 109. DEFINITIONS AND SPECIAL RULES FOR APPLICATION OF ALLOCATION FORMULAS.

(a) IN GENERAL.—For purposes of this subtitle—

(1) POPULATION.—Population shall be determined on the same basis as resident population is determined by the Bureau of the Census for general statistical purposes.

(2) URBANIZED POPULATION.—Urbanized population means the population of any area consisting of a central city or cities of 50,000 or more inhabitants (and of the surrounding closely settled territory for such city or cities) which is treated as an urbanized area by the Bureau of the Census for general statistical purposes.

(3) INCOME.—Income means total money income received from all sources, as determined by the Bureau of the Census for general statistical purposes.

(4) PERSONAL INCOME.—Personal income means the income of individuals, as determined by the Department of Commerce for national income accounts purposes.

(5) DATES FOR DETERMINING ALLOCATIONS AND ENTITLEMENTS.—Except as provided in regulations, the determination of allocations and entitlements for any entitlement period shall be made as of the first day of the third month immediately preceding the beginning of such period.

(6) INTERGOVERNMENTAL TRANSFERS.—The intergovernmental transfers of revenue to any government are the amounts of revenue received by that government from other governments as a share in financing (or as reimbursement for) the performance of governmental functions, as determined by the Bureau of the Census for general statistical purposes.

(7) DATA USED; UNIFORMITY OF DATA.—

(A) GENERAL RULE.—Except as provided in subparagraph (B), the data used shall be the most recently available data provided by the Bureau of the Census or the Department of Commerce, as the case may be.

(B) USE OF ESTIMATES, ETC.—Where the Secretary determines that the data referred to in subparagraph (A) are not current enough or are not comprehensive enough to provide for equitable allocations, he may use such additional data (including data based on estimates) as may be provided for in regulations.

(b) INCOME TAX AMOUNT OF STATES.—For purposes of this subtitle—

(1) IN GENERAL.—The income tax amount of any State for any entitlement period is the income tax amount of such State as determined under paragraphs (2) and (3).

(2) INCOME TAX AMOUNT.—The income tax amount of any State for any entitlement period is 15 percent of the net amount collected from the State individual income tax of such State during 1972 or (if later) during the last calendar year ending before the beginning of such entitlement period.

(3) CEILING AND FLOOR.—The income tax amount of any State for any entitlement period—

(A) shall not exceed 6 percent, and

(B) shall not be less than 1 percent,

of the Federal individual income tax liabilities attributed to such State for taxable years ending during 1971 or (if later) during the last calendar year ending before the beginning of such entitlement period.

(4) STATE INDIVIDUAL INCOME TAX.—The individual income tax of any State is the tax imposed upon the income of individuals by such State and described as a State income tax under section 164(a)(3) of the Internal Revenue Code of 1954. 78 Stat. 40. 26 USC 164.

(5) FEDERAL INDIVIDUAL INCOME TAX LIABILITIES.—Federal individual income tax liabilities attributed to any State for any period shall be determined on the same basis as such liabilities are determined for such period by the Internal Revenue Service for general statistical purposes.

(c) GENERAL TAX EFFORT OF STATES.—

(1) IN GENERAL.—For purposes of this subtitle—

(A) GENERAL TAX EFFORT FACTOR.—The general tax effort factor of any State for any entitlement period is (i) the net amount collected from the State and local taxes of such State during the most recent reporting year, divided by (ii) the aggregate personal income (as defined in paragraph (4) of subsection (a)) attributed to such State for the same period.

(B) GENERAL TAX EFFORT AMOUNT.—The general tax effort amount of any State for any entitlement period is the amount determined by multiplying—

(i) the net amount collected from the State and local taxes of such State during the most recent reporting year, by

(ii) the general tax effort factor of that State.

(2) STATE AND LOCAL TAXES.—

(A) TAXES TAKEN INTO ACCOUNT.—The State and local taxes taken into account under paragraph (1) are the compulsory contributions exacted by the State (or by any unit of local government or other political subdivision of the State) for public purposes (other than employee and employer assessments and contributions to finance retirement and social insurance systems, and other than special assessments for capital outlay), as such contributions are determined by the Bureau of the Census for general statistical purposes.

(B) MOST RECENT REPORTING YEAR.—The most recent reporting year with respect to any entitlement period consists of the years taken into account by the Bureau of the Census in its most recent general determination of State and local taxes made before the close of such period.

(d) GENERAL TAX EFFORT FACTOR OF COUNTY AREA.—For purposes of this subtitle, the general tax effort factor of any county area for any entitlement period is—

(1) the adjusted taxes of the county government plus the ad-

justed taxes of each other unit of local government within that county area, divided by

(2) the aggregate income (as defined in paragraph (3) of subsection (a)) attributed to that county area.

(e) GENERAL TAX EFFORT FACTOR OF UNIT OF LOCAL GOVERNMENT.—For purposes of this subtitle—

(1) IN GENERAL.—The general tax effort factor of any unit of local government for any entitlement period is—

(A) the adjusted taxes of that unit of local government, divided by

(B) the aggregate income (as defined in paragraph (3) of subsection (a)) attributed to that unit of local government.

(2) ADJUSTED TAXES.—

(A) IN GENERAL.—The adjusted taxes of any unit of local government are—

(i) the compulsory contributions exacted by such government for public purposes (other than employee and employer assessments and contributions to finance retirement and social insurance systems, and other than special assessments for capital outlay), as such contributions are determined by the Bureau of the Census for general statistical purposes,

(ii) adjusted (under regulations prescribed by the Secretary) by excluding an amount equal to that portion of such compulsory contributions which is properly allocable to expenses for education.

(B) CERTAIN SALES TAXES COLLECTED BY COUNTIES.—In any case where—

(i) a county government exacts sales taxes within the geographic area of a unit of local government and transfers part or all of such taxes to such unit without specifying the purposes for which such unit may spend the revenues, and

(ii) the Governor of the State notifies the Secretary that the requirements of this subparagraph have been met with respect to such taxes,

then the taxes so transferred shall be treated as the taxes of the unit of local government (and not the taxes of the county government).

(f) RELATIVE INCOME FACTOR.—For purposes of this subtitle, the relative income factor is a fraction—

(1) in the case of a State, the numerator of which is the per capita income of the United States and the denominator of which is the per capita income of that State;

(2) in the case of a county area, the numerator of which is the per capita income of the State in which it is located and the denominator of which is the per capita income of that county area; and

(3) in the case of a unit of local government, the numerator of which is the per capita income of the county area in which it is located and the denominator of which is the per capita income of the geographic area of that unit of local government.

For purposes of this subsection, per capita income shall be determined on the basis of income as defined in paragraph (3) of subsection (a).

(g) ALLOCATION RULES FOR FIVE FACTOR FORMULA.—For purposes of section 106(b)(3)—

(1) ALLOCATION ON BASIS OF POPULATION.—Any allocation among the States on the basis of population shall be made by

allocating to each State an amount which bears the same ratio to the total amount to be allocated as the population of such State bears to the population of all the States.

(2) ALLOCATION ON BASIS OF URBANIZED POPULATION.—Any allocation among the States on the basis of urbanized population shall be made by allocating to each State an amount which bears the same ratio to the total amount to be allocated as the urbanized population of such State bears to the urbanized population of all the States.

(3) ALLOCATION ON BASIS OF POPULATION INVERSELY WEIGHTED FOR PER CAPITA INCOME.—Any allocation among the States on the basis of population inversely weighted for per capita income shall be made by allocating to each State an amount which bears the same ratio to the total amount to be allocated as—

(A) the population of such State, multiplied by a fraction the numerator of which is the per capita income of all the States and the denominator of which is the per capita income of such State, bears to

(B) the sum of the products determined under subparagraph (A) for all the States.

(4) ALLOCATION ON BASIS OF INCOME TAX COLLECTIONS.—Any allocation among the States on the basis of income tax collections shall be made by allocating to each State an amount which bears the same ratio to the total amount to be allocated as the income tax amount of such State bears to the sum of the income tax amounts of all the States.

(5) ALLOCATION ON BASIS OF GENERAL TAX EFFORT.—Any allocation among the States on the basis of general tax effort shall be made by allocating to each State an amount which bears the same ratio to the total amount to be allocated as the general tax effort amount of such State bears to the sum of the general tax effort amounts of all the States.

Subtitle B—Administrative Provisions

SEC. 121. REPORTS ON USE OF FUNDS; PUBLICATION.

(a) REPORTS ON USE OF FUNDS.—Each State government and unit of local government which receives funds under subtitle A shall, after the close of each entitlement period, submit a report to the Secretary setting forth the amounts and purposes for which funds received during such period have been spent or obligated. Such reports shall be in such form and detail and shall be submitted at such time as the Secretary may prescribe.

(b) REPORTS ON PLANNED USE OF FUNDS.—Each State government and unit of local government which expects to receive funds under subtitle A for any entitlement period beginning on or after January 1, 1973, shall submit a report to the Secretary setting forth the amounts and purposes for which it plans to spend or obligate the funds which it expects to receive during such period. Such reports shall be in such form and detail as the Secretary may prescribe and shall be submitted at such time before the beginning of the entitlement period as the Secretary may prescribe.

(c) PUBLICATION AND PUBLICITY OF REPORTS.—Each State government and unit of local government shall have a copy of each report submitted by it under subsection (a) or (b) published in a newspaper which is published within the State and has general circulation within the geographic area of that government. Each State government and unit of local government shall advise the news media of the publication of its reports pursuant to this subsection.

SEC. 122. NONDISCRIMINATION PROVISION.

(a) IN GENERAL.—No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under subtitle A.

(b) AUTHORITY OF SECRETARY.—Whenever the Secretary determines that a State government or unit of local government has failed to comply with subsection (a) or an applicable regulation, he shall notify the Governor of the State (or, in the case of a unit of local government, the Governor of the State in which such unit is located) of the noncompliance and shall request the Governor to secure compliance. If within a reasonable period of time the Governor fails or refuses to secure compliance, the Secretary is authorized (1) to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; (2) to exercise the powers and functions provided by title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); or (3) to take such other action as may be provided by law.

78 Stat. 252.

(c) AUTHORITY OF ATTORNEY GENERAL.—When a matter is referred to the Attorney General pursuant to subsection (b), or whenever he has reason to believe that a State government or unit of local government is engaged in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including injunctive relief.

SEC. 123. MISCELLANEOUS PROVISIONS.

(a) ASSURANCES TO THE SECRETARY.—In order to qualify for any payment under subtitle A for any entitlement period beginning on or after January 1, 1973, a State government or unit of local government must establish (in accordance with regulations prescribed by the Secretary, and, with respect to a unit of local government, after an opportunity for review and comment by the Governor of the State in which such unit is located) to the satisfaction of the Secretary that—

(1) it will establish a trust fund in which it will deposit all payments it receives under subtitle A;

(2) it will use amounts in such trust fund (including any interest earned thereon while in such trust fund) during such reasonable period or periods as may be provided in such regulations;

(3) in the case of a unit of local government, it will use amounts in such trust fund (including any interest earned thereon while in such trust fund) only for priority expenditures (as defined in section 103(a)), and will pay over to the Secretary (for deposit in the general fund of the Treasury) an amount equal to 110 percent of any amount expended out of such trust fund in violation of this paragraph, unless such amount is promptly repaid to such trust fund (or the violation is otherwise corrected) after notice and opportunity for corrective action;

(4) it will provide for the expenditure of amounts received under subtitle A only in accordance with the laws and procedures applicable to the expenditure of its own revenues;

(5) it will—

(A) use fiscal, accounting, and audit procedures which conform to guidelines established therefor by the Secretary (after consultation with the Comptroller General of the United States),

(B) provide to the Secretary (and to the Comptroller General of the United States), on reasonable notice, access to, and

the right to examine, such books, documents, papers, or records as the Secretary may reasonably require for purposes of reviewing compliance with this title (or, in the case of the Comptroller General, as the Comptroller General may reasonably require for purposes of reviewing compliance and operations under subsection (c)(2)), and

(C) make such annual and interim reports (other than reports required by section 121) to the Secretary as he may reasonably require; Reports.

(6) all laborers and mechanics employed by contractors or subcontractors in the performance of work on any construction project, 25 percent or more of the costs of which project are paid out of its trust fund established under paragraph (1), will be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a–276a–5), and that with respect to the labor standards specified in this paragraph the Secretary of Labor shall act in accordance with Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 276c); 49 Stat. 1011. 5 USC app. 63 Stat. 108.

(7) individuals employed by it whose wages are paid in whole or in part out of its trust fund established under paragraph (1) will be paid wages which are not lower than the prevailing rates of pay for persons employed in similar public occupations by the same employer; and

(8) in the case of a unit of local government as defined in the second sentence of section 108(d)(1) (relating to governments of Indian tribes and Alaskan native villages), it will expend funds received by it under subtitle A for the benefit of members of the tribe or village residing in the county area from the allocation of which funds are allocated to it under section 108(b)(4).

Paragraph (7) shall apply with respect to employees in any category only if 25 percent or more of the wages of all employees of the State government or unit of local government in such category are paid from the trust fund established by it under paragraph (1).

(b) WITHHOLDING OF PAYMENTS.—If the Secretary determines that a State government or unit of local government has failed to comply substantially with any provision of subsection (a) or any regulations prescribed thereunder, after giving reasonable notice and opportunity for a hearing to the Governor of the State or the chief executive officer of the unit of local government, he shall notify the State government or unit of local government that if it fails to take corrective action within 60 days from the date of receipt of such notification further payments to it will be withheld for the remainder of the entitlement period and for any subsequent entitlement period until such time as the Secretary is satisfied that appropriate corrective action has been taken and that there will no longer be any failure to comply. Until he is satisfied, the Secretary shall make no further payments of such amounts.

(c) ACCOUNTING, AUDITING, AND EVALUATION.—

(1) IN GENERAL.—The Secretary shall provide for such accounting and auditing procedures, evaluations, and reviews as may be necessary to insure that the expenditures of funds received under subtitle A by State governments and units of local government comply fully with the requirements of this title. The Secretary is authorized to accept an audit by a State of such expenditures of a

State government or unit of local government if he determines that such audit and the audit procedures of that State are sufficiently reliable to enable him to carry out his duties under this title.

(2) COMPTROLLER GENERAL SHALL REVIEW COMPLIANCE.—The Comptroller General of the United States shall make such reviews of the work as done by the Secretary, the State governments, and the units of local government as may be necessary for the Congress to evaluate compliance and operations under this title.

Subtitle C—General Provisions

SEC. 141. DEFINITIONS AND SPECIAL RULES.

(a) SECRETARY.—For purposes of this title, the term "Secretary" means the Secretary of the Treasury or his delegate. The term "Secretary of the Treasury" means the Secretary of the Treasury personally, not including any delegate.

(b) ENTITLEMENT PERIOD.—For purposes of this title, the term "entitlement period" means—

(1) The period beginning January 1, 1972, and ending June 30, 1972.

(2) The period beginning July 1, 1972, and ending December 31, 1972.

(3) The period beginning January 1, 1973, and ending June 30, 1973.

(4) The one-year periods beginning on July 1 of 1973, 1974, and 1975.

(5) The period beginning July 1, 1976, and ending December 31, 1976.

(c) DISTRICT OF COLUMBIA.—

(1) TREATMENT AS STATE AND LOCAL GOVERNMENT.—For purposes of this title, the District of Columbia shall be treated both—

(A) as a State (and any reference to the Governor of a State shall, in the case of the District of Columbia, be treated as a reference to the Commissioner of the District of Columbia), and

(B) as a county area which has no units of local government (other than itself) within its geographic area.

(2) REDUCTION IN CASE OF INCOME TAX ON NONRESIDENT INDIVIDUALS.—If there is hereafter enacted a law imposing a tax on income earned in the District of Columbia by individuals who are not residents of the District of Columbia, then the entitlement of the District of Columbia under subtitle A for any entitlement period shall be reduced by an amount equal to the net collections from such tax during such entitlement period attributable to individuals who are not residents of the District of Columbia. The preceding sentence shall not apply if—

(A) the District of Columbia and Maryland enter into an agreement under which each State agrees to impose a tax on income earned in that State by individuals who are residents of the other State, and the District of Columbia and Virginia enter into an agreement under which each State agrees to impose a tax on income earned in that State by individuals who are residents of the other State, or

(B) the Congress enacts a law directly imposing a tax on income earned in the District of Columbia by individuals who are not residents of the District of Columbia.

SEC. 142. REGULATIONS.

(a) GENERAL RULE.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the provisions of this title.

(b) ADMINISTRATIVE PROCEDURE ACT TO APPLY.—The rulemaking provisions of subchapter II of chapter 5 of title 5 of the United States Code shall apply to the regulations prescribed under this title for entitlement periods beginning on or after January 1, 1973. 80 Stat. 381. 5 USC 551.

SEC. 143. JUDICIAL REVIEW.

(a) PETITIONS FOR REVIEW.—Any State which receives a notice of reduction in entitlement under section 107(b), and any State or unit of local government which receives a notice of withholding of payments under section 104(b) or 123(b), may, within 60 days after receiving such notice, file with the United States court of appeals for the circuit in which such State or unit of local government is located a petition for review of the action of the Secretary. A copy of the petition shall forthwith be transmitted to the Secretary; a copy shall also forthwith be transmitted to the Attorney General.

(b) RECORD.—The Secretary shall file in the court the record of the proceeding on which he based his action, as provided in section 2112 of title 28, United States Code. No objection to the action of the Secretary shall be considered by the court unless such objection has been urged before the Secretary. 72 Stat. 941; 80 Stat. 1323.

(c) JURISDICTION OF COURT.—The court shall have jurisdiction to affirm or modify the action of the Secretary or to set it aside in whole or in part. The findings of fact by the Secretary, if supported by substantial evidence contained in the record, shall be conclusive. However, if any finding is not supported by substantial evidence contained in the record, the court may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous actions. He shall certify to the court the record of any further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence contained in the record.

(d) REVIEW BY SUPREME COURT.—The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of title 28, United States Code. 62 Stat. 928.

SEC. 144. AUTHORITY TO REQUIRE INFORMATION ON INCOME TAX RETURNS.

(a) GENERAL RULE.—

(1) INFORMATION WITH RESPECT TO PLACE OF RESIDENCE.—Subpart B of part II of subchapter A of chapter 61 of the Internal Revenue Code of 1954 (relating to income tax returns) is amended by adding at the end thereof the following new section: 68A Stat. 731. 26 USC 6001.

"SEC. 6017A. PLACE OF RESIDENCE.

"In the case of an individual, the information required on any return with respect to the taxes imposed by chapter 1 for any period shall include information as to the State, county, municipality, and any other unit of local government in which the taxpayer (and any other individual with respect to whom an exemption is claimed on such return) resided on one or more dates (determined in the manner provided by regulations prescribed by the Secretary or his delegate) during such period." 26 USC 1.

(2) CLERICAL AMENDMENT.—The table of sections for such subpart B is amended by adding at the end thereof the following:

"Sec. 6017A. Place of residence."

(b) CIVIL PENALTY.—

68A Stat. 828; 85 Stat. 551. 26 USC 6651.

(1) IN GENERAL.—Subchapter B of chapter 68 of the Internal Revenue Code of 1954 is amended by adding at the end thereof the following new section:

"SEC. 6687. FAILURE TO SUPPLY INFORMATION WITH RESPECT TO PLACE OF RESIDENCE.

"(a) CIVIL PENALTY.—If any person fails to include on his return any information required under section 6017A with respect to his place of residence, he shall pay a penalty of $5 for each such failure, unless it is shown that such failure is due to reasonable cause.

"(b) DEFICIENCY PROCEDURES NOT TO APPLY.—Subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and chapter 42 taxes) shall not apply in respect of the assessment or collection of any penalty imposed by subsection (a)."

26 USC 6211. 26 USC 4940.

(2) CLERICAL AMENDMENT.—The table of sections for such subchapter B is amended by adding at the end thereof the following:

"Sec. 6687. Failure to supply information with respect to place of residence."

AFFIRMATIVE ACTION -- ITS MEANING AND APPLICATION

One of the most hotly debated areas in the Equal Employment Opportunity concept centers on two words: "Affirmative Action" (AA). Affirmative Action spawns arguments that it is synonymous with "quota" systems; that it is reverse discrimination based on preferential treatment.

I. MEANING OF AFFIRMATIVE ACTION

In simplest of terms, AA means taking "positive" or "active" steps to accomplish the public policy goal of equal employment opportunity. Hence, it differs from "passive" support of EEO. For example, in the area of recruitment:

Passive Support: An employer depends on word-of-mouth recruitment. If the employer has a predominantly all white-male workforce, it is a reasonably safe assumption that the word will reach only their white-male friends and aquaintances.

Thus, while an employer can be nondiscriminating --i.e., would hire a qualified minority or female jobseeker, neither race nor sex would be the basis of refusal -- it has no meaning if the minority or female community doesn't know a job opening exists.

Active Support: If this same employer undertook the following recruitment or hiring steps, he would be an "affirmative action" employer as distinguished from a passive "equal opportunity" employer:

(1) Notified the minority community of the job vacancy through proper community media; contacted community and civic organizations associated with minority and women activities.

(2) Abolished artificial barriers to hiring -- such as exams which are not related to the job or which are culturally biased, or educational requirements not necessary to the given job -- hence not necessary to the operation of the business or public enterprise.

II. BASIS FOR AFFIRMATIVE ACTION

A. Overview

There are two types of discriminatory practices:

(1) Overt: Intentional and obvious, for example, job assignments by race or sex, resulting in segregated departments or work units.

(2) Covert: Subtle, mostly unintentional, forms of discrimination which pervade an organization. Such "systemic" or "institutionalized" discrimination is founded on artificial barriers which appear "neutral" on their face -- often insurmountable barriers for minorities and women to hurdle.

It is the position of the U.S. Commission on Civil Rights that the effect of either or both types of discrimination has been a "substantial preference of white males, irrespective of their relative qualifications vis-à-vis members of the excluded group."

The Commission asserts:

> Viewed in this context affirmative action programs are designed not to establish preferential treatment for minorities and women. Rather, the purpose of such programs is to eliminate the institutional barriers that minorities and women now encounter in seeking employment and thereby to redress the historic imbalance favoring white males in the job market....
>
> Source: Statement on Affirmative Action for Equal Employment Opportunities, Clearinghouse Publication No. 41, Feb. 1973.

B. Affirmative action is aimed at ending barriers to EEO such as:

(1) Word-of-mouth recruitment that never reaches minority, ethnic or underrepresented sex groups.

(2) Recruitment at schools or colleges/universities with a predominantly non-minority or male student population when comparable recruitment is not carried out in predominantly minority or coeducational institutions.

(3) Rules against employment of married women and automatic termination of a pregnant employee.

(4) Job qualification - e.g., high school diploma or previous work experience which is not substantially related to job requirement. Penalizes not only minority but all low-income applicants with limited educational opportunity or job experience.

(5) Past discriminatory hiring history of a company or public agency still discouraging excluded classes from applying until company or agency demonstrates an equal opportunity in employment effort.

III. AFFIRMATIVE ACTION REQUIRED OF GOVERNMENT CONTRACTORS/SUBCONTRACTORS

A. Background

(1) The intended reach of Executive Order 11246 can be appreciated by a review of these facts:

(a) An estimated 30-40 million workers -- about 40 percent of the nation's total civilian workforce -- are employed by companies and institutions which are federal government contractors.

(b) The federal government procured property and services amounting to more than $100 million during fiscal year 1972.

(c) Based on several studies, there is a finding that minority males and females, plus non-minority females, are substantially underrepresented in government contractors' workforce and, where employed, are concentrated heavily in the lower-paying jobs.

Source: Report of U.S. Commission on Civil Rights: The Federal Civil Rights Enforcement Effort, Vol. 5, July 1975, p. 230.

(2) Numerous court decisions have established that the President has a duty and the authority -- under the Constitution and through executive control of the government's procurement process -- to require those who do business with the federal government to provide equal employment opportunity.

(3) The Constitution (Fifth Amendment) prohibits the federal government from engaging in discriminatory practices. Thus, if the federal government gives financial assistance to or enters into contracts with private or public employers whose practices or policies discriminate, the government itself may well be engaged in unconstitutional discrimination.

B. Requirements of Executive Order 11246, as amended, and Office of Federal Contract Compliance Regulations

(1) The Equal Opportunity Clause

Each contractural agreement of $10,000 or more must include two basic commitments:

(a) Not to discriminate because of race, color, religion, sex or national origin (nondiscrimination pledge). The OFCC exempts religious educational institutions with respect to employing persons of a particular religion, and provides for an exemption if sex is a bona fide occupational qualification.

(b) To undertake affirmative action in all employment practices at all company facilities, even those not involved in the contract work. In turn, prime contractors must obtain similar guarantees from all of their subcontractors. Also includes a pledge that no facility will be segregated: i.e., lunchrooms, recreation areas, housing facilities when provided, etc.

Exemptions for state and local government:

While obligated to have an Equal Opportunity Clause, the Clause is not applicable to those government subdivisions or agencies which do not participate in work under the contract. Thus the EO Clause is more limited in the public sector.

The Equal Employment Opportunity Clause also applies to federally assisted construction contracts (e.g., a grant or a loan from the federal government to a state-or county-initiated construction project).

2. Elements In Affirmative Action

Affirmative action compliance includes, but is not limited to: recruitment; hiring; upgrading; demotion; transfer; layoff or termination; rates of pay and other forms of compensation; selection for training, including apprenticeship.

3. Affirmative Action Regulations

(a) Construction contracts

(b) Nonconstruction contracts

The AA compliance requirements differ between construction and nonconstruction contracts.

The OFCC maintains that the distinction is necessary for two reasons:

(1) The temporary and fluctuating nature of construction work makes it difficult to predict job opportunities; consequently, it is difficult for a construction contractor to set realistic goals for filling a given number of jobs with minorities.

(2) The construction industry relies on trade unions for referral of workers. The industry draws from a "labor pool." Construction contractors usually are not able to adopt AA hiring practices independent of unions.

Consequently, the affirmative action compliance program for the construction industry has relied upon area-wide plans: (1) plans imposed by the OFCC, or (2) hometown (voluntary) plans developed by contractors, craft unions, and minority organizations to increase minority participation in the construction workforce of the area as a whole.

Provisions of <u>hometown plans</u> typically include:

(1) Training or apprenticeship outreach programs

(2) Goals or ranges of goals to increase minority membership in unions

(3) Nondiscrimination agreements by contractors

(4) Local administrative committees to oversee implementation of the hometown plan -- usually composed of an equal number of representatives from the three principal groups (contractors-unions-minority organizations)

Final approval of hometown plans must come from the OFCC. If these groups cannot agree, the OFCC may impose a plan.

An imposed plan sets goals for minority utilization in each trade on all federal and federally assisted construction projects in the plan area. Perhaps the best known of imposed plans is the Philadelphia Plan, which was upheld by the courts.

Reporting Requirements

The reporting procedure requires all construction contractors -- in both hometown and imposed plans -- to submit a monthly report (Monthly Manpower Utilization Report). The report is sent to the assigned compliance agency, which in turn forwards copies to the Office of Federal Contract Compliance.

IV. THE ROLE OF UNIONS IN AFFIRMATIVE ACTION UNDER EO 11246

While labor unions (unless they themselves are contractors) are not covered under EO 11246, they are nevertheless affected.

The contractor must send the union with which it has a contract a notice advising the union of the contractor's obligations and commitments under the order. The contractor is not required to undertake any actions in order to insure nondiscriminatory practices by the union. Nor must the union accept any obligation.

Nevertheless, a contractor who is party to a collective bargaining agreement is required to include in his compliance report how union practices and policies are affecting the contractor's ability to comply with the order.

If a union interferes with the contractor's EEO program, the Secretary of Labor may report such interferences to the Department of Justice or to the Equal Employment Opportunity Commission. The Secretary may recommend that appropriate proceedings be brought under Title VII of the Civil Right Act of 1964.

Additionally, the OFCC regulations allow the Director of OFCC to hold hearings concerning union practices or policies. The record, to date, indicates that OFCC hearings have been confined to construction unions. It is estimated that 60 percent of all construction workers are hired through referral unions.

(Source: Bureau of Labor Statistics (BLS) Bulletin 1665, 1970, p. 73, Table 8).

A referral union, as defined by the EEOC, is one that performs any of the following functions: operates a hiring hall or hiring office; has an arrangement under which an employer or employers are required to consider or hire persons referred by the union or its agents; has at least 10 percent of its members employed by persons who customarily look to the union, or an agent of the union, for employees to hire. Source: EEOC, Local Union Report EEO-3 (1971).

V. THE CONCEPT OF GOALS AND TIMETABLES

It was in construction contracting that the federal government developed the concept of goals and timetables. This concept also has been adopted for nonconstruction contractors, but with a

basic difference. The OFCC analyzes the factors leading to acceptable goals in the construction industry; however, under Revised Order 4, which details the AA obligation of the nonconstruction contractor, the latter must undertake a "self-analysis" in setting goals.

This difference in setting goals is premised on the fact that most nonconstruction contractors have a relatively constant workforce, and hence can establish their own goals and timetables. (It should be noted that supply and service contractors employ the vast majority of workers protected by EO 11246.)

Required Content of AA Programs: Nonconstruction Contractors

(1) The purpose of the required AA program for nonconstruction contractors/subcontractors is set forth in Section 60-2.10 of Revised Order 4 (as of February 14, 1974):

> 60-2.10 Purpose of affirmative action program.
>
> An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.

(2) Regarding the establishment of goals and timetables, Revised Order 4 prohibits "quotas" and preferential treatment (reverse discrimination).

On quotas, the Order states:	On preferential treatment, the Order states:
Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.	The purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.
[Section 60-2.10 (e)]	[Section 60-2.30 Use of Goals]

(3) Reporting Requirements:

(a) Each contractor and subcontractor who has at least 50 employees and a contract of $50,000 or more must develop a written affirmative action compliance program for each of its establishments. Time allowed after commencement of contract - 120 days.

(b) An annual report of results must be submitted.

State and Local Government Exemptions: Only educational institutions and medical facilities are required to meet requirements of (a) and (b).

VI. GOALS AND TIMETABLES: A NEW NAME FOR QUOTAS?

Those responding "yes" would argue, in effect, that numerical standards, by whatever name, are illegal quotas. Typical of the position taken by those attacking the goals and timetables concept is this statement:

> A problem with significant potential importance is that of reverse discrimination. It is this issue, we believe, that will pose the ultimate dilemma for the employer who seeks to obey the requirements of all the agencies charged with responsibilities in the equal employment opportunity area.
>
> Let us be blunt about it--goals and timetables as required by OFCC under the Executive Order are actually quotas. OFCC and the compliance agencies deny this and say that goals are merely targets which an employer must make a good effort to attain. But employers are not stupid. They know that if they fail to attain a "goal" they have a lot of explaining to do. And much of the explanation may fall on deaf ears.
>
> It is easy to see the dilemma thus posed: An employer has set a goal under the Executive Order of hiring three black carpenters within one year. Five applicants, equally qualified, apply for the jobs. Three are black and two are white. If the employer wants to be on safe terrain with OFCC or the compliance agencies it is clear what he should do--hire the three black carpenters. Yet EEOC takes the position, and rightly so, that this constitutes reverse discrimination and hence is unlawful. We are beginning to see a number of lawsuits charging reverse discrimination. We expect that there will be many more--including class actions. The dilemma for the employer is all too clear--he'll be damned by the OFCC if he doesn't hire by quota and will risk losing Government contracts; at the same time he faces a Title VII suit if he does hire by quota.
>
> [Source: From text of NAM Congressional testimony, "NAM Analysis on Equal Employment Opportunity Reform." Reprinted in Daily Labor Report, BNA, Oct. 13, 1975, E-1]

The supporters of goals and timetables, on the other hand, argue that there is a difference between quotas and goals and timetables. They contend that goals are not quotas which must be met, but, rather, objectives by which "good faith" effort may be determined.

In answer to the question, "Are not goals and timetables the same as quotas for racial, ethnic and sex groups?", the U.S. Civil Rights Commission responds:

> No. The essential difference is that under a quota system a fixed number or percentage of minorities or females is imposed upon the employer, who has an absolute obligation to meet that fixed number. No excuses are accepted, nor can failure to meet the quota be justified.
>
> Goals and timetables, by contrast, are result-oriented procedures by which the employer--subject only to the requirement that the targeted results are as much as reasonably can be expected--determines goals and a time schedule for correcting minority underutilization, and then makes every good-faith effort to achieve the self-imposed goals. Contrary to what would be true in the case of quotas, failure to meet goals and timetables is excused if the employer can show that good-faith efforts have really been made. However, an employer must be prepared to demonstrate in detail why good-faith efforts failed to produce desired results.
>
> In a sense, goals and timetables represent a shifting of the burden of proof from the government to the employer on the question of whether or not the employer used good-faith efforts to hire more minority individuals and women.

The Commission also responds to closely allied questions, offered here in full to provide opportunity for exploration, discussion and analysis:

Question-- Do not goals and timetables result in hiring on the basis of race or sex, rather than on the basis of who is best qualified for the job, thereby undermining the merit system?

Answer-- No. There is a myth abroad that, in years past, hiring decisions always were made on the basis of objective and proven methods for assessing applicants' "qualifications." In fact, the hiring decisions of many, if not of most, employers were based in large measure on subjective and unproven criteria. As a result, racial and sexist stereotypes operated to exclude women and minorities without regard for their actual qualifications. Indeed, such criteria in some degree were institutionalized within the "merit system" itself. For example, under the well established "rule of three," public employers have been free to use subjective and unsubstantiated criteria in selecting among the top three candidates for a post. Following the principle of the Griggs case...therefore, a major affirmative action step to be taken in achieving minority employment goals is to assure that job qualifications are accurately appraised. Thus, if a hiring standard disproportionately excludes women or minorities, the employer can use that standard only if such standard demonstrably assesses qualifications for the job. This does not weaken, but rather strengthens, the role of applicant "qualifications" in determining employee selection.

Question-- Do not affirmative action plans establish preferential treatment for minority groups and women?

Answer-- No. On the contrary, their purpose is to undo a preferential system many years in the making and to redress the historic imbalances now favoring white males in the job market.

Redressing this imbalance requires that discriminatory patterns be eradicated and some measure of equity be established for persons who have been discriminatorily excluded in the past. Implementation of affirmative action plans must, therefore, necessarily involve a selection process aimed at achieving these goals.

For the purpose of remedying discriminatory practices, a selection process designed to achieve such goals is a valid technique so long as it does not produce a pattern of discrimination against qualified members of another group.

The fact is that very few persons are ever hired on a totally objective basis. Even the Civil Service merit system rarely requires the selection of a specific person from among a group of qualified applicants. The requirement is that from among such a group a person be selected. Obviously many subjective elements then enter into the selection process. The candidate's personality, disposition, experience, and apparent judgement are just a few of the elements that always influence a selection. Unfortunately, a significant reason for the paucity of minority group persons and women in many job categories is that these subjective factors never include providing a fair share of employment opportunities to them.

An affirmative action plan must require some action that has not heretofore taken place. Otherwise it is useless. One of the requirements, therefore, is that in the subjective evaluations that always occur in the selection process, one factor previously excluded should now be included--a concern that a reasonable number of qualified minorities and women be hired until equity is attained.

Question-- Are goals and timetables aimed at achieving proportional representation of minorities and women?

Answer-- The concept of goals and timetables is not synonymous with proportional representation. Rather, the concept comes into play when it has been determined that women or minorities are underutilized or underrepresented in one or more job classifications. When underutilization has been established, affirmative action programs ... are employed to bring minorities and women into the labor force in the numbers that "would reasonably be expected by their availability." Goals and timetables may be viewed as the measure or yardstick to determine whether the affirmative action programs are, in fact, achieving the goals of increasing the number of women and minorities in the labor force.

The concept of goals and timetables often conjures up an image of some precise mathematical division of a pie, whereby each group or subgroup gets a share dependent upon the size of the group. But the concept in no way depends upon a precise mathematical formula. Rather, it focuses on the demonstrable results of past discrimination (the underutilization) and seeks to remedy that by compensatory programs (affirmative action). The "goal" that we refer to is nothing more than a description of what that labor force would look like absent the effects of illegal racial or sexual discrimination, and the "timetable" is the informed estimate of time needed to achieve the discrimination-free labor force without disrupting the industry or denying anyone the opportunity for employment.

A California judge has not accepted the proportional representation explanation of the U.S. Civil Rights Commission, for he held that proportional employment is a concept that sets quotas for each race and sex.

Judge Lyle E. Cook of the California Superior Court held unconstitutional a 1972 affirmative action plan developed by the City Council of Berkeley. He held that hiring priorities for minorities and women violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Title VII of the Civil Rights Act of 1964.

The City Council stated that its goal was to "achieve and maintain no less than proportional employment for all minorities and women in each department, job classification and/or salary category throughout the city service." Proportional employment was defined by the Council: "...the percentage of each race and sex in the City of Berkeley workforce shall be approximately equal to that of the percentage of each race and sex in the Berkeley population as a whole."

Judge Cook stated:

> Racial quotas, generally, are viewed in our law with suspicion. They tend to freeze official conduct in the future by reference to yesterday's conditions. One need only look at Berkeley's racial proportions of 30 years ago and consider its impact on racial employment quotas, fixed at that time, to be alarmed at the future effect of resort to such devices. It must be remembered that quotas operate to exclude as well as include.

Source: Government Employee Relations Report, BNA, April 28, 1975, A-1

Then there is the case in which the court of appeals held that promotions in the New York State Department of Corrections may be made on a quota basis as an "interim" measure, to be abandoned as soon as a nondiscriminatory promotional procedure (testing) was adopted. Nevertheless, the court of appeals took a strong position against the use of quotas:

> The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society.

The court acknowledged that quotas may be proper in those instances in which a clear-cut, long-time pattern of discrimination existed. The court found, in the case at hand, that there was no evidence of long-term discrimination since the only convincing evidence was the one-time use of an invalid test.

The court concluded in this case, which was brought as a class action suit under the Civil Rights Act of 1866:

> So long as civil service remains the constitutionally mandated route to public employment in the State of New York, no one should be bumped from a preferred position on the eligibility list solely because of his race. Unless the Fourteenth Amendment is applicable only to blacks, this is constitutionally forbidden reverse discrimination.
>
> (Kirkland v. Dept. of Correctional Services CA 2, 1975, 11 FEP Cases 38)

In another and related case, the Court of Appeals for the Third Circuit declined to enjoin the starting of a class of cadet

police officers selected on the basis of a hiring quota. The appellate court upheld the district court which refused to grant an injunction. Its reasoning: racial classifications have not yet been declared unconstitutional when used to fashion a remedy against discrimination. (Osburn v. Shapp, CA 3, 1975. 11 FEP Cases 58)

The foregoing positions are merely illustrative of divergent viewpoints. Undoubtedly, the courts will be grappling with the burning issue of affirmative relief for a long time.

VII. AFFIRMATIVE ACTION UNDER EO 11246 AND UNDER TITLE VII: A DIFFERENCE

A distinction should be made between AA requirements under the Executive Order under Title VII.

First, Title VII: the law grants to the courts broad discretion in fashioning affirmative remedies. Thus, there must be a finding of discrimination before affirmative action remedies are imposed. As a practical matter, EEOC attempts in conciliation to shape affirmative action programs, but absent success, the courts provide a remedy if called for.

Under Executive Order 11246, affirmative action is not based on a finding that the contractor has unlawfully discriminated. In order to get and keep a contract, the EO 11246 imposes upon the contractor the duty to make a self-determination as to the need for affirmative action, without resort to a judicial determination.

Examples of Other Sources for Affirmative Action

1. California Fair Employment Practices Act: While the Act does not mandate AA, except for certain employers in the construction industry receiving contracts funded solely by the state, the policy of the FEP Commission is to encourage AA as a necessary means of achieving equal employment opportunity. The Commission has issued a pamphlet on "Affirmative Action Guidelines."
2. Executive Order 11478: Prohibits discrimination in federal employment based on race, color, religion, sex, or national origin. The order states in part: "It is the policy of the Government...to promote...equal employment opportunity through a continuing affirmative program in each executive department and agency... (Section 1)
3. Rehabilitation Act of 1973, as amended in 1974 (Section 503): Prohibits discrimination based on physical or mental handicap. Proposed regulations would appear to impose a different AA concept: instead of goals and timetables, specific AA efforts are required, e.g., access to accommodations to the building, work area, lunchroom, restrooms, restructuring of jobs, etc.
4. Apprenticeship Rules and Regulations of the U.S. Department of Labor: Deal with EEO in apprenticeship and training programs and provide that apprenticeship programs registered with

either the Department of Labor or with the State apprenticeship agencies must adopt written AA plans. A definition of affirmative action is found under Section 30.4 of the Rules and Regulations to be found in appendix.

(The source of authority of the Secretary of Labor to issue Rules and Regulations is a 1937 Act authorizing him to develop labor standards in apprenticeship programs.)

Note: The various regulations dealing with the obligation of contractors and subcontractors may be obtained by writing to:

Office of Federal Contract Compliance
U.S. Department of Labor
Washington, D.C. 20210

They can also be found in the Code of Federal Regulations. Updates on changes in the Regulations are found in the Federal Register.

APPENDIX TO TAB H

Executive Order 11246[1]

EQUAL EMPLOYMENT OPPORTUNITY

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—Nondiscrimination in Government Employment

SECTION 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

SEC. 102. The head of each executive department and agency shall establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 101.

SEC. 103. The Civil Service Commission shall supervise and provide leadership and guidance in the conduct of equal employment opportunity programs for the civilian employees of and applications for employment within the executive departments and agencies and shall review agency program accomplishments periodically. In order to facilitate the achievement of a model program for equal employment opportunity in the Federal service, the Commission may consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Part.

SEC. 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, creed, color, or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 105. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this Part, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Part.

PART II—Nondiscrimination in Employment by Government Contractors and Subcontractors

Subpart A—Duties of the Secretary of Labor

SEC. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and

[1]See also Executive Order 11375

shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

Subpart B--Contractors' Agreements

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of Sept. 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of Sept., 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contacting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies involved as provided in Executive Order No. 11246 of Sept. 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: ***Provided***, however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: ***Provided***, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers of providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor

may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, creed, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

SEC. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

Subpart C—Powers and Duties of the Secretary of Labor and the Contracting Agencies

SEC. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

SEC. 206 (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

SEC. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

SEC. 208. (8) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a) (6) shall be made without affording the contractor an opportunity for a hearing.

Subpart D—Sanctions and Penalties

SEC. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a) (2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a) (5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

SEC. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

SEC. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

SEC. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209 (a) (6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor, or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

Subpart E—Certificates of Merit

SEC. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

SEC. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

SEC. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III—Nondiscrimination Provisions in Federally Assisted Construction Contracts

SEC. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction

contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

SEC. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

SEC. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

SEC. 304. Any executive department or agency which imposes by rule, regulation, or other requirements of non-discrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV—Miscellaneous

SEC. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

SEC. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

SEC. 403. (a) Executive Orders Nos. 10590 (January 18, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations,

Executive Order 11375

AMENDING EXECUTIVE ORDER NO. 11246, RELATING TO EQUAL EMPLOYMENT OPPORTUNITY

It is the policy of the United States Government to provide equal opportunity in Federal employment and in employment by Federal contractors on the basis of merit and without discrimination because of race, color, religion, sex or national origin.

The Congress, by enacting Title VII of the Civil Rights Act of 1964, enunciated a national policy of equal employment opportunity in private employment, without discrimination because of race, color, religion, sex or national origin.

Executive Order No. 11246 of September 24, 1965, carried forward a program of equal employment opportunity in Government employment, employment by Federal contractors and subcontractors and employment under Federally assisted construction contracts regardless of race, creed, color or national origin.

It is desirable that the equal employment opportunity programs provided for in Executive Order No. 11246 expressly embrace discrimination on account of sex.

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered that Executive Order No. 11246 of September 24, 1965, be amended as follows:

(1) Section 101 of Part I, concerning nondiscrimination in Government employment, is revised to read as follows:

"SECTION 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, color, religion, sex or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice."

(2) Section 104 of Part I is revised to read as follows:

"SECTION 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission."

(3) Paragraphs (1) and (2) of the quoted required contract provisions in section 202 of Part II, concerning nondiscrimination in employment by Government contractors and subcontractors, are revised to read as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin."

(4) Section 203 (d) of Part II is revised to read as follows:

"(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require."

The amendments to Part I shall be effective 30 days after the date of this order. The amendments to Part II shall be effective one year after the date of this order.

LYNDON B. JOHNSON

THE WHITE HOUSE,
October 13, 1967.

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PART II

DEPARTMENT OF LABOR

Office of the Secretary

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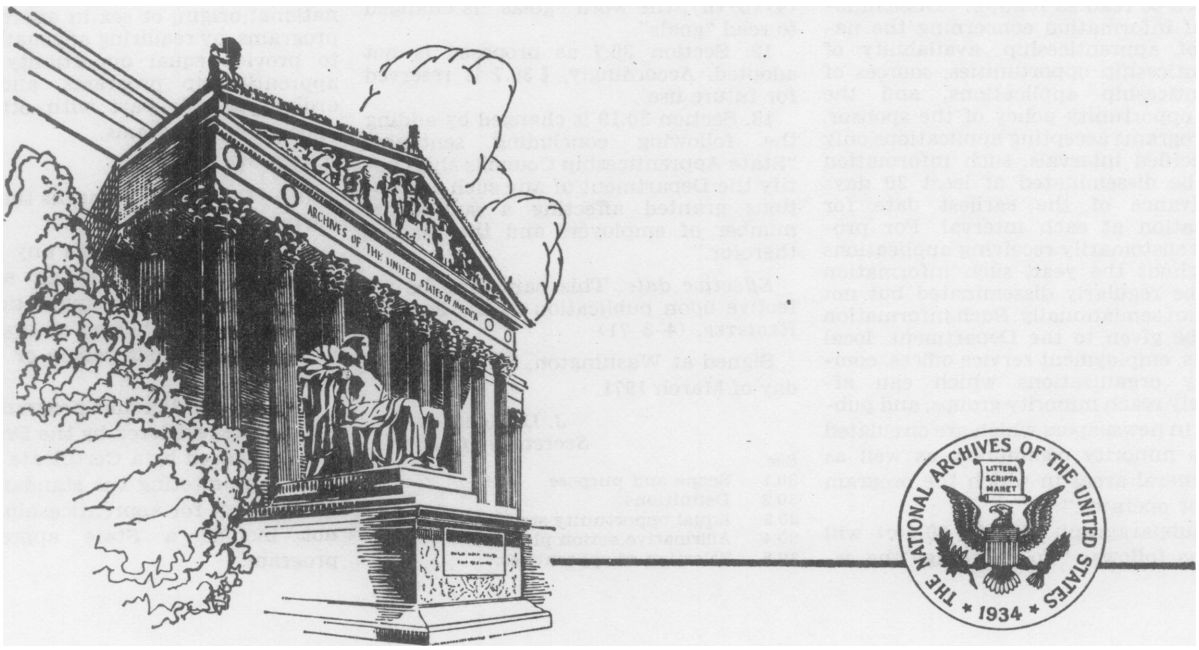
EQUAL EMPLOYMENT OPPORTUNITY IN APPRENTICESHIP AND TRAINING

General revision of apprenticeship rules



Title 29—LABOR

Subtitle A—Office of the Secretary of Labor

PART 30—EQUAL EMPLOYMENT OPPORTUNITY IN APPRENTICESHIP AND TRAINING

On January 29, 1971, notice of proposed rule making was published in the FEDERAL REGISTER (36 F.R. 1419), with regard to revising Part 30 of Title 29 of the Code of Federal Regulations, issued by the Secretary of Labor on December 13, 1963, 28 F.R. 13775, dealing with equal employment opportunity in apprenticeship and training. Interested persons were given 30 days in which to submit written statements, data, views, or arguments regarding any or all of the policies or procedures contained in the proposal. After consideration of all such relevant matter as was presented by interested persons, 29 CFR Part 30 as so proposed is hereby adopted, subject to the following changes:

1. In § 30.1, the sentence reading "This part also provides policies and procedures for recognizing appropriate State agencies for registering apprenticeship programs for Federal purposes" is changed to read "This part also provides policies and procedures for continued or withdrawal of recognition of State agencies for registering of apprenticeship programs for federal purposes."

2. Paragraph (c) in § 30.4 is changed by inserting immediately after the last sentence thereof the following concluding sentences: "The affirmative action plan shall set forth the specific steps the sponsor intends to take in the areas listed below. Whenever special circumstances warrant, the Department may provide such financial or other assistance as it deems necessary to implement the requirements of this paragraph."

3. Subparagraph (1) of § 30.4(c) is changed to read as follows: "Dissemination of information concerning the nature of apprenticeship, availability of apprenticeship opportunities, sources of apprenticeship applications, and the equal opportunity policy of the sponsor. For programs accepting applications only at specified intervals, such information shall be disseminated at least 30 days in advance of the earliest date for application at each interval. For programs customarily receiving applications throughout the year, such information shall be regularly disseminated but not less than semiannually. Such information shall be given to the Department, local schools, employment service offices, community organizations which can effectively reach minority groups, and published in newspapers which are circulated in the minority community as well as the general areas in which the program sponsor operates."

4. Subparagraph (6) of § 30.4(c) will read as follows: "To encourage the establishment and utilization of programs of preapprenticeship, preparatory trade training, or others designed to afford related work experience or to prepare candidates for apprenticeship, a sponsor shall make appropriate provision in its affirmative action plan to assure that those who complete such programs are afforded full and equal opportunity for admission into the apprenticeship program."

5. Subparagraphs (6), (7), and (8) of § 30.4(c) are renumbered subparagraphs (7), (8), and (9) of § 30.4(c), respectively.

6. Subparagraph (10) of § 30.4(c) will read as follows: "Such other action as to insure that the recruitment, selection, employment, and training of apprentices during apprenticeship, shall be without discrimination because of race, color, religion, national origin, or sex; such as: General publication of apprenticeship opportunities and advantages in advertisements, industry reports, articles, etc.; use of present minority apprentices and journeymen as recruiters; career counseling; periodic auditing of affirmative action programs and activities; and development of reasonable procedures between the sponsor and employers of apprentices to insure that equal employment opportunity is being granted including reporting systems, onsite reviews, briefing sessions, etc."

7. In subparagraph (3) of § 30.4(d), the words "affirmative action program" are changed to read "affirmative action plan".

8. In paragraph (e) of § 30.4, the words "affirmative action program" are changed to read "affirmative action plan".

9. In paragraph (g) of § 30.4, the words "as shall be designated by the Secretary" are changed to read "as appropriate".

10. In paragraph (a) of § 30.5, the words "further to otherwise ensure" are changed to read "otherwise insure".

11. In the last sentence of § 30.5(b)(4)(b)(ii), the word "golas" is changed to read "goals".

12. Section 30.7 as proposed is not adopted. Accordingly, § 30.7 is reserved for future use.

13. Section 30.19 is changed by adding the following concluding sentence: "State Apprenticeship Councils shall notify the Department of any such exemptions granted affecting a substantial number of employers and the reasons therefor."

Effective date. This part shall be effective upon publication in the FEDERAL REGISTER. (4-8-71)

Signed at Washington, D.C., this 30th day of March 1971.

J. D. HODGSON,
Secretary of Labor.

Sec.

AUTHORITY: The provisions of this Part 30 are issued under sec. 1, 50 Stat. 664, as amended; 29 U.S.C. 50; 40 U.S.C. 276c; 5 U.S.C. 301; Reorganization Plan No. 14 of 1950, 64 Stat. 1267, 3 CFR 1949-53 Comp., p. 1007.

§ 30.1 Scope and purpose.

This part sets forth policies and procedures to promote equality of opportunity in apprenticeship programs registered with the U.S. Department of Labor or with State apprenticeship programs registered with recognized State apprenticeship agencies. These policies and procedures apply to the recruitment and selection of apprentices, and to all conditions of employment and training during apprenticeship; and the procedures established provide for review of apprenticeship programs, for registering apprenticeship programs, for processing complaints, and for deregistering noncomplying apprenticeship programs. This part also provides policies and procedures for continued or withdrawal of recognition of State agencies for registering of apprenticeship programs for Federal purposes. The purpose of this part is to promote equality of opportunity in apprenticeship by prohibiting discrimination based on race, color, religion, national origin, or sex in apprenticeship programs, by requiring affirmative action to provide equal opportunity in such apprenticeship programs, and by coordinating this part with other equal opportunity programs.

§ 30.2 Definitions.

(a) "Department" means the U.S. Department of Labor.

(b) "Employer" means any person or organization employing an apprentice whether or not the apprentice is enrolled with such person or organization or with some other person or organization.

(c) "Apprenticeship program" means a program registered by the Department and evidenced by a Certificate of Registration as meeting the standards of the Department for apprenticeship, but does not include a State apprenticeship program.

(d) "Sponsor" means any person or organization operating an apprenticeship program, irrespective of whether such person or organization is an employer.

(e) "Secretary" means the Secretary of Labor, the Assistant Secretary of Labor for Manpower or any person specifically designated by either of them.

(f) "State Apprenticeship Council" means a State apprenticeship council or other State agency in any of the 50 States, the District of Columbia, or any territory or possession of the United States, which is recognized by the Department as the appropriate agency for registering programs for Federal purposes.

(g) "State apprenticeship program" means a program registered with a State Apprenticeship Council and evidenced by a Certificate of Registration or other appropriate document as meeting the standards of the State Apprenticeship Council for apprenticeship.

(h) "State program sponsor" means any person or organization operating a State apprenticeship program, irrespective of whether such person or organization is an employer.

§ 30.3 Equal opportunity standards.

(a) *Obligations of sponsors.* Each sponsor of an apprenticeship program shall:

(1) Recruit, select, employ, and train apprentices during their apprenticeship, without discrimination because of race, color, religion, national origin, or sex; and

(2) Uniformly apply rules and regulations concerning apprentices, including but not limited to, equality of wages, periodic advancement, promotion, assignment of work, job performance, rotation among all work processes of the trade, imposition of penalties or other disciplinary action, and all other aspects of the apprenticeship program administration by the program sponsor; and

(3) Take affirmative action to provide equal opportunity in apprenticeship, including adoption of an affirmative action plan as required by this part.

(b) *Equal opportunity pledge.* Each sponsor of an apprenticeship program shall include in its standards the following equal opportunity pledge:

The recruitment, selection, employment, and training of apprentices during their apprenticeship, shall be without discrimination because of race, color, religion, national origin, or sex. The sponsor will take affirmative action to provide equal opportunity in apprenticeship and will operate the apprenticeship program as required under Title 29 of the Code of Federal Regulations, Part 30.

(c) *Programs presently registered.* Each sponsor of a program registered with the Department as of the effective date of this part shall within 9 months following that effective date take the following action:

(1) Include in the standards of its apprenticeship program the equal opportunity pledge prescribed by paragraph (b) of this section; and,

(2) Adopt an affirmative action plan required by § 30.4; and

(3) Adopt a selection procedure required by § 30.5. A sponsor adopting a selection method under § 30.5(b) (1), (2), or (3) shall prepare, and have available for submission upon request, copies of its amended standards, affirmative action plans, and selection procedure. A sponsor adopting a selection method under § 30.5(b)(4) shall submit to the Department copies of its standards, affirmative action plan and selection procedure in accordance with the requirements of § 30.5(b)(4)(i)(*a*).

(d) *Sponsors seeking new registration.* A sponsor of a program seeking new registration with the Department shall submit copies of its proposed standards, affirmative action plan, selection procedures, and such other information as may be required. The program shall be registered if such standards, affirmative action plan, and selection procedure meet the requirements of this part.

(e) *Programs subject to approved equal employment opportunity plans.* A sponsor shall not be required to adopt an affirmative action plan under §30.4 or a selection procedure under §30.5 if it submits to the Department satisfactory evidence that it is subject to an equal employment opportunity program providing for the selection of apprentices and for affirmative action in apprenticeship which has been approved as meeting the requirements of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or Executive Order 11246, as amended (30 F.R. 12319, 32 F.R. 14303, 34 F.R. 12986) and the implementing regulations published in Title 29 of the Code of Federal Regulations, Chapter XIV, and Title 41 of the Code of Federal Regulations, Chapter 60.

(f) *Program with fewer than five apprentices.* A sponsor of a program in which fewer than five apprentices are indentured shall not be required to adopt an affirmative action plan under § 30.4 or a selection procedure under § 30.5.

§ 30.4 Affirmative action plans.

(a) *Adoption of affirmative action plans.* A sponsor's commitment to equal opportunity in recruitment, selection, employment, and training of apprentices shall include the adoption of a written affirmative action plan.

(b) *Definition of affirmative action.* Affirmative action is not mere passive nondiscrimination. It includes procedures, methods and program for the identification, positive recruitment, training, and motivation of present and potential minority group apprentices. It is action which will equalize opportunity in apprenticeship so as to allow full utilization of minority group manpower potential. The overall result to be sought is equal opportunity in apprenticeship for all individuals participating in or seeking entrance to the Nation's labor force.

(c) *Outreach and positive recruitment.* An acceptable affirmative action plan must also include adequate provision for outreach and positive recruitment that would reasonably be expected to increase minority participation in apprenticeship by expanding the opportunity of minority persons to become eligible for apprenticeship selection. In order to achieve these objectives, sponsors shall undertake activities such as those listed below. It is not contemplated that each sponsor necessarily will include all of the listed activities in its affirmative action program. The scope of the affirmative action program will depend on all the circumstances including the size and type of the program and its resources. However, the sponsor will be required to undertake a significant number of appropriate activities in order to enable it to meet its obligations under this part. The affirmative action plan shall set forth the specific steps the sponsor intends to take in the areas listed below. Whenever special circumstances warrant, the Department may provide such financial or other assistance as it deems necessary to implement the requirements of this paragraph.

(1) Dissemination of information concerning the nature of apprenticeship, availability of apprenticeship opportunities, sources of apprenticeship applications, and the equal opportunity policy of the sponsor. For programs accepting applications only at specified intervals, such information shall be disseminated at least 30 days in advance of the earliest date for application at each interval. For programs customarily receiving applications throughout the year, such information shall be regularly disseminated but not less than semiannually. Such information shall be given to the Department, local schools, employment service offices, community organizations which can effectively reach minority groups, and published in newspapers which are circulated in the minority community as well as the general areas in which the program sponsor operates.

(2) Participate in annual workshops conducted by employment service agencies for the purpose of familiarizing school, employment service and other appropriate personnel with the apprenticeship system and current opportunities therein.

(3) Cooperation with local school boards and vocational education systems to develop programs for preparing students to meet the standards and criteria required to qualify for entry into apprenticeship programs.

(4) Internal communication of the sponsor's equal opportunity policy in such a manner as to foster understanding, acceptance, and support among the sponsor's various officers, supervisors, employees, and members and to encourage such persons to take the necessary action to aid the sponsor in meeting its obligations under this part.

(5) Engaging in programs such as outreach for the positive recruitment and preparation of potential applicants for apprenticeships; where appropriate and feasible, such programs shall provide for pretesting experience and training. If no

such programs are in existence, the sponsor shall seek to initiate these programs, or, when available, to obtain financial assistance from the Department. In initiating and conducting these programs, the sponsor may be required to work with other sponsors and appropriate community organizations.

(6) To encourage the establishment and utilization of programs of preapprenticeship, preparatory trade training, or others designed to afford related work experience or to prepare candidates for apprenticeship, a sponsor shall make appropriate provision in its affirmative action plan to assure that those who complete such programs are afforded full and equal opportunity for admission into the apprenticeship program.

(7) Utilization of journeymen to assist in the implementation of the sponsor's affirmative action program.

(8) Granting advance standing or credit on the basis of previously acquired experience, training, skills, or aptitude for all applicants equally.

(9) Admitting to apprenticeship persons whose age exceeds the maximum age for admission to the program, where such action is necessary to assist the sponsor in achieving its affirmative action obligations.

(10) Such other action as to insure that the recruitment, selection, employment, and training of apprentices during apprenticeship, shall be without discrimination because of race, color, religion, national origin, or sex; such as: General publication of apprenticeship opportunities and advantages in advertisements, industry reports, articles, etc.; use of present minority apprentices and journeymen as recruiters; career counseling; periodic auditing of affirmative action programs and activities; and development of reasonable procedures between the sponsor and employers of apprentices to insure that equal employment opportunity is being granted including reporting systems, on site reviews, briefing sessions, etc. The affirmative action program shall set forth the specific steps the program under this paragraph (c) sponsors intend to take, in the above areas. Whenever special circumstances warrant, the Department may provide such financial or other assistance as it deems necessary to implement the above requirements.

(d) *Goals and timetables.* (1) A sponsor adopting a selection method under § 30.5(b) (1) or (2) which determines on the basis of the analysis described in paragraph (e) of this section that it has deficiencies in terms of underutilization of minorities in the craft or crafts represented by the program shall include in its affirmative action plan percentage goals and timetables for the admission of minority applicants into the eligibility pool.

(2) A sponsor adopting a selection method under § 30.5(b) (3) or (4) which determines on the basis of the analysis described in paragraph (e) of this section that it has deficiencies in terms of the underutilization of minorities in the craft or crafts represented by the program shall include in its affirmative action plan percentage goals and timetables for the selection of minority applicants for the apprenticeship program.

(3) "Underutilization" as used in this paragraph refers to the situation where there are fewer minorities in the particular craft or crafts represented by the program than would reasonably be expected in view of an analysis of the specific factors in subparagraphs (1) through (5) in paragraph (e) of this section. Where, on the basis of the analysis, the sponsor determines that it has no deficiencies, no goals and timetables need be established. However, where no goals and timetables are established, the affirmative action plan shall include a detailed explanation why no goals and timetables have been established.

(4) Where the sponsor fails to submit goals and timetables as part of its affirmative action plan or submits goals and timetables which are unacceptable, and the Department determines that the sponsor has deficiencies in terms of underutilization of minorities within the meaning of this section, the Department shall establish goals and timetables applicable to the sponsor for the admission of minority applicants into the eligibility pool or selection of apprentices, as appropriate. The sponsor shall make good faith efforts to attain these goals and timetables in accordance with the requirements of this section.

(e) *Analysis to determine if deficiencies exist.* The sponsor's determination as to whether goals and timetables shall be established, shall be based on an analysis of at least the following factors, which analysis shall be set forth in writing as part of the affirmative action plan.

(1) The minority population of the labor market area in which the program sponsor operates;

(2) The size of the minority labor force in the program sponsor's labor market area;

(3) The percentage of minority participation as apprentices in the particular craft as compared with the percentage of minorities in the labor force in the program sponsor's labor market area;

(4) The percentage of minority participation as journeymen employed by the employer or employers participating in the program as compared with the percentage of minorities in the sponsor's labor market area and the extent to which the sponsor should be expected to correct any deficiencies through the achievement of goals and timetables for the selection of apprentices.

(5) The general availability of minorities with present or potential capacity for apprenticeship in the program sponsor's labor market area.

(f) *Establishment and attainment of goals and timetables.* The goals and timetables shall be established on the basis of the sponsor's analysis of its underutilization of minorities and its entire affirmative action program. In establishing the goals, the sponsor should consider the results which could be reasonably expected from its good faith efforts to make its overall affirmative action program work. Compliance with these requirements shall be determined by whether the sponsor has met its goals within its timetable, or failing that, whether it has made good faith efforts to meet its goals and timetables. Its "good faith efforts" shall be judged by whether it is following its affirmative action program and attempting to make it work, including evaluation and changes in its program where necessary to obtain the maximum effectiveness toward the attainment of its goals.

(g) *Data and information.* The Secretary of Labor, or a person or agency designated by him, shall make available to program sponsors data and information on minority population and labor force characteristics for each Standard Metropolitan Statistical Area, and for other special areas as appropriate.

§ 30.5 Selection of apprentices.

(a) *Obligations of sponsors.* In addition to the development of a written affirmative action plan to insure that minorities have an equal opportunity for selection as apprentices and otherwise insure the prompt achievement of full and equal opportunity in apprenticeship, each sponsor shall further provide in its affirmative action program that the selection of apprentices shall be made under one of the methods specified in the following subparagraphs (1) through (4) of paragraph (b) of this section.

(b) *Selection methods.* The sponsor shall adopt one of the following methods for selecting apprentices:

(1) *Selection on basis of rank from pool of eligible applicants*—(i) *Selection.* A sponsor may select apprentices from a pool of eligible applicants created in accordance with the requirements of subdivision (iii) of this subparagraph on the basis of the rank order of scores of applicants on one or more qualification standards where there is a significant statistical and practical relationship between rank order of scores and performance in the apprenticeship program. In demonstrating such relationship, the sponsor shall follow the procedures set forth in the Department of Labor Order of September 9, 1968 (33 F.R. 14392, Sept. 24, 1968), covering the validation of employment tests of contractors and subcontractors subject to the provision of Executive Order 11246, as amended.

(ii) *Requirements.* The sponsor adopting this method of selecting apprentices shall meet the requirements of subdivisions (iii) through (vii) of this subparagraph.

(iii) *Creation of pool of eligibles.* A pool of eligibles shall be created from applicants who meet the qualifications of minimum legal working age and the sponsor's minimum physical requirements; or from applicants who meet qualification standards in addition to minimum legal working age and the sponsor's minimum physical requirements: *Provided,* That any additional

qualification standards conform with the following requirements:

(a) *Qualification standards.* The qualification standards, and the procedures for determining such qualification standards, shall be stated in detail and shall provide criteria for the specific factors and attributes to be considered in evaluating applicants for admission to the pool. The score required under each qualification standard for admission to the pool shall also be specified. All qualification standards, and the score required on any standard for admission to the pool, shall be directly related to job performance, as shown by a significant statistical and practical relationship between the score on the standards, and the score required for admission to the pool, and performance in the apprenticeship program. In demonstrating such relationships, the sponsor shall follow the procedures set forth in the Department's testing order of September 9, 1968. Qualifications shall be considered as separately required so that the failure of an applicant to attain the specified score under a single qualification standard shall disqualify the applicant from admission to the pool.

(b) *Aptitude tests.* Any qualification standard for admission to the pool consisting of aptitude test scores shall be directly related to job performance, as shown by significant statistical and practical relationships between the score on the aptitude tests, and the score required for admission to the pool, and performance in the apprenticeship program. In determining such relationships, the sponsor shall follow the procedures set forth in the Department's testing order of September 9, 1968. The requirements of this item (b) shall also be applicable to aptitude tests utilized by a program sponsor which are administered by a State employment service agency, a private employment agency, or an other person, agency, or organization engaged in the selection or evaluation of personnel. A national test developed and administered by a national joint apprenticeship committee will not be approved by the Department unless such test meets the requirements of this subsection.

(c) *Educational attainments.* All educational attainments or achievements as qualifications for admission to the pool shall be directly related to job performance, as shown by a significant statistical and practical relationship between the score, and the score required for admission to the pool, and performance in the apprenticeship program. In demonstrating such relationships, the sponsor shall meet the requirements of the Department's testing order of September 9, 1968. School records or the results of general education development tests recognized by the State or local public instruction authority shall be evidence of educational achievement. Education requirements shall be applied uniformly to all applicants.

(iv) *Oral interviews.* Oral interviews shall not be used as a qualification standard for admission into an eligibility pool. However, once an applicant is placed in the eligibility pool, and before he is selected for apprenticeship from the pool, he may be required to submit to an oral interview. Oral interviews shall be limited only to such objective questions as may be required to determine the fitness of applicants to enter the apprenticeship program, but shall not include questions relating to qualifications previously determined in gaining entrance to the eligibility pool. When an oral interview is used, each interviewer shall record his questions, the general nature of answers, and shall prepare a summary of any conclusions. Applicants rejected from the pool of eligibles on the basis of an oral interview shall be given a written statement of such rejection, the reasons therefor, and the appeal rights available to the applicant.

(v) *Notification of applicants.* All applicants who meet the requirements for admission shall be notified and placed in the eligibility pool. The program sponsor shall give each rejected applicant notice of his rejection including the reasons for his rejection, the requirements for admission to the pool of eligibles, and the appeal rights available to the applicant.

(vi) *Goals and timetables.* The sponsor shall establish, where required by § 30.4 (d), percentage goals and timetables for the admission of minority persons into the pool of eligibles, in accordance with the provisions of § 30.4 (d), (e), and (f).

(vii) *Compliance.* A sponsor shall be deemed to be in compliance with its commitments under subdivision (vi) of this subparagraph if it meets its goals or timetables or if it makes a good faith effort to meet these goals and timetables. In the event of the failure of the sponsor to meet its goals and timetables, it shall be given an opportunity to demonstrate that it has made every "good faith effort" to meet its commitments (see § 30.4(f)). All the actions of the sponsor shall be reviewed and evaluated in determining whether such good faith efforts have been made.

(2) *Random selection from pool of eligible applicants*—(i) *Selection.* A sponsor may select apprentices from a pool of eligible applicants on a random basis. The method of random selection is subject to approval by the Department. Supervision of the random selection process shall be by an impartial person or persons selected by the sponsor, but not associated with the administration of the apprenticeship program. The time and place of the selection, and the number of apprentices to be selected, shall be announced. The place of the selection shall be open to all applicants and the public. The names of apprentices drawn by this method shall be posted immediately following the selection at the program sponsor's place of business.

(ii) The sponsor adopting this method of selecting apprentices shall meet the requirements of subdivisions (iii) through (v) of subparagraph (1) of this paragraph relating to the creation of pool of eligibles, oral interviews, and notification of applicants.

(iii) *Goals and timetables.* The sponsor shall establish, where required by § 30.4(d), percentage goals and timetables for the admission of minority persons into the pool of eligibles in accordance with the provisions of § 30.4 (d), (e), and (f).

(iv) *Compliance.* Determinations as to the sponsor's compliance with its obligations under these regulations shall be in accordance with the provisions of subdivision (vii) of subparagraph (1) of this paragraph (b).

(3) *Selection from pool of current employees*—(i) *Selection.* A sponsor may select apprentices from an eligibility pool of the workers already employed by the program sponsor in a manner prescribed by a collective bargaining agreement where such exists, or by the sponsor's established promotion policy. The sponsor adopting this method of selecting apprentices shall establish goals and timetables for the selection of minority apprentices, unless the sponsor concludes, in accordance with the provisions of § 30.4 (d), (e), and (f) that it does not have deficiencies in terms of underutilization of minorities in the apprenticeship of journeymen crafts represented by the program.

(ii) *Compliance.* Determinations as to the sponsor's compliance with its obligations under these regulations shall be in accordance with the provisions of subdivision (vii) of subparagraph (1) of this paragraph (b).

(4) *Alternative selection methods*—(i) *Selection.* A sponsor may select apprentices by means of any other method, including its present selection method: *Provided,* That the sponsor meets the following requirements:

(a) *Selection method and goals and timetables.* Within 6 months of the effective date of this part, the sponsor shall submit to the Department a detailed statement of the selection method it proposes to use along with the rest of its written affirmative action program including, where required by § 30.4(d), its percentage goals and timetables for the selection of minority applicants for apprenticeship and its written analysis, upon which such goals and timetables, or lack thereof, are based. The establishment of goals and timetables shall be in accordance with the provisions of § 30.4 (d), (e), and (f). The sponsor may not implement any such selection method until the Department has approved the selection method as meeting the requirements of item (b) of this subdivision and has approved the remainder of its affirmative action program including its goals and timetables. If the Department fails to act upon the selection method and the affirmative action program within 30 days of its submission, the sponsor may implement the selection method on the effective date of this part.

(b) *Qualification standards.* Apprentices shall be selected on the basis of objective and specific qualification standards. Examples of such standards as fair aptitude tests, school diplomas, age requirements, occupationally essential physical requirements, fair interviews, school grades, and previous work experience. Where interviews are used,

adequate records shall be kept including a brief summary of each interview and the conclusions on each of the specific factors, e.g., motivation, ambition, and willingness to accept direction which are part of the total judgment.

(ii) *Compliance.* Determination as to the sponsor's compliance with its obligations under these regulations shall be in accordance with the provisions of subdivision (vii) of subparagraph (1) of this paragraph (b). Where a sponsor, despite its good faith efforts, fails to meet its goals and timetables within a reasonable period of time, the sponsor may be required to make appropriate changes in its affirmative action program to the extent necessary to obtain maximum effectiveness towards the attainment of its goals. The sponsor may also be required to develop and adopt an alternative selection method, including a method prescribed by the Department, where it is determined that the failure of the sponsor to meet its goals is attributable in substantial part to the selection method. Where the sponsor's failure to meet its goals is attributable in substantial part to its use of a qualification standard which has adversely affected the opportunities of minority persons for apprenticeship, the sponsor may be required to demostrate that such qualification standard is directly related to job performance, in accordance with the provisions of subparagraph (1) (iii) (*a*) of this paragraph.

§ 30.6 Existing lists of eligibles and public notice.

A sponsor adopting a selection method under § 30.5(b) (1) or (2), and a sponsor adopting a selection method under § 30.5(b) (4) who determines that there are fewer minorities on its existing lists of eligibles than would reasonably be expected in view of the analysis described in § 30.4(e) shall discard all existing eligibility lists upon adoption of the selection methods required by this part. New eligibility pools shall be established and lists of eligibility pools shall be posted at the sponsor's place of business. Sponsors shall establish a reasonable period of not less than 2 weeks for accepting applications for admission to an apprenticeship program. There shall be at least 30 days of public notice in advance of the earliest date for application for admission to the apprenticeship program (see § 30.4(c) on affirmative action with respect to dissemination of information). Applicants who have been placed in a pool of eligibles shall be retained on lists of eligibles subject to selection for a period of 2 years. Applicants may be removed from the list at an earlier date by their request or following their failure to respond to an apprentice job opportunity given by registered return receipt mail notice. Applicants who have been accepted in the program shall be afforded a reasonable period of time in light of the customs and practices of the industry for reporting for work. All applicants shall be treated equally in determining such period of time. It shall be the responsibility of the applicant to keep the sponsor informed of his current mailing address. A sponsor may restore to the list of eligibles an applicant who has been removed from the list at his request or who has failed to respond to an apprenticeship job opportunity.

§ 30.7 [Reserved]

§ 30.8 Records.

(a) *Obligations of sponsors.* Each sponsor shall keep adequate records including a summary of the qualifications of each applicant, the basis for evaluation and for selection or rejection of each applicant, the records pertaining to interviews of applicants, the original application for each applicant, information relative to the operation of the apprenticeship program, including but not limited to job assignment, promotion, demotion, layoff, or termination, rates of pay, or other forms of compensation or conditions of work, and any other records pertinent to a determination of compliance with these regulations, as may be required by the Department. The records pertaining to individual applicants, whether selected or rejected shall be maintained in such manner as to permit identification of minority participants.

(b) *Affirmative action plans.* Each sponsor must retain a statement of its affirmative action plan required by § 30.4 for the prompt achievement of full and equal opportunity in apprenticeship, including all data and analyses made pursuant to the requirements of § 30.4. Sponsors shall periodically review their affirmative action plan and update it where necessary.

(c) *Qualification standards.* Each sponsor must maintain evidence that its qualification standards have been validated in accordance with the requirements set forth in § 30.5(b).

(d) *Records of State Apprenticeship Councils.* State Apprenticeship Councils shall keep adequate records, including registration requirements, individual program standards and registration records, program compliance reviews and investigations, and any other records pertinent to a determination of compliance with this part, as may be required by the Department, and shall report to the Department as may be required by the Department.

(e) *Maintenance of records.* The records required by this part and any other information relevant to compliance with these regulations shall be maintained for 5 years and made available upon request to the Department or other authorized representative.

§ 30.9 Compliance reviews.

(a) *Conduct of compliance reviews.* The Department will regularly conduct systematic reviews of apprenticeship programs in order to determine the extent to which sponsors are complying with these regulations and will also conduct compliance reviews when circumstances, including receipt of complaints not referred to a private review body pursuant to § 30.11(b) (1) (i), so warrant, and take appropriate action regarding programs which are not in compliance with the requirements of this part. Compliance reviews will consist of comprehensive analyses and evaluations of each aspect of the apprenticeship program, including on-site investigations and audits.

(b) *Reregistration.* Sponsors seeking reregistration shall be subject to a compliance review as described in paragraph (a) of this section by the Department as part of the reregistration process.

(c) *New registrations.* Sponsors seeking new registration shall be subject to a compliance review as described in paragraph (a) of this section by the Department as part of the registration process.

(d) *Voluntary compliance.* Where the compliance review indicates that the sponsor is not operating in accordance with this part, the Department shall notify the sponsor in writing of the results of the review and make a reasonable effort to secure voluntary compliance on the part of the program sponsor within a reasonable time before undertaking sanctions under § 30.13. In the case of sponsors seeking new registration, the Department will provide appropriate recommendations to the sponsor to enable it to achieve compliance for registration purposes.

§ 30.10 Noncompliance with Federal and State equal opportunity requirements.

A pattern or practice of noncompliance by a sponsor (or where the sponsor is a joint apprenticeship committee, by one of the parties represented on such committee) with Federal or State laws or regulations requiring equal opportunity may be grounds for the imposition of sanctions in accordance with § 30.13 if such noncompliance is related to the equal employment opportunity of apprentices and/or graduates of such an apprenticeship program under this part. The sponsor shall take affirmative steps to assist and cooperate with employers and unions in fulfilling their equal employment opportunity obligations.

§ 30.11 Complaint procedure.

(a) *Filing.* (1) Any apprentice or applicant for apprenticeship who believes that he has been discriminated against on the basis of race, color, religion, national origin, or sex with regard to apprenticeship or that the equal opportunity standards with respect to his selection have not been followed in the operation of an apprenticeship program may, by himself or by an authorized representative, file a complaint with the Department, or with a private review body established pursuant to subparagraph (3) of this paragraph. The complaint shall be in writing and shall be signed by the complainant. It must include the name, address, and telephone number of the person allegedly discriminated against, the program sponsor involved, and a brief description of the circumstances of the failure to apply the equal opportunity standards provided for in this part.

(2) The complaint must be filed not later than 90 days from the date of the alleged discrimination of specified failure to follow the equal opportunity standards; and, in the case of complaints filed directly with review bodies designated by program sponsors to review such complaints, any referral of such complaint by the complainant to the Department must occur within the time limitation stated above or 30 days from the final decision of such review body, whichever is later. The time may be extended by the Department for good cause shown.

(3) Sponsors are encouraged to establish fair, speedy, and effective procedures for a review body to consider complaints of failure to follow the equal opportunity standards. A private review body established by the program sponsor for this purpose should number three or more responsible persons from the community serving in this capacity without compensation. Members of the review body should not be directly associated with the administration of an apprenticeship program. Sponsors may join together in establishing a review body to serve the needs of programs within the community.

(b) *Processing of complaints.* (1) (i) When the sponsor has designated a review body for reviewing complaints, and if the Department determines that such review body will effectively enforce the equal opportunity standards, the Department, upon receiving a complaint, shall refer the complaint to the review body.

(ii) The Department shall, within 30 days following the referral of a complaint to the review body, obtain reports from the complainant and the review body as to the disposition of the complaint. If the complaint has been satisfactorily adjusted and there is no other indication of failure to apply equal opportunity standards, the case shall be closed and the parties appropriately informed.

(iii) When a complaint has not been resolved by the review body within 90 days or where, despite satisfactory resolution of the particular complaint by the review body, there is evidence that equal opportunity practices of the apprenticeship program are not in accordance with this part, the Department may conduct such compliance review as found necessary, and will take all necessary steps to resolve the complaint.

(2) Where no review body exists, the Department may conduct such compliance review as found necessary in order to determine the facts of the complaint, and obtain such other information relating to compliance with these regulations as the circumstances warrant.

§ 30.12 Adjustments in schedule for compliance review of complaint processing.

If, in the judgment of the Department, a particular situation warrants and requires special processing and either expedited or extended determination, it shall take the steps necessary to permit such determination if it finds that no person or party affected by such determination will be prejudiced by such special processing.

§ 30.13 Sanctions.

(a) Where the Department, as a result of a compliance review or other reason, determines that there is reasonable cause to believe that an apprenticeship program is not operating in accordance with this part and voluntary corrective action has not been taken by the program sponsor, the Department shall institute proceedings to deregister the program or it shall refer the matter to the Attorney General with recommendations for the institution of a court action by the Attorney General under title VII of the Civil Rights Act of 1964.

(b) Deregistration proceedings shall be conducted in accordance with the following procedures:

(1) The Department shall notify the sponsor, in writing, that a determination of reasonable cause has been made under paragraph (a) of this section and that the apprenticeship program may be deregistered unless, within 15 days of the receipt of the notice, the sponsor requests a hearing. The notification shall specify the facts on which the determination is based.

(2) If within 15 days of the receipt of the notice provided for in subparagraph (1) of this paragraph the sponsor mails a request for a hearing, the Secretary shall convene a hearing in accordance with § 30.16.

(3) The Secretary shall make a final decision on the basis of the record before him, which shall consist of the compliance review file and other evidence presented and, if a hearing was conducted pursuant to § 30.16, the proposed findings and recommended decision of the hearing officer. In his discretion, the Secretary may allow the sponsor a reasonable time to achieve voluntary corrective action. If the Secretary's decision is that the apprenticeship program is not operating in accordance with this part, the apprenticeship program shall be deregistered. In each case in which deregistration is ordered, the Secretary shall make public notice of the order and shall notify the sponsor and the complainant, if any.

§ 30.14 Reinstatement of program registration.

Any apprenticeship program deregistered pursuant to this part may be reinstated upon presentation of adequate evidence to the Secretary that the apprenticeship program is operating in accordance with this part.

§ 30.15 State Apprenticeship Councils.

(a) *Adoption of consistent State plans.* (1) The Department shall encourage State Apprenticeship Councils to adopt and implement the requirements of this part.

(2) Each State Apprenticeship Council which, prior to the effective date of this part had in operation a State equal opportunity plan, shall submit a new State plan within 6 months from the effective date of this part. Such new State plan shall, as a prerequisite to approval by the Department, adopt and implement the requirements of this part. The new State plan shall also require all State apprenticeship programs registered with the State Apprenticeship Council to comply with the requirements of the new State plan within 1 year after the effective date of this part. No State Apprenticeship Council shall continue to be recognized by the Department if it has not adopted within 6 months after the effective date of this part a plan implementing the requirements of this part.

(3) The Department retains authority to conduct compliance reviews to determine whether the State plan or any State apprenticeship program registered with a State Apprenticeship Council is being administered or operated in accordance with this part.

(4) It shall be the responsibility of the State Apprenticeship Council to take the necessary action to bring a noncomplying program into compliance with the State plan. In the event the State Apprenticeship Council fails to fulfill this responsibility, the Secretary may withdraw the recognition for Federal purposes of any or all State apprenticeship programs, in accordance with the procedures for deregistration of programs registered by the Department, or refer the matter to the Attorney General with a recommendation for the institution by the Attorney General of a court action under title VII of the Civil Rights Act of 1964.

(5) Each State Apprenticeship Council shall notify the Department of any State apprenticeship program deregistered by it.

(6) Any State apprenticeship program deregistered by a State Apprenticeship Council for noncompliance with requirements of this part may, within 15 days of the receipt of a notice of deregistration, appeal to the Department to set aside the determination of the State Apprenticeship Council. The Department shall make its determination on the basis of the record. The Department may grant the State program sponsor, the State Apprenticeship Council and the complainant(s), if any, the opportunity to present oral or written argument.

(b) *Withdrawal of recognition.* (1) Whenever the Department determines that reasonable cause exists to believe that a State Apprenticeship Council has not adopted or implemented a plan in accordance with the equal opportunity requirements of this part, it shall give notice to such State Apprenticeship Council and to appropriate State sponsors of this determination, stating specifically wherein the State's plan fails to meet such requirements and that the Department proposes to withdraw recognition for Federal purposes, from the State Apprenticeship Council unless within 15 days of the receipt of the notice, the State Apprenticeship Council complies with the provisions of this part or mails a request for a hearing to the Secretary.

(2) If within 15 days of the receipt of the notice provided for in subparagraph (1) of this paragraph the State Apprenticeship Council neither complies with the provisions of this part, nor mails a request for a hearing, the Secretary

shall determine whether the State Apprenticeship Council has adopted or implemented a plan in accordance with the equal opportunity requirements of this part.

(3) If within 15 days of the receipt of the notice provided for in subparagraph (1) of this paragraph the State Apprenticeship Council mails a request for a hearing, the Secretary shall proceed in accordance with § 30.16.

(4) If a hearing is conducted in accordance with § 30.16, the Secretary upon receipt of the proposed findings and recommended decision of the hearing officer shall make a final decision whether the State Apprenticeship Council has adopted or implemented a plan in accordance with the equal opportunity requirements of this part.

(5) If the Secretary determines to withdraw recognition, for Federal purposes, from the State Apprenticeship Council he shall notify the State Apprenticeship Council of this determination. He shall also notify the State sponsors that within 30 days of the receipt of the notice the Department shall cease to recognize, for Federal purposes, each State apprenticeship program unless the State program sponsor requests registration with the Department. Such registration may be granted contingent upon finding that the State apprenticeship program is operating in accordance with the requirements of this part.

(6) A State Apprenticeship Council whose recognition has been withdrawn pursuant to this part may have its recognition reinstated upon presentation of adequate evidence to the Secretary that it has adopted and implemented a plan carrying out the equal opportunity requirements of this part.

§ 30.16 Hearings.

(a) Within 10 days of his receipt of a request for a hearing, the Secretary shall designate a hearing officer. The hearing officer shall give reasonable notice of such hearing by registered mail, return receipt requested, to the appropriate sponsor (Federal or State registered), the State Apprenticeship Council, or both, as the case may be. Such notice shall include (1) a reasonable time and place of hearing, (2) a statement of the provisions of this part pursuant to which the hearing is to be held, and (3) a concise statement of the matters pursuant to which the action forming the basis of the hearing is proposed to be taken.

(b) The hearing officer shall regulate the course of the hearing. Hearings shall be informally conducted. Every party shall have the right to counsel, and a fair opportunity to present his case including such cross-examination as may be appropriate in the circumstances. Hearing officers shall make their proposed findings and recommended decisions to the Secretary upon the basis of the record before them.

§ 30.17 Intimidatory or retaliatory acts.

Any intimidation, threat, coercion, or retaliation by or with the approval of any sponsor against any person for the purpose of interfering with any right or privilege secured by title VII of the Civil Rights Act of 1964, Executive Order 11246 of September 24, 1965, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation proceeding, or hearing under this part shall be considered noncompliance with the equal opportunity standards of this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing or judicial proceeding arising therefrom.

§ 30.18 Nondiscrimination.

The commitments contained in the sponsor's affirmative action program are not intended and shall not be used to discriminate against any qualified applicant or apprentice on the basis of race, color, religion, national origin, or sex.

§ 30.19 Exemptions.

Requests for exemption from these regulations, or any part thereof, shall be made in writing to the Secretary, and shall contain a statement of reasons supporting the request. Exemptions may be granted for good cause. State Apprenticeship Councils shall notify the Department of any such exemptions granted affecting a substantial number of employers and the reasons therefor.

[FR Doc.71-4725 Filed 4-7-71;8:45 am]

THE PROBLEM OF MULTIPLE REMEDIES

(This subject area should be discussed after the trainer has covered numerous laws and the agencies responsible for enforcement found under Tabs B through G.)

I. OVERVIEW

There are two major areas that complicate the federal enforcement effort as well as confuse and confound employers, employee organizations, and the person or persons alleging discrimination:

(1) Overlapping coverage and jurisdiction:

For example, a female employee claiming an equal pay violation can file with

a. The Wage and Hour (W&H) Division, U.S. Department of Labor, or

b. The Equal Employment Opportunity Commission (EEOC), or

c. both

(2) Disagreement on what constitutes employment discrimination:

Using the equal pay issue in (1) above, we find:

a. The W&H Division defines pay as including fringe benefits, in addition to direct compensation -- in short, total compensation.

b. EEOC also defines pay as total compensation.

But -- the two agencies disagree on what constitutes meeting the test of equal pay in the fringe benefit area -- for example: retirement (pension) benefits and maternity benefits.

RETIREMENT (PENSION) BENEFITS

Entitlement to retirement benefits is based on several apparent factors:

(1) The individual has worked.

(2) The individual has earned a certain income.

(3) The individual has been employed over a given period of time.

W & H Interpretation

All payments made directly to an employee (wages) and on behalf of an employee (retirement fund) are considered wages. Equal pay retirement is met if either (1) employer's contribution to a pension plan is the same for both sexes, or (2) the retirement benefits are equal. Thus, if an employer pays the same amount into a retirement fund for both male and female employees, but the latter receive a smaller monthly pension, this would satisfy the W & H test of equal pay.

EEOC Interpretation

Disagrees with W & H division, taking the position that payment of different retirement benefit amounts constitutes unequal pay and hence is sex discrimination.

According to the EEOC Guidelines on Sex Discrimination (1974), employees, regardless of gender, must receive the same retirement benefits; a plan which pays men and women different monthly benefit amounts violates Title VII. The EEOC Guideline states that "the principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."

The particular "characteristic" to which EEOC refers in this instance is the fact that women as a group outlive men as a group and hence will collect pensions longer -- thus the basis for lower benefits.

MATERNITY BENEFITS

W & H Interpretation

Maternity benefits are not wages within the definition of the Fair Labor Standards Act. A different standard of payment under a health plan, for example, would not be unlawful (i.e., sex discrimination): maternity benefits may be subject to a flat maximum payment unrelated to actual expenses of childbirth, while other conditions are covered on an indemnity basis related to actual claims, or on maximum payments related to actual medical costs.

EEOC Interpretation

Takes the opposite position. There should be no distinction between maternity and other health insurance claims. Thus, if the hospital plan provides for a payment to the doctor, up to 100% of the prevailing or community fee, this should apply in maternity coverage, rather than a specified flat fee. EEOC takes the position in its Guidelines on Sex Discrimination that "payment under any health...plan...shall be applied to disability due to ... childbirth on the same terms and conditions as they are applied to other temporary disabilities."

Other Examples of Disagreement and Lack of Coordination

1. Testing--there is no disagreement among enforcement agencies that tests for hiring or promotion should be job-related. In employment discrimination doctrine a test which operates to exclude a disproportionate number of a minority or ethnic group is unlawful, unless there is demonstrable proof it is job-related. The employer must provide evidence that the test is valid, i.e., is job-related and hence meets the requirement of "business necessity."

   The interagency testing controversy arises out of standards to be used to validate a written exam. The disagreement has been particularly sharp between the EEOC and the U.S. Civil Service Commission.

2. A frequently cited illustration of dissipation of enforcement effort and failure to coordinate is the Crown-Zellerbach Case (Local 189, United Papermakers U.S., 416 F. 2nd 980, 984, 985, 5th Circuit, 1969). The company and union worked out a seniority agreement with the EEOC which involved the merger of segregated job lines. A year later, the agreement was found to be inadequate by the OFCC. A second plan was imposed, only to be successfully challenged by the Justice Department in Title VII litigation.

II. PROBLEMS FACING EMPLOYERS

Under a multi-faceted FEP enforcement effort there are obvious compliance problems facing employers: conflicts can arise when employers, in pursuing an affirmative action program, hire a large number of one group of employees -- for instance, women or members of a given minority group -- and have no openings for other groups -- for instance, the 40 - 65 age group protected by the Age Discrimination in Employment Act of 1967, or the handicapped protected by the Rehabilitation Act of 1973.

Employer concern was voiced by the Electronic Industries Association, which reflected a common complaint among government contractors in all industries.

In a letter of May 5, 1975 to the chairman of the staff committee of the Equal Employment Opportunity Coordinating Council (EEOCC),

the Association's president wrote, in part:

> The dilemma facing employers, and more specifically government contractors, is becoming more complex on a daily basis, and the original intent of the Civil Rights Act is slowly disappearing within the multitude of requirements and regulations. To review briefly, it is our understanding that currently government contractors have nondiscrimination and affirmative action obligations under the following statutes, executive orders, guidelines, and regulations, administered by the following agencies:
>
> 1. Title VII of the Civil Rights Act of 1964, as amended by the EEO Act of 1972, and administered by the Equal Employment Opportunity Commission (EEOC).
> 2. The Equal Pay Act of 1964 (sic), administered by the Wage and Hour Division of the Department of Labor.
> 3. The Age Discrimination in Employment Act of 1967, which prohibits discrimination based on age between the ages of 40-65, and administered by the Wage and Hour Division of the Department of Labor.
> 4. The prohibition against discrimination because of age imposed on government contractors and subcontractors by the Federal Procurement Regulations issued by the General Services Administration (GSA).
> 5. Executive Order 11246, as amended by Executive Order 11375, which is administered by the Office of Federal Contract Compliance (OFCC) and the designated compliance agencies.
> 6. ... the Vietnam Era Veterans Readjustment Assistance Act of 1972, and the rules and regulations issued by the Secretary of Labor.
> 7. Title V, Section 503 of the Rehabilitation Act of 1973, and the regulations issued by the Employment Standards Administration (ESA) of the Department of Labor.
> 8. Civil Rights Act of 1866.
> 9. Municipal and state ordinances, executive orders, and laws dealing with nondiscrimination and affirmative action in virtually all of the areas noted in items 1-8.
>
> ...The practical problem facing a contractor every day is that it (sic) may have 1, 10, 100, or 1,000 job openings for which a variety of people will apply from both inside and outside a company. If more people apply than the available number of job openings, and their qualifications are comparable, how is the contractor to determine who to hire or promote from an applicant pool or employer work force which may contain some or all of the following: Blacks, Spanish-surnamed Americans,

Orientals, Indians, women, disabled veterans, Vietnam era veterans, the physically and mentally handicapped, those over 40, Jews, Catholics, white Protestant males, Italians, Greeks, and Slavs? Unfortunately, quite often when that choice is finally made, it is usually followed by a formal charge or complaint alleging discrimination by a member of one of the groups not selected.

To our knowledge, the federal government has never issued any guide to contractors or the public indicating how these different obligations are to be reconciled and coordinated and what priorities, if any, exist. Furthermore, the federal government has not worked out a meaningful accommodation in these areas with state and local governments.

Ultimate responsibility for affirmative action, ... and nondiscrimination should be coordinated so a contractor may develop one consistent program to cover all groups protected by the legislation, executive orders, statutes, etc. As Senator Randolph said in supporting passage of Section 715 of the EEO Act of 1972:

> "It is critical that employers be in a position to rely on a coordinated government position on all matters, not the least of which is equal employment opportunity. It is just as vital to employees who feel that they have been subjected to discriminatory employment practices that the relevant agencies of the government coordinate their efforts..." (emphasis added). Source: Daily Labor Report, BNA, May 16, 1975, A-1.

III. PROBLEMS FACING EMPLOYEE ORGANIZATIONS

The multiple remedies also pose a heavy burden on unions and employee associations which are bargaining agents for private and public sector employees.

The affirmative duty to represent bargaining unit employees fairly covers a wide variety of issues both at the bargaining table and under the grievance-arbitration mechanism. The subject of employment discrimination is certainly among those issues; it is becoming an even more pressing one in contract provisions and in promotion, transfer and disciplinary grievances.

Obviously, the employee representative wants to use the negotiated grievance machinery as effectively as possible. If the union or association spokesperson determines to argue discrimination cases based on public policy criteria, he or she also is faced, as is the employer, with many overlapping laws, regulations, and inconsistent agency interpretations.

One theoretical example will serve to illustrate the dilemma:

1. Basis of grievance: A minority female working for City "X" charges that her failure to pass a promotional test was based on a culturally biased exam which had nothing to do with her ability to perform in the better paying job.
2. The union challenges the employer to prove that the test is job-related.
3. The public employer claims the test is valid, i.e., job-related; that it met the "construct validity" standard accepted by the U.S. Civil Service Commission. As a member of the Federal Merit Standards System, City X is in compliance.
4. The union representative seeks advice from the EEOC; discovers that EEOC rejects the "construct validity" standard, and insists compliance must be based on a "criterion-related" study.
5. The union rep needs help from some expert source, merely to explain in King's (or Queen's) English the meaning of the terminology born within the world of the American Psychological Association. He finally gets clarification.
6. Armed with a layman's understanding, the union rep returns to public management, arguing the EEOC position and pointing out that the Supreme Court has given great deference to its Guidelines on Employee Selection Procedures. Public management refuses to budge on this issue.
7. Result - a grievance deadlock based on two different interpretations of what constitutes a job-related exam.

Can an arbitrator resolve this legal issue -- would he even want to? Does the union have an obligation, then, to assist or advise the grievant to pursue a legal remedy? And if so, under what law? Title VII? Civil Rights Act of 1866? Fourteenth Amendment and the related Civil Rights Act of 1871? Or a combination of laws?

IV. PROBLEMS FACING JOB APPLICANTS AND EMPLOYEES

The main problems would appear to be:

(1) A lack of knowledge -- and understandably so -- about the variety of laws, state and federal (and sometimes local) on the books; a lack of awareness of differences among agencies as to what constitutes discrimination; the different time limitations for filing a complaint, etc.

(2) In filing a cause of action under Title VII, the aggrieved confronts an EEOC backlog, currently estimated to be over 100,000 cases. This means an interminable waiting period for the complainants, initially merely to learn if the Commission finds or does not find reasonable cause to believe there is a violation of Title VII. Either finding allows the grievant to pursue a legal remedy, but the case will be turned down by the Court if the aggrieved has not exhausted the administrative channels of the EEOC and has not received a "right to sue" letter from the agency.

As a result of the backlog, it is estimated that the median period of time required for the processing of a complaint -- from receipt to final resolution -- is 32 months! EEOC testimony before Congress indicates that an effort is underway to resolve many of the internal organizational problems that have not been conducive to handling the ever mounting number of complaints.

V. CONGRESSIONAL ANSWER TO JIGSAW ENFORCEMENT PUZZLE

Recognizing disagreements among enforcement agencies Congress, in 1972, responded by creating under Title VII the Equal Employment Opportunity Coordinating Council (EEOCC).

The member agencies on the Council are:

1. Equal Employment Opportunity Commission
2. Department of Labor
3. Department of Justice
4. U.S. Civil Service Commission
5. U.S. Commission on Civil Rights

The prime Congressional objective, of course, was to "...eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies, and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders and policies." (Section 715).

The three major areas of contention confronting the EEOCC with no final resolution as of Jan. 1976, involve:

1. Uniform testing guidelines (working on this for a good 3 years. A tentative draft has been forthcoming but no final action).
2. Seniority guidelines
3. Pension guidelines

VI. PROPOSED SOLUTIONS TO JIGSAW ENFORCEMENT PUZZLE

A. U.S. Civil Rights Commission:

Recommends one federal equal employment opportunity law with a single enforcement board, to be called the "National Employees Rights Board" (NERB).

This recommendation is based on a 2-year study of the federal government's enforcement efforts.

The proposed consolidated agency would enforce one encompassing EEO law. The Commission recommends:

(1) Add to the protected classes under Title VII: age and handicapped status. Thus the new law would cover: race, color, religion, sex, national origin, age and handicapped status.

(2) Rescind other laws such as Equal Pay Act of 1963 and Executive Order 11246 which deals with the federal contract compliance program.

This would mean abolishment of the EEOC and would remove enforcement authority from the Departments of Labor and Justice and from the U.S. Civil Service Commission.

The U.S. Commission on Civil Rights recommends deletion of Section 712 from Title VII, which exempts veterans' preference rights from the law's prohibited employment practices.

In urging the creation of NERB and abolishment of the Coordinating Council, the Commission charges that during the 3-year existence of the Equal Employment Opportunity Coordinating Council, preoccupation with "the testing issue has resulted in a failure" to deliberate and reach resolution on such important questions as uniform data collection procedures, joint training programs, coordinated investigations, or consistent standards governing affirmative action and nondiscriminatory employment practices.

The proposed National Employment Rights Board would have stronger enforcement powers than any existing agency: the authority to issue cease-and-desist orders, including the power to order relief such as back pay and affirmative action. The Board also would have authority to bring suit in federal district courts; would stress the elimination of patterns and practices of discrimination. Although it would be empowered to act on individual complaints, most of them would be referred to state and local fair employment practices agencies. These agencies would be reviewed periodically by NERB to assure consistency with board guidelines.

In urging consolidation of the national effort to achieve equal employment opportunity, the Civil Rights Commission called the current federal effort "fundamentally inadequate" and charged that the "fragmented administrative picture has resulted in duplication of effort, inconsistent findings and a loss of public faith in the objectivity and efficiency of the program."

-- Source: The Federal Civil Rights Enforcement Effort - 1974 (Vol.5), A Report of the U.S. Commission on Civil Rights, July 1975

B. National Association of Manufacturers

A spokesman for the NAM, in Congressional testimony stated:

> "We think the U.S. Civil Rights Commission has best summed up the dilemma of the employer trying to obey both Title VII and the Executive Order [dealing with government contractors and subcontractors]. In its 1975 report... it said in no uncertain terms that a major enforcement effort has been "the assignment of authority to a number of agencies which have issued inconsistent policies, and developed independent and uncoordinated compliance programs ...Thus, employers, employees and aggrieved citizens are left to their own devices in trying to understand and react to a complex administrative structure."

While the Civil Rights Commission seeks one administrative agency, the NAM proposes a special court within the federal judiciary: The Employment Rights Court.

This court would consist of a given number of Federal judges sitting throughout the country in "specified districts whose function it would be to hear and decide cases involving employment discrimination...appeals from the decision of the judges would be to the Circuit Courts of Appeals. Remedies available to the court would be the same as those presently available to Federal District Court judges. These include back pay awards, injunctive relief, and other affirmative equitable remedies...."

The NAM advocates a control mechanism to determine who can pursue a legal remedy:

(1) Each district would have a special division of the U.S. Attorney General's office. The division would be headed by a special U.S. Attorney for Employment Rights.

(2) A person alleging job discrimination would file a charge with the special U.S. Attorney's district office. An investigator (attorney) would look into the charge. Based on the investigation, the special U.S. Attorney would decide whether to issue a complaint.

(3) If no complaint is issued, the case would be closed.

(4) If a complaint is issued, the case would be tried in the proposed Employment Rights Court.

-- Source: Daily Labor Report
BNA, 10-3-75, E-1

VII. RESPONSES TO THE ONE AGENCY PROPOSAL

A. EEOC Response to Civil Rights Commission Recommendation:

EEOC Chairman Lowell W. Perry told a House Labor Subcommittee:

> The agencies charged with enforcing the various anti-discrimination laws have distinct statutory responsibilities and distinct ways in which they go about carrying out these responsibilities... The cumulative effect of this effort is to advance the cause of fair employment.

Perry pointed to the work of the EEOCC as the mechanism already being used to coordinate the activities of the 5 federal civil rights agencies where there is inconsistency. He said:

> An attempt should be made to get one posture but the agencies won't always be in complete agreement.

Source: "News and Background Information," 90 Labor Relations Reporter, 121

B. Position of the Department of Labor: It would appear that the Department of Labor also prefers to maintain the variety of laws and agencies responsible for EEO enforcement. Secretary of Labor Dunlop, in a prepared statement on the contract compliance program before the House Labor Subcommittee on Equal Opportunity, stated support of interagency cooperation through the existing coordinating council:

> It is clear that the effectiveness of our efforts in equal employment opportunity depends upon a close and cooperative relationship between the various Federal agencies with equal employment opportunity responsibilities. In this respect, it is necessary that steps be taken to assure uniformity of interpretation among Federal agencies, and that existing mechanisms be reviewed for their efficacy.

The proper forum for the resolution of differences between agencies is the Equal Employment Opportunity Coordinating Council which was created by Congress in 1972.... charged with the responsibility of reaching uniform or consistent policies on issues involving the administration or enforcement of the various EEO laws. An example of the proper use of the Council is its attempt to develop a uniform policy among the agencies on the seniority and layoff questions. A committee composed of staff from each of the agencies is presently attempting to work out a common policy for consideration by the Council. The Council has also been attempting for some time to develop a government-wide policy on testing and selection guidelines. I support the EEOCC's review of these areas and I endorse the attempt to arrive at common policies. It is imperative that the Government speak with one voice when it promulgates policies affecting employment practices throughout the nation.

Related to the problem of agency EEO coordination is the need for the agencies to give full faith and credit to settlements entered into by each other. Clearly, if an equal employment opportunity issue is resolved by one agency, other agencies with EEO responsibilities should honor the agreement. Without this mutual comity, it will be exceedingly difficult to conciliate and negotiate agreements.

Source: Daily Labor Report
BNA 6/19/75. D-1

TESTING

I. BACKGROUND

In the public sector, the use of written tests is a way of life in hiring and promotion decisions. Written tests as a means intended to prevent political patronage and personal favoritism ("spoils" system) date back to the early 1800s.

The seeds of the merit principle in federal government employment were planted following the assassination of President James Garfield in 1881 by a disappointed office-seeker -- in 1883 the Civil Service Act (generally known as the Pendleton Act) was enacted. This law established the U.S. Civil Service Commission to administer a merit system.

Over the years state and local governments, at varying paces, adapted to the federal concept of an apolitical employee selection procedure. The written exam became an integral part of that concept.

Testing is also a popular and much-used employee selection procedure in private industry. National surveys indicate that between one-half to three-fourths of all business enterprises use psychological tests of one kind or another. (Wm. C. Byham and Morton E. Spitzer, The Law and Personnel Testing, New York: American Management Assn. 1971)

THE BIRTH AND GROWTH OF TESTING . . .

When and where did the idea of testing originate? How and why has testing become a major element in employee selection?

In an article, "Testing and Equal Opportunity," Willo White, of the Office of Scientific Affairs of the American Psychological Association, provides some answers:

History of Test Use

Philip Dubois has documented that rigorous competitive examinations were used as early as 2200 B.C. by an emperor in China to select government officials. In fact, the stability of the Chinese system is credited to the largely uninterrupted use of tests for centuries. In 1905 the Chinese civil service examination system was abolished. The exams were literary in character and were not compatible with China's goal to become an important 20th century military power, which required the brightest students to pursue studies in science and technology.

It is interesting to note that the civil service examination systems ultimately introduced in the Western world were based on the Chinese model. A system was adopted in France during the reform movement in 1791, although it was later abolished by Napoleon. Around 1833 the English introduced a system of competitive exams to select trainees for the civil service in India.

The widespread use of tests in personnel selection and placement in this country is a recent development, although competitive exams were used as early as 1872 in some departments of the Federal Government.

Around 1900 Hugo Munsterberg is given credit for developing the first test in this country specifically for selecting persons for a job—as motorperson on the Boston Elevated Railroad. He analyzed the job, enumerating the abilities and traits required, and prepared a test to measure those basic requirements. He rigorously related the scores achieved by workers to their actual level of performance.

Test use received important impetus in 1917 when the United States entered World War I (WWI). The American Psychological Association appointed a subcommittee to determine how psychology might contribute to the war effort. A small group of psychologists developed the Army Alpha (verbal test) and the Army Beta (nonverbal) tests which could be used rapidly and inexpensively to classify large numbers of recruits so that they could be assigned to the most appropriate military service.

The techniques growing out of the WWI experience were introduced in the regular Federal civil service examination program in 1922. It was the widespread belief in tests as an impartial selection tool that did much at that time to restore faith in the civil service system by removing it from the realm of political patronage. Tests were thought to eliminate the possibility that interviewers, supervisory prejudice, or subjective opinion would be the basis of a selection decision.

During the rapid and vigorous economic expansion of the 1920s the use of tests in private industry burgeoned. Tests were felt to be a tool of scientific management and employers scrupulously attempted to validate them. During the depression, tests were used in an effort to place unemployed persons rapidly and cheaply.

Millions of persons were tested during World War II in order to assign them to military or industrial jobs. Because of the time constraint, most of these tests were never validated. By the 1950s the efficacy of tests in all phases of American life was generally accepted, especially in predicting occupational success in a wide variety of jobs.

Originally, tests were developed within companies for internal use in an effort to develop better job placement techniques. However, beleaguered personnel managers increasingly used tests they could buy off the shelf to select and place personnel at all levels.

From their rudimentary beginnings in the laboratory as research tools, tests have grown into big business in this country. In the seventh edition of the *Mental Measurement Yearbook*, Oscar Buros reports that approximately 1157 different kinds of tests are available from test publishers. Today millions of tests are sold annually and Americans may well be the most tested, analyzed, and researched people on earth.

Whether in employment, education, or mental health clinics, tests are on the front line in screening and diagnosis, or as tools in selection and decisionmaking processes. The incredible growth in the use of tests has been due to their close tie to data. Unlike many other assessment procedures, tests are open to scientific scrutiny, review, and reevaluation.

Thus, despite the fact that they are only one part of the selection process, paper and pencil tests have become synonymous with that process itself.

Source: Civil Rights Digest, Spring 1975, published quarterly by U.S. Commission on Civil Rights)

II. TESTING AND TITLE VII

A. Legislative History

During Congressional debate, concern was expressed that Title VII would force the abandonment of paper and pencil tests. Such abandonment, it was argued, would compel employers to hire unqualified persons merely because they had been victims of past discrimination. It was contended that in the name of equality the concept of merit would be destroyed, that management's right to hire the most qualified would be eroded.

Those expressing such concerns were not satisfied by the assurances of Senators Joseph Clark (D. Penn.) and Clifford Case (R. N.J.) -- Senate co-managers of the 1964 Civil Rights Act -- that an employer would still have the right to establish job qualifications at any level and could use tests as a basis to select and place workers.

Senator Tower (R. Texas) was among those not convinced by the explanation. He introduced an amendment to authorize the use of "professionally developed tests." His original amendment was defeated; his substitute amendment passed and was incorporated in Title VII as Section 703h:

> Nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration, or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.

Passage of the so-called Tower amendment perhaps was interpreted by employers to permit them to continue testing programs which, in their judgement, were neither designed, intended, nor used to discriminate.

The history of the testing controversy is sufficient testimony to the contrary.

B. EEOC Guidelines on Employee Selection Procedures

(Full test in Appendix of this section)

There are two distinct concepts in the Guidelines that are important in order to understand court interpretations of tests in relation to job discrimination:

(1) disparate impact

(2) validity

Disparate Impact

The dictionary definition of "disparate", an adjective, is: "completely distinct or different in kind; entirely dissimilar" (The American Heritage Dictionary of the English Language, 1969)

A test or other selection procedure has disparate impact (adverse effect) if, for example, a significantly higher proportion of blacks than whites are excluded from consideration for employment as a result of test or selection procedures:

if about 30% of black applicants and 30% of white applicants pass an exam, there is no disparate impact on blacks as compared to whites;

the EEOC guidelines would not require further study of that particular test so far as blacks and whites are concerned;

if, however, 65% of the whites and only 20% of the blacks pass the exam, then that test has a disparate impact -- adverse effect-- on the job opportunities of blacks as a class;

the test would be <u>invalid</u>, unless this discriminatory impact can be justified in accordance with the job-related validation procedure in the EEOC Guidelines.

Validity

A test is valid if it can be demonstrated that is predictive of, or substantially related to, job performance.

Disparate impact and validity are distinct concepts:

a test that has no disparate impact upon job opportunities of a protected class under Title VII may or may not be a valid predictor of job performance;

a valid test may or may not have disparate impact on some protected class's job opportunities.

The EEOC Guidelines require proof of validity only for tests which have a disparate impact upon the job chances of some protected class.

DEFINITION OF "TEST"

EEOC Guidelines define "test" broadly:

> ...the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

C. Three Main Methods of Test Validation

Test validation is extremely complicated and expensive.

To "validate" a test means to prove that it is fundamentally job-related and, hence, nondiscriminatory.

There are three commonly accepted studies of validation which enter into the test validation dispute:

1. criterion-related validity (preferred by EEOC)
2. construct validity (preferred by the U.S. Civil Service Commission.
3. content validity

1. Criterion-Related Validity

This approach is based on an empirical study. "Empirical" means gaining knowledge and information from practical experience and observation, rather than from theory. Thus under criterion, or empirical validation, the only way to determine whether the test matches the required job performance is to match test scores of a fairly large number of persons against their subsequent job performance. Thus, a test would be valid if those who scored high on the exam generally turn out to be successful on the job; those who scored low generally turn out to be unsuccessful on the job. Assessment of job performance would include productivity, supervisory ratings, attendance, work behavior and other elements pertaining to performance on the job.

[In the proposed new Guidelines, representing interagency consensus, a fairly large number is "Generally...30 or more..."]

2. Construct Validity

As someone has stated, this method is so complicated, most people don't-- or can't -- talk about it! A construct validity study involves measurement of traits-- e.g., verbal or mechanical aptitudes -- which are supposedly desirable for success on the job. The proposed guidelines that have been drafted by the Equal Employment Opportunity Coordinating Council -- in an effort to have interagency agreement in the testing area -- say, "construct validity is a more complex strategy than either criterion-related or content validity," since the traits or aptitudes being measured must relate to "important or critical duties of the job."

The U.S. Civil Service Commission relies almost exclusively on construct validity.

EEOC Guidelines on Employee Selection Procedures give priority to the empirical approach; the guidelines recognize construct validity "only when proof of empirical validity is not feasible." (Text of Guidelines will be found in Appendix under this tab)

3. Content Validity

This approach is based on a demonstration that the test deals with specific knowledge and skills needed in a given job, for example, a typing test for applicant typists. Content

validity does not require nor does it clearly establish a significant correlation between a person's performance on the test and the job, as does criterion-related validity.

III. CULTURAL BIAS IN TESTING

If the United States were a country with a homogenous population, devising tests that accurately assess a job-seeker's qualifications would perhaps not be so difficult. But in the heterogenous U.S. society there is recognition of the need to bring economically and educationally disadvantaged groups (all races) into the working mainstream which, currently, is experiencing a dry spell.

Therefore, it should not be surprising that the issue of testing in EEO became and remains a volatile and emotionally-charged proposition. In simplistic and perhaps misleading terms, the issue is viewed as "merit vs. equality." The concept of test validation is shrouded in complex language and procedural confusion. However, there is one descriptive expression that is easier to comprehend and to discuss: "culturally-biased" tests.

It is recognized that cultural bias can be built into tests, intentionally or unintentionally. Items selected for a test may require knowledge that is not equally available to all. Hence, the test norms, developed for the majority, are then used to measure abilities of the minority. An example: a math test giving complicated directions may be measuring reading ability rather than a knowledge of mathematics.

The following article, based on actual experience, is an excellent exposition on cultural bias in testing:

FLEISCHMAN, LET'S BE HUMAN

(National Labor Service January 1968).

The Federal Equal Employment Opportunity Commission last year investigated a complaint by a Negro who charged that a company was discriminating against him by requiring the passing of an I.Q. test for promotion to the job of forklift operator. The test involved is used very widely throughout the country. Here are three questions from the test.

1. *Clutter, clatter.* Do these words have a similar meaning? Contradictory? Mean neither the same nor opposite?

2. *Piteous, pitiable.* Do these words have a similar meaning? Contradictory? Mean neither the same nor opposite?

3. *Parasite, parasol.* Do these words have a similar meaning? Contradictory? Mean neither the same nor opposite?

If the applicant gets these questions right, can he drive a forklift? Some may answer that, even if it does not indicate performance on the forklift, it indicates I.Q. Stephen N. Schulman, then Chairman of EEOC, asks what difference I.Q. makes if the individual cannot drive a forklift. Moreover, he insists, it does not even indicate I.Q. but rather familiarity with the verbal facility required in white society. Indicating how the test may be applying culturally biased values—biased against the Negro—Schulman offers another test which is deliberately designed to be culturally biased in favor of the Negro and against the white.

1. If a man is called a "blood," then he is—a) a fighter, b) a Mexican-American, c) a Negro, d) a hungry hemophile, e) a red man or Indian.

2. Cheap chittlings will taste rubbery unless they are cooked long enough. How soon should you quit cooking them to eat and enjoy them? 45 minutes, 2 hours, 24 hours?

3. A "gas head" is a person who has —a) a fast moving car, b) stable of "lace," c) "process," d) habit of stealing cars, e) long jail record for arson.

How would you feel if your job depended on the extent to which you could answer this test? You'd probably reply that it has nothing to do with your job. But was the other test more relevant to the forklift operator?

The Negro who failed the first test had driven a forklift for five years with the Federal government, and had passed a test there, with a score of 90, about its actual operation.

Supreme Court on Cultural Bias

In Griggs vs. Duke Power Co., discussed below, the U.S. Supreme Court recognized and spoke to the problem of cultural bias in both testing and high school diploma requirements:

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, and degrees. Diplomas and tests are useful servants, but Congress had mandated the common-sense preposition that they are not to become masters of reality.

Any doubt about the High Court's meaning of "reality" was washed away when, in another decision dealing with racial discrimination, Mr. Justice Powell said:

> Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. (McDonnell Douglas Corp. v. Green, No. 72-490, May 14, 1973, 5 FEP Cases 965)

IV. GRIGGS -- A LANDMARK DECISION
(Griggs v. Duke Power Co. 3 FEP Cases)

In 1971, the U.S. Supreme Court, in a unanimous decision, held in a Title VII action:

> If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

This doctrine can be applied to other bases of discrimination as well: sex, age, handicapped, etc.

Facts in Griggs:

The facts in the case were not in dispute.

Employment Policy Before Title VII (7/2/65)

(1) Labor	(2) Coal Handling	(3) Operations	(4) Maintenance	(5) Lab & Test
Blacks employed only in this Dept.	Whites Only	Whites Only	Whites Only	Whites Only

----These are "Inside" Departments----

Five Departments in Steam Plant

A. Highest pay in Labor Dept. (1) $1.55 an hour--less than the lowest hourly wage rate in any of the other four departments.

B. Promotions--normally made within each department--were based on seniority. Thus, a worker transferring from Coal Handling (2) to Operations (3) would usually start at the lowest position. He would have to start from scratch in building seniority in the new department, since his departmental seniority in his former job could not be carried over.

C. In 1955, the company initiated a new policy requiring a high-school diploma for

   (1) new hires into all departments except Labor, and

   (2) transfers from coal handling into any of the "inside" departments (3-4-5)

Employment Policy After Title VII

D. On July 2, 1965, the date Title VII became effective, the company abandoned its segregated employment policy by opening up the other departments to transfers from the labor department. But the company required that incumbents in the labor department show proof of high school completion in order to be considered for transfer.

E. New hires--except for the labor department-- would be required to take two professionally prepared aptitude tests and to have completed a high school education.

F. In September of 1965, the company announced a transfer policy which required the incumbents in both labor and coal handling to take two tests if they lacked a high school education.

   1. Tests included the WONDERLIC PERSONNEL TEST (an I.Q. test) and the BENNETT MECHANICAL APTITUDE TEST.

   2. Both tests were highly related to formal education and were not designed to measure ability to either learn or perform any given job or category of jobs.

   3. A passing grade required a score above the national median scores for high school graduates. The passing scores were more stringent than the usual high school graduation requirement: only one half of high school graduates in the country would be able to pass the tests.

G. From the time the high school requirement was instituted up to the time of the trial, those white employees hired before the educational requirement went into effect continued to perform satisfactorily and to achieve promotions in the "Operating" departments.

SUPREME COURT FINDINGS AND CONCLUSIONS:

The Supreme Court found and held:

1. Title VII was enacted to achieve equality of employment opportunity and to remove barriers operating in the past to favor an identifiable group of white employees over other employees. The Court said:

> 'Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

2. The record in Griggs established that whites fared better under the company's alternative requirements than did blacks. A 1960 North Carolina census showed that 34 percent of white males had completed high school, compared to only 12 percent of black males. This situation and other data led the High Court to observe:

> This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in Gaston County v. U.S. 395 U.S. 285 (1969)

3. Title VII does not guarantee every person a job regardless of qualifications. The Court said:

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is

required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

4. If a practice excludes blacks, then the burden falls on the employer to prove the practice is job-related, hence, is related to business necessity.

The Court said:

> ...The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
>
> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.
>
> The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used. The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon showing that such long range requirements fulfill a genuine business need. In the present case the Company has made no such showing.

5. The thrust of Title VII is directed to the consequences of employment practices not to their intent:

> Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.
>
> The Company's lack of discriminatory intent is suggested by special efforts to help the under-educated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

6. Testing is an acceptable, useful employment selection procedure:

> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

In the Griggs case, the Court held that:

> "...the administrative interpretation of the Act by the enforcing agency is entitled to great deference."

In a case which reached the High Court in 1975, the same observation was made.

V. TEST 21: JOB RELATED?

Test 21 was designed by the U.S. Civil Service Commission as a measure of verbal ability used throughout the federal service.

The Washington, D.C. police department, not a party to the formulation of the test, used the exam to select candidates for the police recruit training school. A passing grade required 40 correct answers out of a possible 80. Other qualifying requirements for positions with the D.C. police department included character and physical standards, a high school diploma or the equivalent.

Court action was brought by a group of black applicants who had unsuccessfully sought appointment to the department since 1968. Not covered at the time by Title VII, the cause of action was brought under the Fifth Amendment and early federal civil rights laws.

The plaintiffs offered statistical evidence that from 1968 through 1971, 57 percent of black applicants had failed the test, compared to a 13 percent failure rate for whites.

The city government and federal authorities argued that use of the test was justified by a validity study, showing that Test 21 accurately predicted performance in the police recruit training school.

In a 2 to 1 decision, the U.S. Court of Appeals for the District of Columbia Circuit found Test 21 to be invalid. The dissenting judge

asserted that the majority's view is a "step backward that will lead to debasing of our police force." He asserted the test was job-related on its face: "Issuing a badge and gun to a semi-literate cannot transform him into a competent police officer."

On the other hand, the majority held that the statistical evidence showing four times as many blacks as whites had failed the test was sufficient to shift the burden to the city to prove the test was job-related.

The District of Columbia had to establish that there was a direct relationship between performance on Test 21 and performance on the job. Judge Robinson, writing for the majority, distinguished between using the test for job performance and recruit school performance:

> The validity study revealed that persons with high Test 21 scores are more likely to achieve a final average exceeding 85 in Recruit School, but there is no evidence to support the proposition that a candidate with an average below 85 is more difficult to train or will not be as good a police officer as a candidate with an average over 85. Moreover, since applicants who scored below 40 on Test 21 have never been admitted to Recruit School, the validity study expressed no conclusion regarding the likely performance in Recruit School of Test 21 failures.

This decision overturned the district court which had concluded Test 21 was non-discriminatory and was reasonably and directly related to the requirements of the police recruit training program. The Court of Appeals remanded the case to the district court for further

proceedings to arrive at a suitable remedy. (Davis, et al v. Washington, 512 F 2d 956, D.C. Cir. 1975)

A copy of Test 21 is found in the appendix of this section.

Is it job-related?

This question will be answered by the U.S. Supreme Court, which has granted a review. But in the meantime, what is your judgment?

APPENDIX TO TAB J

(Source: Title 29, Code of Federal Regulations,

PART 1607—GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

Sec.

AUTHORITY: The provisions of this Part 1607 issued under sec. 713(a), 78 Stat. 265; 42 U.S.C. 2000e–12.

SOURCE: The provisions of this Part 1607 appear at 35 F.R. 12333, Aug. 1, 1970, unless otherwise noted.

§ 1607.1 Statement of purpose.

(a) The guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.

(b) An examination of charges of discrimination filed with the Commission and an evaluation of the results of the Commission's compliance activities has revealed a decided increase in total test usage and a marked increase in doubtful testing practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for classes protected by title VII may result in the rejection of many who have necessary qualifications for successful work performance.

(c) The guidelines in this part are designed to serve as a workable set of standards for employers, unions and employment agencies in determining whether their selection procedures conform with the obligations contained in title VII of the Civil Rights Act of 1964. Section 703 of title VII places an affirmative obligation upon employers, labor unions, and employment agencies, as defined in section 701 of the Act, not to discriminate because of race, color, religion, sex, or national origin Subsection (h) of section 703 allows such persons "* * * to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results

is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

§ 1607.2 "Test" defined.

For the purpose of the guidelines in this part, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specfic intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

§ 1607.3 Discrimination defined.

The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

§ 1607.4 Evidence of validity.

(a) Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate § 1607.3. Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

(b) The term "technically feasible" as used in these guidelines means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

(c) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion in validating employment tests only when there is a high probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from more than one company in the same industry. Both in this instance and in the use of data collected throughout a multiunit organization, evidence of validity specific to each unit may not be required: *Provided,* That no significant

differences exist between units, jobs, and applicant populations.

§ 1607.5 Minimum standards for validation.

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street NW., Washington, D.C. 20036. Evidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job.

(b) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of tests and test manuals, including instructions for administration, scoring, and interpretation of test results, that are privately developed and/or are not available through normal commercial channels must be included as a part of the validation evidence.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisor's prejudice, as when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

(5) Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question. (See § 1607.9). A test which is differentially

valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups.

(c) In assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance.

(2) In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available;

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the test and a criterion of job success for the test to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

§ 1607.6 Presentation of validity evidence.

The presentation of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior. (See § 1607.5(c) concerning assessing utility of a test.) Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test or the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the minimum acceptable cutoff (passing) score on the test must be reported. It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

§ 1607.7 Use of other validity studies.

In cases where the validity of a test cannot be determined pursuant to § 1607.4 and § 1607.5 (e.g., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to significantly affect validity. Any person citing evidence from other validity studies as evidence of test validity for his own jobs must substantiate in detail job comparability and must demonstrate the absence of contextual or sample differences cited in paragraphs (a) and (b) of this section.

§ 1607.8 Assumption of validity.

(a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on test names

or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonempirical or anecdotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

§ 1607.9 Continued use of tests.

Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a specific setting is practicable and required but not yet obtained, the use of the test may continue: *Provided:* (a) The person can cite substantial evidence of validity as described in § 1607.7 (a) and (b); and (b) he has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

§ 1607.10 Employment agencies and employment services.

(a) An employment service, including private employment agencies, State employment agencies, and the U.S. Training and Employment Service, as defined in section 701(c), shall not make applicant or employee appraisals or referrals based on the results obtained from any psychological test or other selection standard not validated in accordance with these guidelines.

(b) An employment agency or service which is requested by an employer or union to devise a testing program is required to follow the standards for test validation as set forth in these guidelines. An employment service is not relieved of its obligation herein because the test user did not request such validation or has requested the use of some lesser standard than is provided in these guidelines.

(c) Where an employment agency or service is requested only to administer a testing program which has been elsewhere devised, the employment agency or service shall request evidence of validation, as described in the guidelines in this part, before it administers the testing program and/or makes referral pursuant to the test results. The employment agency must furnish on request such evidence of validation. An employment agency or service will be expected to refuse to administer a test where the employer or union does not supply satisfactory evidence of validation. Reliance by the test user on the reputation of the test, its author, or the name of the test shall not be deemed sufficient evidence of validity (see § 1607.8(a)). An employment agency or service may administer a testing program where the evidence of validity comports with the standards provided in § 1607.7.

§ 1607.11 Disparate treatment.

The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard—even though validated against job performance in accordance with the guidelines in this part—cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

§ 1607.12 Retesting.

Employers, unions, and employment agencies should provide an opportunity for retesting and reconsideration to earlier "failure" candidates who have availed themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment pro-

cedure claims more education or experience, that individual should be retested.

§ 1607.13 Other selection techniques.

Selection techniques other than tests, as defined in § 1607.2, may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being of the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

§ 1607.14 Affirmative action.

Nothing in these guidelines shall be interpreted as diminishing a person's obligation under both title VII and Executive Order 11246 as amended by Executive Order 11375 to undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, the use of tests which have been validated pursuant to these guidelines does not relieve employers, unions or employment agencies of their obligations to take positive action in affording employment and training to members of classes protected by title VII.

TEST USED IN

DAVIS vs. WASHINGTON CASE

Passing Grade: 40 out of 80 questions

Test No. 21
Series No. 173
February 1970

Print Name _____
Last Name *First Name* *Middle Initial*

Date of Birth _____ Identification No. _____
Month Day Year

UNITED STATES CIVIL SERVICE COMMISSION

Fill in the identifying blanks at the top of the answer sheet and test booklet. Place no other identifying marks on your answer sheet and test booklet.

The questions in this test need not be taken up in order. Answer first those that you can answer without any delay. Then use the remainder of the time on the questions you have passed over.

For each question, select the BEST ANSWER, and darken the space on the answer sheet that bears the same letter as the answer.

1. ORDINARY means most nearly
   A) uncommon
   B) worthless
   C) usual
   D) tiresome
   E) lasting

2. SMILE is related to HAPPINESS as FROWN is related to
   A) surprise
   B) ridicule
   C) face
   D) displeasure
   E) inquiry

3. Laws restricting hunting to certain regions and to a specific time of the year were passed *chiefly* to
   A) prevent people from endangering their lives by hunting
   B) keep our forests more beautiful
   C) raise funds from the sale of hunting licenses
   D) prevent complete destruction of certain kinds of animals
   E) preserve certain game for eating purposes

4. The saying "All things are easy that are done willingly" means most nearly
   A) Work undertaken without reluctance proceeds smoothly.
   B) To the lighthearted all things are easy.
   C) Many hands make light work.
   D) Easy things are done willingly.
   E) Everyone likes a cheerful worker.

5. PECULIARLY means most nearly
   A) calmly
   B) stubbornly
   C) wonderingly
   D) sensibly
   E) strangely

6. (*Reading*) "Dates are the fruit of a species of palm tree which ranges from the Canary Islands through northern Africa and the southeast of Asia to India. These trees have been cultivated and their fruit much prized throughout most of these regions from remotest antiquity. In Arabia date palms are an important source of national wealth, and their fruit forms the staple article of food in the country."

   The quotation best supports the statement that date palms
   A) are the chief source of wealth in many countries
   B) have long been valued as a source of food
   C) were first grown in the Canary Islands and Africa
   D) were not prized for their fruit in early times
   E) cannot be grown in other than tropical climates

7. SKETCHING is related to PEN as PHOTOGRAPHY is related to
   A) brush
   B) camera
   C) picture
   D) pose
   E) studio

8. The *best* reason, of the following, for requiring that ballots be marked in secret is that
   A) this provides for a permanent record of results
   B) the results are thus unknown until voting is over
   C) the vote is intended to indicate the real opinion of the voter
   D) this permits several matters to be voted on at the same time
   E) this is the established custom of our country

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9. BOUNTY means most nearly
   A) generosity
   B) limit
   C) service
   D) fine
   E) duty

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10. Strands of fiber used in a rope are twisted or braided together *chiefly* in order to make the rope
A) more flexible
B) less expensive
C) unbreakable
D) more rigid
E) stronger

11. CANOE is related to PADDLE as STEAMSHIP is related to
A) wharves
B) propeller
C) water
D) routes
E) yard

12. The saying "No gains without pains" means most nearly
A) Progress is made only at the expense of effort.
B) The lazy man rarely reaches his goal.
C) One cannot always be certain that results will justify his efforts.
D) Achievement without toil deserves little apreciation.
E) To plan one's work is to hasten its completion.

13. The purpose of trademarks is to
A) show that a tax has been paid
B) distinguish the brand of goods manufactured
C) show that a patent has been granted
D) indicate that goods are unadulterated
E) distinguish home from foreign products

14. CRISP means most nearly
A) broken
B) frosty
C) brittle
D) burnt
E) dry

15. (*Reading*) "The practical skill of primitive man became, in time, quite admirable in the treatment of certain kinds of disease and even more so in surgery. Examples of his accomplishments may be seen today, among primitive tribes, and, together with prehistoric remains, testify to the status of medicine before history was written."

The quotation best supports the statement that primitive man
A) lacked knowledge of surgery
B) exhibited more skill in medicine than in surgery
C) was not easily affected by disease
D) developed a definite skill in dealing with physical ailments
E) buried complete records of his ability

16. WEED is related to PLANT as FLY is related to
A) screen
B) disease
C) insect
D) food
E) spider

17. The saying "A drowning man will catch at a straw" means most nearly
A) Help sometimes comes after we have abandoned all hope of it.
B) Great effort is necessary to overcome great difficulties.
C) He who relies on too slim a chance is lost.
D) A man will try anything as a last resort.
E) No disaster is entirely without remedy.

18. SCARCELY means most nearly
A) minutely
B) fittingly
C) partially
D) precisely
E) barely

19. (*Reading*) "A great many small mammals, and not a few of considerable size, have developed the arboreal habit. Most climbing forms have taken to the trees for food, and perhaps even more important, to escape terrestrial enemies which would readily overcome them had they not evolved climbing habits.

The only entirely tree-living mammals, however, are confined to the tropics."

The quotation best supports the statement that tree-living mammals
A) are afraid to descend to the ground
B) have to be small to find sufficient food in trees
C) damage trees by consuming the leaves
D) developed climbing habits as a matter of necessity
E) are confined to small, tropical animals

20. GARDEN is related to FLOWER as LAKE is related to
A) pool
B) river
C) beach
D) cottage
E) fish

21. PERTURBED means most nearly
A) agitated
B) distrustful
C) impelled
D) repulsed
E) unmoved

22. The saying "To believe a thing impossible is a way to make it so" means most nearly
A) It is unwise to begin what is beyond one's ability.
B) The only way to prove a thing can be done is to do it.
C) We can do whatever we think we can do.
D) What is easy to obtain is not worth having.
E) Lack of confidence leads to failure.

23. SPEAK is related to SHOUT as DAMAGE is related to
A) sue
B) repay
C) destroy
D) condemn
E) repair

24. (*Reading*) "Men who have good mechanical ability, and especially those who have had some experience in mechanical work, will, when they show their worth, be detailed as helpers in machine shops and engine rooms, where opportunity will be given them for acquiring training with machinists' tools."

The quotation best supports the statement that the qualifications for helpers in machine shops and engine rooms must include
A) the demonstration of mechanical ability or training
B) special experience in mechanical work
C) training with machinists' tools
D) previous apprenticeship on the job
E) similar duties in previous positions

25. Of the following reasons, the one that *best* explains the continued sale of records in spite of the popularity of the radio is that the
A) records make available the particular selections desired when they are desired
B) appreciation of records is more wide-spread than apreciation of radio
C) collection of records provides an interesting hobby
D) newest records are almost unbreakable
E) sound effect of records is superior to that of the radio

26. The saying "The fire in the flint shows not till it is struck" means most nearly
A) One should be prompt to recognize one's opportunities.
B) The first attempt is not always successful.
C) Unless abilities are demonstrated, they remain unrecognized.
D) There is a proper time for everything to be done.
E) Only by repeated efforts can skill be achieved.

27. ISOLATION is related to COMPANIONSHIP as DESPAIR is related to
A) despondency
B) success
C) strength
D) recovery
E) hope

28. The saying "Straight trees are the first to be felled" means most nearly
A) Honest effort is always rewarded.
B) The best are the first chosen.
C) Ill luck passes no one by.
D) The highest in rank have farthest to fall.
E) The stubborn are soon broken.

29. SUN is related to HEAT as FOG is related to
A) moisture
B) twilight
C) storm
D) winter
E) evening

30. (*Reading*) "The Pure Food and Drugs Act would be totally incapable of enforcement were it not for the fact that chemists have perfected methods of investigation whereby the claims of composition of various foods and drugs can be verified or exposed. The Government has an ever-watchful force of 'chemist detectives' trying to protect the Nation's health in respect to remedies sold to the public." *The quotation best supports the statement that* Government chemists
A) prosecute violators of the Pure Food and Drugs Act
B) improve the quality of foods and drugs
C) discourage the sale of patent medicines
D) tests the chemical composition of foods and drugs
E) have considerably improved the health of the Nation

31. To DEVIATE means most nearly to
A) intend
B) vary
C) steer
D) enlarge
E) return

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32. BECAUSE is related to REASON as THEREFORE is related to
A) result
B) heretofore
C) instinct
D) logic
E) antecedent

33. The saying "Do not make the bite larger than the mouth" means most nearly
A) Do not attempt to do work which you do not enjoy.
B) Magnifying one's difficulties makes one less able to overcome them.
C) Those who want too much are never satisfied.
D) An individual should not attempt a task which is beyond his capacity.
E) It is unwise to indulge one's appetite.

34. (*Reading*) "Although the types of buildings in ghetto areas vary from the one-story shack to the large tenement building, they are alike in that they are all drab, unsanitary, in disrepair, and often structurally unsound."

The quotation best supports the statement that all buildings in ghetto areas are
A) overcrowded
B) undesirable as living quarters
C) well-constructed
D) about to be torn down
E) seldom inspected

35. Which of the following is the *chief* reason that posters placed in busses are a successful medium of advertising?
A) Their bright colors and pictures attract attention.
B) They can be understood by children.
C) They are an inexpensive method of advertising.
D) All passengers are in a receptive mood when riding in such vehicles.
E) They reach a working, and therefore consuming, public.

36. To RETRENCH means most nearly to
A) impede
B) replace
C) counteract
D) attack
E) curtail

37. BRAKE is related to MOTION as DAMPER is related to
A) draft
B) furnace
C) accelerator

D) chimney
E) humidity

38. The saying "The good seaman is known in bad weather" means most nearly
A) Everyone has an opportunity to show his ability.
B) Skill is chiefly a matter of practice.
C) People seldom complain when things run smoothly.
D) One's skill becomes apparent in times of stress.
E) No one can do his best under certain conditions.

39. (*Reading*) "Brass is an alloy consisting mainly, if not exclusively, of copper and zinc, but in its older use the term was applied rather to alloys of copper and tin, now known as bronze. It is quite likely that from very early times brass was made accidentally, owing to the mixture of zinc ores with those of copper, but was not recognized as distinct from bronze. One of the earliest examples of Roman brass is a coin made in 20 B.C., containing 17.3 percent zinc."

The quotation best supports the statement that
A) brass developed somewhat earlier than did bronze
B) bronze and brass have one essential ingredient in common
C) the earliest known coins were made from brass
D) alloys of copper and zinc are now known as bronze
E) bronze and brass were first made by the Romans

40. The saying "A little knowledge is a dangerous thing" means most nearly
A) It is better to be ignorant than to know too much.
B) No one knows so much but that he could know more.
C) Those who know the least usually do the most talking.
D) To know a little about many things is to know nothing well.
E) Incomplete information may have unfortunate results.

41. ARTIFICIAL means most nearly
A) disguised
B) awkward
C) genuine
D) unnatural
E) useless

42. FRAME is related to PICTURE as MARGIN is related to
A) edge
B) decoration
C) page
D) border
E) width

43. (*Reading*) "There are two basic types of silent reading. In one type, called cursory reading, the reader does not try to grasp the meaning of every word but only the essential concept. The other form of silent reading is careful and exact. In the latter type, detailed attention is required in order to assimilate the complete thought. Cursory reading is a valuable tool, but much of the reading required in business must be careful and exact. Too often, people who have become habituated to cursory reading cannot adapt themselves to careful reading."

The quotation best supports the statement that the businessman
A) cannot afford to read so rapidly as to miss the fine points of the matter read
B) is required to relearn his whole method of silent reading
C) must do so much reading that he does not take time to read carefully
D) soon becomes highly skilled in reading with speed as well as with accuracy
E) fails to realize the need for becoming adept in the two basic types of silent reading

44. The saying "Nothing ventured, nothing gained" means most nearly
A) Persistent effort brings success.
B) Cooperation is vital to achievement.
C) A certain amount of risk is required to win anything.
D) Success attained without effort is not enduring.
E) Success encourages continued effort.

45. (*Reading*) "A sudden brief heavy rain will penetrate the soil less than the same amount of water falling for a longer period, since it takes time for water to expell the soil air and work its way downward among the soil particles. The downward movement is hastened by soil cracks, roots, root paths, and the holes of burrowing animals."

The quotation best supports the statement that penetration of the soil by rain
A) is rapid as soon as the soil air is expelled
B) is affected by the intensity of the rainfall
C) depends on the amount rather than the duration of rainfall
D) is affected more by the amount of vegetation than by other soil conditions
E) is affected only slightly by the presence of soil cracks

46. SKEPTIC means most nearly
A) guide
B) enthusiast
C) mystic
D) doubter
E) exile

47. ACCIDENT is related to NEGLIGENCE as SAFETY is related to
A) indifference
B) appliance
C) security
D) danger
E) carefulness

48. (*Reading*) "A brush properly selected for the job at hand will not only make the application of paint easier but will also add to the appearance of the finished surface by increasing its smoothness. Brushes with medium or long bristles hold more paint than do brushes with short bristles and therefore reduce the number of times the brush is dipped into the paint, thus saving time. Longer bristles are more flexible and insure a smoother application."

The quotation best supports the statement that in painting a house
A) choice of the correct type of brush is the most important step
B) frequent dipping of the brush into the paint will cause much waste
C) use of a thin paint tends to make the job shorter and easier
D) best results are likely to be achieved by using a brush with long bristles
E) a smooth finish is hard to get with a soft brush

49. The saying "Muddy springs will have muddy streams" means most nearly
A) A bad ending does not always follow a bad beginning.
B) No effort should be made to improve what is worthless.
C) Causes are usually less important than results.
D) Good cannot come out of evil.
E) What cannot be corrected must be accepted.

50. (*Reading*) "When minerals split easily with smooth faces in certain directions, they are said to have the property of cleavage. Some minerals having the property of cleavage, like quartz, when struck a blow, will break into fragments of various shapes; others, like calcite, break into fragments each of the same general shape."

The quotation best supports the statement that when minerals are broken into fragments
A) the size of the fragments shows whether the mineral possesses cleavage
B) the smoothness of the surfaces of the fragments reveals the skill of the worker
C) the manner in which the mineral breaks shows if the mineral possesses cleavage
D) many of the fragments are more beautiful than the original piece of material
E) those minerals possessing cleavage to a high degree break into fragments similar in shape

51. IMPERTINENCE means most nearly
A) impatience
B) briskness
C) conceit
D) curiosity
E) incivility

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52. The saying "Habits are at first cobwebs, at last cables" means most nearly
A) Good work habits make any task easier.
B) Habits grow stronger with time.
C) It is sometimes difficult to acquire good habits.
D) Bad habits are the hardest to break.
E) Good habits should be acquired early in life.

53. (*Reading*) "Illustrations should really illustrate; too often they are simply photographic inserts to help sell the book. They should develop from and enliven the text and be so much a part of the book that they harmonize with it in spirit and in appearance. Moreover, they should be placed as nearly as possible next to or opposite the paragraph or page illustrated and not scattered at random through the book with a consequent loss of interpretative value."

The quotation best supports the statement that the illustrations of a book
A) should be grouped rather than scattered through the book
B) increase sales appeal only when they truly illustrate
C) should be photographs taken from real life
D) may be of more value to the reader than is the text
E) should serve to add interest to the text

54. A tenant who holds a long-term lease on a building will be *most likely* to gain by the transaction if during the period covered by the lease
A) business rentals vary considerably
B) real estate becomes cheaper
C) prices in general are increased
D) living costs are lowered
E) the tax rate is decreased

55. (*Reading*) "Although metals may occur in nature as pure native metal, they are more commonly found in combination with other materials in an ore. An ore is a metal-bearing substance from which a metal, alloy, or metallic compound can be extracted at a profit."

The quotation best supports the statement that
A) an ore contains other materials in addition to metal
B) few metals occur in a pure form in nature
C) the extraction of metal from an ore is an expensive process
D) some metals are not mined because the cost of extraction is prohibitive
E) metals found in ores do not occur in nature as pure native metals

56. DISPARAGEMENT means most nearly
A) depreciation
B) distinction
C) idealization
D) jealousy
E) reputation

57. The saying "Other times, other customs" means most nearly
A) Change is more frequent today than in the past.
B) Modes of living change with the times.
C) Tolerance is a virtue in every society.
D) Certain values have remained constant for centuries.
E) The ideals of civilization are becoming continually higher.

58. (*Reading*) "Individuals develop personality characteristics on the basis of their innate physiological equipment, the experiences which beset them from birth on, and their relationships with other human beings and with the social institutions that surround them."

The quotation best supports the statement that the formation of personality
A) is affected as much by physique as by environment
B) becomes evident at an earlier age in some persons than in others
C) is based on certain factors outside the control of the individual

D) determines the types of persons with whom an individual will associate
E) is based on hereditary factors rather than social experiences

59. PLACIDITY means most nearly
A) ignorance
B) serenity
C) solitude
D) timidity
E) freedom

60. NEWS is related to INFORM as ARGUMENT is related to
A) understand
B) convince
C) defy
D) entertain
E) deceive

61. To CAREEN means most nearly to
A) hurry
B) thrust
C) quiver
D) jostle
E) lurch

62. RUBBISH is related to DISCARD as TREASURE is related to
A) share
B) discover
C) cherish
D) lose
E) worry

63. The saying "They wrangle about an egg and let the hens fly away" means most nearly
A) They dispute at every opportunity.
B) Attention to details is important.
C) Arguing is seldom worth while.
D) They have a poor sense of values.
E) A grasping person has few friends.

64. (*Reading*) "Adhering to old traditions, old methods, and old policies at a time when new circumstances demand a new course of action may be praiseworthy from a sentimental point of view, but success is won most frequently by facing the facts and acting in accordance with the logic of the facts."

The quotation best supports the statement that success is attained through
A) recognizing necessity and adjusting to it
B) using methods that have proved successful
C) exercising will power
D) remaining on a job until it is completed
E) considering each new problem separately

65. The saying "The first blow is as much as two" means most nearly
A) He who takes the initiative gains a distinct advantage.
B) One hard blow is more effective than numerous lighter ones.
C) In any struggle the stronger participant makes the first move.
D) The wise man takes advantage of every opportunity.
E) He who strikes first will win the battle.

66. To EVINCE means most nearly to
A) claim without good reason
B) state with certain reservations
C) show in a clear manner
D) follow against one's will
E) deny in an indirect fashion

67. INSERT is related to REMOVE as INTRUDE is related to
A) interrupt
B) withdraw
C) conceal
D) disclaim
E) enter

68. (*Reading*) "Fireboats should be of light draft for harbor work, and the larger sizes should be equipped with twin screws for quick turning. Boats of recent construction have steel hulls and steel deck houses; plank-covered decks are preferable to metal, as steel decks are slippery."

The quotation best supports the statement that fireboats must be
A) entirely fireproof
B) built of wood
C) of recent construction
D) all of the same size
E) capable of quick movement

69. In installing fire hydrants, a city should make sure that the outlets are of the same standard thread as those in adjacent cities *chiefly* because
A) in emergencies it is sometimes necessary to borrow fire apparatus from neighboring cities
B) one set of apparatus will do for several cities
C) the same repairman can be utilized by several cities
D) small cities are dependent on the larger cities for fire-extinguishing service
E) unused equipment can be returned to dealers

70. TENACIOUS means most nearly
A) boisterous
B) obstinate
C) industrious
D) inseparable
E) honorable

71. AMPLIFIER is to HEARING as TELESCOPE is to
A) astronomy
B) lens
C) sight
D) mirror
E) sound

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72. The saying "Blind zeal only does harm" means most nearly
A) People are not likely to devote their best efforts to work they do not understand.
B) Appearances should not affect one's attitude.
C) It is difficult to pretend enthusiasm in a hopeless case.
D) At times we must let others do the leading.
E) Enthusiasm ought to be rightly directed.

73. PROMONTORY means most nearly
A) marsh

B) monument
C) headland
D) boundary
E) plateau

74. (*Reading*) "Soldering is the binding together of two or more metals by means of a fusible alloy of tin and lead called solder. The solder used in the operation must melt at a lower temperature than the metals being joined together. However, the nearer the melting points of the solder and the soldered metals, the stronger the completed joint."

The quotation best supports the statement that the melting points of metals being soldered should be
A) identical with the melting point of the solder
B) identical with each other
C) high enough to permit a strong joint
D) lower than the melting point of tin or of lead
E) higher than the melting point of the solder

75. VIVID means most nearly
A) rare
B) intense
C) imaginary
D) absurd
E) attractive

76. NOTE is related to MESSAGE as PICTURE is related to
A) scene
B) camera
C) artist
D) frame
E) gallery

77. An EXIGENCY means most nearly
A) an undue hurry in acting
B) a series of misfortunes
C) an act causing disorder
D) a case demanding urgent action
E) a task requiring specific skills

78. The saying "That is well spoken which is well taken" means most nearly
A) Sensitive people are quick to imagine insults.
B) To accept reproof meekly shows nobleness of spirit.
C) The way in which a remark is received demonstrates its appropriateness.
D) He who ignores one insult will receive many others.
E) He who laughs at his own expense has few enemies.

79. (*Reading*) "When the snow of one winter does not entirely melt during the summer but is added to that of the following winter, there is a gradual accumulation of snow which may result in a glacier. The lower layers are compressed into ice by the weight of the overlying snow and the mass in time begins to spread. The glaciers move downward, following the valleys and ravines, until they reach a point at which the rate of melting equals or exceeds the rate of ice advance."

The quotation best supports the statement that glaciers
A) cease advancing only upon the arrival of summer
B) move very slowly even on steep slopes
C) move downward and forward until checked by warmth
D) form in all areas that are cold and snowy
E) cover great distances in their advance each year

80. The saying "Anger dies quickly with a great man" means most nearly
A) A good man is slow to anger.
B) Nothing ruffles a good disposition.
C) One can forgive but not forget.
D) Strong passions cannot last.
E) To continue to bear malice is petty.

SEX DISCRIMINATION

I. INTRODUCTION

A riddle has been making the rounds for a goodly number of years. It goes something like this: a father and his son were seemingly injured in a car accident. They were rushed to the hospital. The doctor who was to treat the boy entered the operating room, but upon seeing him said, "I cannot operate; that's my son."

How could that be?

Many people do not see the immediate and very obvious answer to the riddle--that the doctor is the boy's mother. The reason is simple: 92 percent of all doctors in the United States are men; the percentage of women doctors, 8 percent, is lower than in all the countries of Western Europe except Spain.

The very existence of the riddle points up that historically, job roles have been classified as "male" and "female." A doctor is a man; a nurse is a woman. A manager is a man; a secretary is a woman.

The Equal Pay Act of 1963 did not address the underlying job-bias problems faced by women. The job-related problems of women include more than equal pay for substantially equal work, important as that problem certainly is.

Some ten years after passage of Title VII, female workers, by and large, still remain grouped in a few occupations--and often in

low-skilled, poorly paid jobs and in a deep recession these jobs are up for grabs. Often the pay is poor simply because the jobs are considered "women's work."

Economist Barbara Bergmann reports that occupational segregation is more intense by sex than by race. While her findings are based on the American job market, this occupational grouping by sex is not peculiar to the United States. It occurs in all nations, but the nature of "women's jobs" varies from country to country and from one period in history to another. For instance, in Sweden crane operators are generally women; it is claimed that in this occupation women are innately more skilled than men.

("The Economics of Women's Liberation," Challenge 16 May/June 1973: 11-17)

II. RELATION OF TITLE VII TO EQUAL PAY ACT (EPA)

Passage of Title VII of the Civil Rights Act of 1964 reached into areas left untouched by the EPA of 1963: Title VII not only prohibits unequal pay for substantially equal work, but outlaws job bias in all aspects of employment, including the important issue of job classification.

Section 703(h) of Title VII deals with the Equal Pay Act by providing that the exceptions set forth under the EPA (e.g., differences in pay based on a bona fide merit system) would be recognized under Title VII.

Thus the Equal Employment Opportunity Commission is not precluded from handling equal pay cases. It should be noted that the EEOC Guidelines on Sex Discrimination state that the EEOC is not bound by EPA interpretations issued by the Wage and Hour Division of the U.S. Department of Labor:

> Section 1604.8 Relationship of Title VII to the Equal Pay Act
>
> (a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.
>
> (b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.
>
> (c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

III. LEGISLATIVE HISTORY: THE ABSENCE OF "SEX"

The 1964 Omnibus Civil Rights bill reported out of the House Judiciary Committee contained no provision under Title VII to include sex as a protected class.

In an effort to defeat the 1964 Act, Congressman Howard Smith (D. Va.), then chairman of the powerful House Rules Committee, offered an amendment to include sex under Title VII. The amendment was approved, but his objective was never realized. Both Houses of Congress enacted the Civil Rights Act of 1964 with sex intact. (In 1972 when Title VII was amended, no effort was made to remove sex as a protected class.)

While Smith's tactical maneuver failed, there were supporters of equal employment opportunity who opposed the sex category inclusion for other reasons, Congressman Celler among them. During debate on the Smith amendment, he offered into the official record the following letter addressed to him by the Secretary of Labor, dated February 7, 1964:

> This is in response to your inquiry about the reaction of the Women's Bureau to suggestions that the civil rights bill be amended to prohibit job discrimination on the basis of sex as well as race, creed, color, or national origin.
>
> Assistant Secretary of Labor Esther Peterson who is in charge of the Women's Bureau has replied to requests for support of such an amendment in the following way:
>
> "This question of broadening civil rights legislation to prohibit discriminations based on sex has arisen previously. The President's Commission on the Status of Women gave this matter careful consideration in its discussion of Executive Order 10925 which now prohibits discrimination based on race, creed, color, or national origin in employment under Federal contracts. Its conclusion is stated on page 30 of its report, "American Women," as follows:
>
> "'We are aware that this order could be expanded to forbid discrimination based on sex. But discrimination based on sex, the Commission believes, involves problems sufficiently different from discrimination based on the other factors listed to make separate treatment preferable.'
>
> "In view of this policy conclusion reached by representatives from a variety of women's organizations and private and public agencies to attack discriminations based on sex separately, we are of the opinion that to attempt to so amend H.R. 7152 would not be to the best advantage of women at this time."
>
> Source: 110 Congressional Record February 8, 1946, p. 2485.

IV. EEOC GUIDELINES ON SEX DISCRIMINATION

(Full text contained in Appendix under this tab)

The original Guidelines were amended in 1972 to reflect issues raised in court cases and in complaints filed with the Equal Employment Opportunity Commission.

The EEOC Guidelines on Sex Discrimination, as well as the other EEOC Guidelines, are interpretative administrative bulletins. They do not have the full effect and force of law as do federal regulations. Before final adoption, federal regulations are submitted to public comment and scrutiny, as required by the Administrative Procedure Act.

The underlying objective of the Sex Guidelines is to open up employment opportunities based on individual abilities and interests, rather than deny job opportunities because of sex stereotypes, such as "men are less capable of assembling intricate equipment" than women, or that "women are less capable of aggressive salesmanship" (Section 1604.2 (ii)); or to deny job opportunities to women based "on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men." (Section 1604.2 (i))

Perhaps the best summation of the Guidelines overall objectives is reflected in this comment:

> . . . Title VII rejects . . . romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks.

> Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The premise of Title VII is that women are now to be on equal footing. . . .
>
> Weeks v. Southern Bell Telephone and Telegraph Company, (5th Circuit, 408 F. 2d 228, 1969).

V. MAJOR ISSUES AND DEVELOPMENTS

A. Bona Fide Occupational Qualification (BFOQ)

Under Title VII an employer may discriminate if a sexual preference is a bona fide (genuine or legitimate) occupational qualification (bfoq), i.e., necessary for the safe and efficient operation of the business enterprise.

The EEOC Guidelines provide a very narrow interpretation of a bfoq. Courts also have narrowly construed the bfoq exception.

(1) "Protective" Laws Fail BFOQ Test

When Title VII became law on July 2, 1965, California was among those states with protective labor laws and Industrial Welfare Commission orders applicable to women: in certain private sector industries and businesses women were not allowed to work shifts beyond eight hours, and in those enterprises in which it was permitted, only on an "emergency" basis; women were subjected to certain weight lifting restrictions; etc.

Did these "protective" laws provide a California employer with a bfoq defense in limiting female job assignments?

That claim was denied in Rosenfeld v. Southern Pacific Company. (444 F. 2d 1219, 1971)

Southern Pacific had argued that it was the company's policy to exclude women from certain jobs, including that of agent telegrapher which had been denied the plaintiff. The company had restricted the job to men for two basic reasons:

(a) the arduous nature of the work-related activities rendered women physically unsuited;

(b) placing women in the position would violate California labor laws and regulations which limit hours for women and restrict the weight they were permitted to lift.

The company argued that its policy -- in line with California labor laws and regulations -- was a bfoq under Title VII and hence a lawful employment practice.

The Ninth Circuit rejected Southern Pacific's bfoq defense:

> . . . The position would result in a violation of California labor laws and regulations which limit hours of work for women and restrict the weight they are permitted to lift. Positions such as that of agent-telegrapher at Thermal fall within the ambit of this policy. The company concludes that effectuation of this policy is not proscribed by Title VII of the Civil Rights Act due to the exception created by the Act for those situations where sex is a "bona fide occupational qualification."
>
> * * *
>
> . . . The premise of Title VII, the wisdom of which is not in question here, is that women are now to be on equal footing with men. . . .
> The footing is not equal if a male employee may be appointed to a particular position on a showing that he is physically qualified, but a female employee is denied an opportunity to demonstrate personal physical qualification. Equality of footing is established only if employees otherwise entitled

> to the position, whether male or female, are excluded only upon a showing of individual incapacity.
>
> * * *
>
> . . . We have considered the meaning which appellants would ascribe to BFOQ, as provided for in the Act. We conclude, however, that the (Equal Employment Opportunity) Commission is correct in determining that BFOQ establishes a narrow exception inapplicable where, as here, employment opportunities are denied on the basis of characterizations of the physical capabilities and endurance of women, even when those characteristics are recognized in state legislation.

Such court decisions do not mean that a state cannot enact protective labor laws; rather they mean that the law must apply to <u>both</u> sexes. Hence, in California legislation was enacted to revise the IWC orders to bring men under coverage. At this writing, the process is underway.

(2) <u>Bfoq's in the "Friendly Skies</u>. . ."

The airline industry, unwittingly, provided the impetus for developing equal employment opportunity doctrine in the following areas:

(a) <u>Marital Status</u>: The plaintiff was a flight attendant who was fired upon her marriage. Male flight attendants could marry without suffering discharge. United Airlines contended that the "no marriage" provision for stewardesses was a bona fide occupational qualification because

their husbands often complained of the wives' irregular work hours. The company also argued that there was no intention to discriminate against married stewardesses because of the class (female) they represented.

The district court held that the plaintiff was unlawfully discharged and ordered reinstatement with back pay. Moreover the court maintained jurisdiction and allowed the plaintiff to extend the action to include the class of female employees who also had been discharged because of their marital status.

United Airlines appealed, alleging

(1) they had not purposely discriminated against the plaintiff;

(2) the marital status qualification was a bfoq;

(3) the court was without authority to allow plaintiff to amend the complaint to encompass a class.

The appellate court held that

(1) United had failed to establish the "no marriage" rule as a bfoq; hence its use serves to punish a large class of prospective, otherwise qualified employees.

(2) Marital status cannot be said to affect the individual woman's ability to create the proper psychological climate of comfort,

safety and security for passengers -- nor does passenger preference provide a valid reason for invoking the "no marriage" rule. The rule's effect is, therefore, discriminatory.

(3) United's discrimination against married female flight attendants need not be intentional.

(4) The district court was correct in making relief available to a broad class who were damaged, whether or not they filed charges and whether or not they joined in the suit.

(Sprogis v. United Airlines, Inc., 444 F. 2d 1194 (7th Cir.), Certiorari denied 404 U.S. 991, 1971)

(b) Bfoq's and Business Necessity -- Plaintiff, a male, applied for a job with Pan American Airlines as a flight attendant. He was rejected because of Pan Am's policy of hiring females only for the position. He filed charges with the EEOC alleging discrimination on account of sex. EEOC found there was reasonable cause to believe the charge and attempted to conciliate with the company, but without success.

The plaintiff filed a class action suit in the district court charging violation of Title VII which prohibits discrimination based on sex. The district court held that being female was a bona fide occupational qualification reasonably necessary to the normal operation of Pan Am's business.

The plaintiff appealed. The U.S. Court of Appeals, Fifth Circuit, reversed the lower court. The appellate court said it was required to "apply a business necessity test, not a business convenience test. That is to say, discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively."

The court said:

> The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as, according to the finding of the trial court, their apparent ability to perform the nonmechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved. No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another. Indeed the record discloses that many airlines including Pan Am have utilized both men and women flight cabin attendants in the past and Pan Am, even at the time of this suit, has 283 male stewards employed on some of its foreign flights.
>
> We do not mean to imply, of course, that Pan Am cannot take into consideration the ability of individuals to perform the nonmechanical functions of the job. What we hold is that because the nonmechanical aspects of the job of flight cabin attendant are not "reasonably necessary to the normal

> operation" of Pan Am's business, Pan Am cannot exclude all males simply because most males may not perform adequately.
>
> We do not agree that in this case "all or substantially all men" have been shown to be inadequate . . .
>
> . . . the exclusion of all males because this is the best way to select the kind of personnel Pan Am desires simply cannot be justified . . . .
>
> Similarly, we do not feel that the fact that Pan Am's passengers prefer female stewardesses should alter our judgment. On this subject, EEOC guidelines state that a BFOQ ought not be based on "the refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers . . . ."
>
> . . . While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.
>
> (Diaz v. Pan American World Airways, Inc., 442 F. 2d 385 (5th Circuit), 1971. Certiorari denied, U.S. Supreme Court, 404 U.S. 905, 1971).

For the most part, the application of the bfoq exception in hiring and promoting has "settled in." The Conference Board, an independent, non-profit business research organization with more than 50 years of research experience in business economics and business management, quoting one personnel director, bluntly stated in a 1973 research report:

> "They'll apparently only allow sex as a bona fide occupational qualification for such extreme cases as wet nurse, sperm donor and maybe models or actors. We don't hire people for jobs like that.
> (Nondiscrimination in Employment: Changing Perspectives, 1963-72, p. 32)

B. Pregnancy-Related Issues

Currently the priority issue in sex discrimination involves the immutable biological characteristic assigned to women: childbearing.

Two issues are involved and both are before the Supreme Court in the Liberty Mutual case:

(1) Paid pregnancy or maternity benefits under a sick leave, disability insurance or income protection plan.

(2) Maternity leave policy.

1. Pregnancy (Maternity) Benefits Under Plans Providing Temporary Disability Benefits

The California Disability Insurance Law

A major challenge to the exclusion of pregnancy benefits arose in California. In a case which reached the U.S. Supreme Court, the plaintiff alleged that the provisions of the California Unemployment Disability Insurance law deny to pregnant women equal protection guaranteed by the Fourteenth Amendment.

Background

California is among five states which have enacted an unemployment disability compensation program. It applies to private sector employees only. (Public sector employees in California have temporary disability income through sick leave accrual.)

The state's unemployment disability insurance (UDI) is meant to compensate, in part, for the wage loss sustained by individuals unemployed because of sickness or injury (non-job related and hence not under workers' compensation).

The UDI fund is financed by workers through a one percent tax on wages up to a specified amount. Weekly benefits can be collected up to a maximum of 26 weeks. The weekly benefit amount is determined by earnings, with the maximum and minimum weekly payment set by law.

The Court issue was raised by the denial of UDI for disability caused by normal pregnancy. There was a time when complications and illnesses caused by pregnancy were not covered, which automatically had eliminated any and all conditions related to pregnancy.

However, in a case brought against the state insurance program in the California Court of Appeals, California was forced to amend the law to include complications of pregnancy and abnormal births. The California Court of Appeals thus construed the law to preclude payment of benefits for disability accompanying normal pregnancy.

Section 2626 was later amended, and a new 2626.2 was added, in order to reflect this interpretation. The two sections now provide as follows:

> 2626 'Disability' or 'disabled' includes both mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.
>
> "2626.2 Benefits relating to pregnancy shall be paid under this part only in accordance with the following:
>
> "(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including, but not limited to: puerperal infection, eclampsia, caersarian section delivery, ectopic pregnancy, and toxemia.

"(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis.

These amendments took effect on January 1, 1974.

The Geduldig Case

The case that reached the U.S. Supreme Court centered on the one issue: payment of UDI for the disability that accompanies normal pregnancy and childbirth. (Geduldig v. Aiello, 417 U.S. 484, 1974)

The U.S. Supreme Court held the California law constitutional, thus denying UDI payments for women incurring the normal disability of being unable to work before and after childbirth. The issue before the Court, decided in June 1974, was "whether the California disability insurance program invidiously discriminates . . . by not paying insurance benefits for disability that accompanies normal pregnancy and childbirth."

In a 6-3 decision, the Court majority (Justices Stewart, Burger, White, Blackman, Powell and Rehnquist) stated: "We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause [of the Fourteenth Amendment]."

The majority reasoned as follows:

> Although California has created a program to insure most risks of employment disability, it has not chosen to insure all such risks, and this decision is reflected in the level of annual contribution exacted from participating employees. This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.... . ." (Williams v. Lee Optical Co., 348 U.S. 483, 489, Jefferson v. Hackney, 406 U.S. 535 (1972).) Particularly with respect to social welfare programs so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "/T/he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." Dandridge v. Williams, 397 U.S. 471, 486-487 (1970).

The majority spoke to the factor of cost, stating that:

> The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance.

The three dissenting Justices -- Brennan, Douglas and Marshall -- stated:

> . . . compensation is paid for virtually all disabling conditions without regard to cost, voluntariness, uniqueness, predictability, or "normalcy" of the disability. Thus, for example, workers are compensated for costly disabilities such as heart attacks, voluntary disabilities such as cosmetic surgery or sterilization, sex and race unique disabilities such as prostatectomies or sickle-cell anemia, pre-existing conditions inevitably resulting in disability such as degenerative arthritis or cataracts, and "normal" disabilities such as removal of irritating wisdom teeth or other orthodonia.

> Despite the Act's broad goals and scope of coverage, compensation is denied for disabilities suffered in connection with a "normal" pregnancy -- disabilities suffered only by women . . . . Disabilities caused by pregnancy, however, like other physically disabling conditions covered by the Act, require medical care, often include hospitalization, anesthesia and surgical procedures, and may involve genuine risk to life. Moreover, the economic effects caused by pregnancy related disabilities are functionally indistinguishable from the effects caused by any other disability: wages are lost due to a physical inability to work and medical expenses are incurred for the delivery of the child and for post-partum care . . . singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcission, hemophilia and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.

Liberty Mutual Case Awaits Supreme Court Ruling

The Supreme Court is now considering a Title VII cause of action against the Liberty Mutual income protection plan.

The plan provides for continuation of a percentage of income when an employee is temporarily ill, but excludes illness incurred during pregnancy or time off for childbirth. Employees contribute to the funding of the plan. After an ill employee is away from work 8 days, under a doctor's care, the employee receives a percentage of his or her salary up to a specified maximum period.

The EEOC Guidelines on Sex Discrimination require that pregnancy-related disabilities be treated like any other temporary disability:

Section 1604.10 Employment policies relating to pregnancy and childbirth:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

The U.S. Court of Appeals, Third Circuit, agreed with the EEOC interpretation, as did the district court.

To be considered by the U.S. Supreme Court are the company's arguments and the Appellate Court's findings and conclusions:

Liberty Mutual Arguments	Court of Appeals, Third Circuit Findings and Conclusions
1. On EEOC Guidelines: EEOC had changed its position and it was only in 1972 that it revised its Guidelines to reflect its change. Guidelines do not reflect Congressional intent.	1. Rejected by court. Said Guidelines did not violate Congressional intent.
2. Even EEOC Guidelines do not require company to include pregnancy benefits in income protection plan. Company relied on decision in Geduldig v. Aiello; i.e., this case disposes of issue.	2. Rejected by Court. Said there are several distinctions: (a) Geduldig involved question of discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. This case involves question of discrimination in violation of a statute, Title VII. Hence case is one of statutory interpretation rather than a constitutional analysis. (b) California law excludes only normal pregnancy and delivery disabilities, but Liberty Mutual excludes all pregnancy-related disabilities.

3. Pregnancy is voluntary. Illnesses are not. Hence pregnancy can be excluded from income protection plan.	3. Rejected by court. (a) "Voluntariness is no basis to justify disparate treatment of pregnancy." People participate in a great many activities involving a recognized risk. Most undertake these activities with full knowledge of potential harm: smoking, drinking, intoxicating beverages, skiing, handball and tennis -- all types of activities in which one could sustain harm. Liberty Mutual includes such activities under its income protection plan. (b) Even if "we were to accept argument of voluntariness," some voluntary disabilities are covered while one voluntary disability which is "peculiar to women" is not covered. (c) Further, pregnancy itself may not be voluntary -- religious convictions and methods of contraception "may play a part in determining the voluntary nature of a pregnancy. There is no 100% sure method of contraception short of surgery, and for health reasons many women cannot use the pill."
4. Plan covers those disabilities arising from sickness. Pregnancy is not a sickness and hence properly excluded from the plan.	4. Rejected by Court. Pregnancy should be treated as any other temporary disability. Purpose of plan is to alleviate economic burdens caused by loss of income and medical expenses. A women disabled by pregnancy also suffers economic loss and incurs medical expense, plus hospital expense that another person may not have.

5. Plan does not violate Title VII because of company's legitimate interest in maintaining financial integrity of plan.	5. Rejected by Court. Company offered no statistical information to conclude increased cost for pregnancy benefits would be "devastating." Cost, as per Guidelines, is no defense under Title VII in this particular issue.

2. Maternity Leave

Maternity leave is the second issue in the Liberty Mutual case to be decided by the High Court.

Before September 1970, female employees who became pregnant were terminated after the eighth month, with no re-employment rights. Subsequently the policy was modified to allow a pregnant woman to work as long as her physician certifies her ability to work. Further, if she had worked for Liberty Mutual for one year, the employee could take a maternity leave of absence for six months from the time the leave started, or three months from the date of delivery, whichever came first.

The employee was required to return to work by or within the time limit or lose her job.

This time limitation was applied only to maternity leaves, not to any other leave of absence for other temporary disabilities. In effect, this means that a person suffering disability other than pregnancy would return to work after recovery; however, a woman with

a pregnancy-related disability would be required to return to work within the specified time limit or be fired.

The appellate court, as it did in its analysis of paid pregnancy benefits, allowed "great deference to the EEOC Guidelines." The Guidelines concerning the maternity leave issue are in pertinent part as follows:

> Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. (1604.10 /6/)
>
> Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity. (1604.10 /c/)

The appellate court held that Liberty Mutual's maternity leave violated Title VII and that "We are not requiring appellant /Liberty Mutual/ to give to women any more than it already gives to men. Since appellant provides leaves for all temporary disabilities, it must also provide leaves for pregnancy on the same basis."

> Note: The Liberty Mutual case has been consolidated with an allied case, Gilbert v. General Electric Co.

The Case of Pregnant Teachers: Maternity Leave and Return Rules

The Supreme Court dealt with the issues of rules governing mandatory (compulsory) leave for pregnant teachers as well as setting the specific

time frame for a female teacher's return to the classroom. (Cleveland Board of Education v. La Fleur and its companion, Cohen v. Chesterfield County School Board, 414 U.S. 632, 1974)

The facts in the two cases are:

(1) La Fleur - The Cleveland Board of Education required pregnant teachers to take an unpaid maternity leave beginning five months before the expected birth of the child. Application for leave had to be made no less than two weeks before the date of departure. The Board also had a return-to-work policy: the teacher could not return until the beginning of the next regular school term following the date when the child reached three months of age. In any case, re-employment was not guaranteed; she was simply given priority in a job assignment for which she qualified. Failure to abide by the regulations was grounds for discharge.

The plaintiffs were two teachers who were forced to take maternity leave before the end of the school year. They brought suit under the Civil Rights Act of 1871 (Section 1983), enacted to enforce the Fourteenth Amendment. (At the time of the suit, Title VII did not cover state and local agencies and educational institutions; they came under coverage in 1972.) Their suit attacking the constitutionality of the maternity leave regulations was rejected by a federal district court. The Court of Appeals for the Sixth Circuit reversed, by a divided vote, finding that the Cleveland School Board's regulations violated the Equal Protection Clause of the Fourteenth Amendment. (465 F. 2d 1184 (6th Cir. 1972))

(2) Cohen - The Chesterfield County School Board's regulations required that pregnant teachers leave work at least four months before the expected birth of the child. It was required that a notice in writing be given to the School Board at least six months before the expected birth. Further, in order to be re-employed, the teacher was required to have a written notice from her doctor that she was physically fit to return to work, and she could assure that care of her child would cause only minimal interference with her job requirements. Under these conditions, re-employment was guaranteed no later than the first day of the school year following the date eligibility was established.

The plaintiff, compelled to leave her job during the school year, also sued under the Civil Rights Act of 1871.

> The federal district court held that the school board regulations violated the Equal Protection Clause. The case was appealed to the Fourth Circuit. By a divided vote, the Court of Appeals reversed the lower court, upholding the constitutionality of the regulations.

Thus two different appellate decisions came before the Supreme Court for decision.

Justice Stewart, writing for a bare majority, declared that the mandatory rules of both school boards violated the Due Process Clause of the Fourteenth Amendment.

The majority opinion recognized ". . . that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause."

The majority opinion held that while the regulations were designed to maintain continuity of classroom instruction and to insure that physically unfit teachers be removed, there was no rational link between the purposes of the regulations and the means used to achieve them.

Justice Stewart said that the rules were too broad, containing "an irrebuttable presumption of physical incompetency," and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary."

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The foregoing indicates the substantive developments to date and answers yet to be found in complex sex discrimination issues.

Whatever the outcome of pending cases, there is general agreement that concepts of "womanhood" in the marketplace are being reshaped and applied.

APPENDIX TO TAB K

(Source: Title 29, Code of Federal Regulations, pp. 751-761 incl.)

PART 1604—GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

Sec.

AUTHORITY: The provisions of this Part 1604 issued under sec. 713(b), 78 Stat. 265, 42 U.S.C. sec. 2000e–12.

SOURCE: 37 FR 6836, April 5, 1972, unless otherwise noted.

§ 1604.1 General principles.

(a) References to "employer" or "employers" in this Part 1604 state principles that are applicable not only to employers but also to labor organizations and to employment agencies insofar as their action or inaction may adversely affect employment opportunities.

(b) To the extent that the views expressed in prior Commission pronouncements are inconsistent with the views expressed herein, such prior views are hereby overruled.

(c) The Commission will continue to consider particular problems relating to sex discrimination on a case-by-case basis.

§ 1604.2 Sex as a bona fide occupational qualification.

(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—"Men's jobs" and

"Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on sterotyped characterizations of the sexes. Such steretoypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

(b) Effect of sex-oriented State employment legislation.

(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(2) The Commission has concluded that State laws and regulations which discriminate on the basis of sex with regard to the employment of minors are in conflict with and are superseded by title VII to the extent that such laws are more restrictive for one sex. Accordingly, restrictions on the employment of minors of one sex over and above those imposed on minors of the other sex will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(3) A number of States require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by State law; or

(ii) It does not provide the same benefits for male employees.

(4) As to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of title VII. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the provision of such benefits; or

(ii) It does not provide the same benefits for male employees. If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by tile VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex.

(5) Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or

otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex.

§ 1604.3 Separate lines of progression and seniority systems.

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male," or for a job in a "male" line of progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

(b) A Seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

§ 1604.4 Discrimination against married women.

(a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

(b) It may be that under certain circumstances, such a rule could be justified within the meaning of section 703 (e)(1) of title VII. We express no opinion on this question at this time except to point out that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work.

§ 1604.5 Job opportunities advertising.

It is a violation of title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed "Male" or "Female," will be considered an expression of a preference, limitation, specification, or discrimination based on sex.

§ 1604.6 Employment agencies.

(a) Section 703(b) of the Civil Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. The Commission has determined that private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

(b) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupations qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

(c) It is the responsibility of employment agencies to keep informed of opinions and decisions of the Commission on sex discrimination.

§ 1604.7 Pre-employment inquiries as to sex.

A pre-employment inquiry may ask "Male _____, Female _____"; or "Mr. Mrs. Miss," provided that the inquiry is made in good faith for a

nondiscriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

§ 1604.8 Relationship of Title VII to the Equal Pay Act.

(a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

§ 1604.9 Fringe benefits.

(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(c) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of the household" or "principal wage earner" in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discrimination contained in the Act.

(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

(e) It shall not be a defense under title VIII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. A statement of the General Counsel of September 13, 1968, providing for a phasing out of differentials with regard to optional retirement age for certain incumbent employees is hereby withdrawn.

§ 1604.10 Employment policies relating to pregnancy and childbirth.

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

RACIAL DISCRIMINATION

I. INTRODUCTION

The issues treated elsewhere in this manual have a direct relationship to racial discrimination -- for example, testing, seniority, affirmative action, etc.

However, there are additional matters that merit review.

II. NO EEOC GUIDELINES

There are no Guidelines on Racial Discrimination. The reason is found in Title VII -- there are no bona fide occupational qualification (bfoq) exceptions based on race or color deemed necessary to the operation of a business.

III. BURDEN OF PROVING RACIAL DISCRIMINATION

The Supreme Court has set criteria or standards to establish a prima facie case of racial discrimination. For instance, if a black male applicant is refused employment and files charges, he must carry the initial burden to prove a prima facie case of racial discrimination by showing:

1. he belongs to a racial minority,
2. he applied and was qualified for the job for which the employer was seeking applicants,
3. he was rejected despite his qualifications, and
4. the position remained open after his rejection and the employer continued to seek applications from persons with his qualifications.

If the complaining party is able to establish this prima facie case, the burden then shifts to the employer to prove some legitimate, nondiscriminatory reason why the job application was rejected. (McDonnell Douglas v. Green, No. 72-490, May 14, 1973, 5 FEP cases 965)

The courts are now applying these criteria in age discrimination cases.

IV. BACK PAY AWARDS IN RACE BIAS CASES

It has been in the areas of race bias litigation that the Supreme Court has attempted to clarify the issue of back pay as a remedy. To be sure, back pay has been a significant remedy in sex discrimination cases too (AT&T consent decree settlement). But a cursory glance at back pay awards indicates the prevalence of this remedy in racial discrimination litigation.

The Case of Albemarle Paper Co.

The U.S. Supreme Court has held that federal district court judges, in most cases, should grant back pay to employees who have been discriminated against because of race.

The Court stated that "back pay has an obvious connection" with the primary objective of Title VII:

1. to achieve equality of employment opportunity, and
2. to make persons whole for injuries suffered because of unlawful employment discrimination. "This is shown by the very fact that Congress took care to arm the courts with full equitable powers...it is the historic purpose of equity to secure complete justice..."

The Court further held that the absence of "bad faith" cannot be considered "sufficient reason for denying back pay...If back pay were awardable only upon a showing of bad faith, the remedy would become a punishment of moral turpitude, rather than compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.' Title VII is not concerned with the employer's 'good intent' or absence of discriminatory intent...." The Court quoted from its decision in Griggs: "Congress directed the thrust of the act to the consequences of employment practices, not simply the motivation."

The High Court made a blunt observation:

> ...It is the reasonably certain prospect of a back pay award that "provide(s) the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices...."

(Albemarle Paper Co. v. Moody, U.S. Sup. Ct. Nos. 74-389 & 74-428, June 25, 1975)

V. PERSONAL HISTORY

Employer hiring, promotion or discharge decisions based on an applicant's or employee's personal history may result in a Title VII violation.

Examples

> An employer had a policy requiring the discharge of employees whose wages had been garnished more than twice. The plaintiff did not claim that the employer maintained generally discriminatory practices nor that the garnishment policy was racially

motivated, but the court held the policy to be unlawful because blacks were subject to wage garnishments more often than whites, and the employer had not proved that his policy was related to successful performance on the job.

(Johnson v. Pike Corp. of America, 332 F. Supp. 490, (C.D. Calif., 1971))

An employer rescinded a job offer to a black applicant upon learning that he had been arrested on fourteen different occasions (but never convicted of any offense). The Court held that the employer violated Title VII, and awarded the plaintiff monetary damages and enjoined the employer (the plaintiff did not seek employment, however) from asking applicants for information about prior arrests; from using a record of arrests as a factor in determining any condition of employment; and from seeking information about prior arrests from any private source whatsoever.

(Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Calif., 1970), modified, 472 F. 2d 631 (9th Cir. 1972))

In a suit against a municipal fire department, the Court enjoined the defendants from asking applicants about prior arrests. Also, the Court ordered that no person could be rejected as an applicant because of a felony conviction more than five years, or a misdemeanor conviction more than two years, prior to application for employment. This order was modified on appeal to prevent the use of a conviction as an absolute bar to a job.

(Carter v. Gallagher, 452 F. 2d 315 (8th Cir. 1971), modified on other grounds, en banc, 452 F. 2d 327 (8th Cir.), cert. denied, 406 U.S. 950 (1972))

VI. REBIRTH OF EARLY CIVIL RIGHTS LAWS

(Texts under Tab B Appendix)

Title VII does not prohibit other legal remedies, although there was an unsuccessful effort to amend the bill to prohibit parallel or other remedies.

Civil Rights Act of 1866

The Civil Rights Act of 1866 (42 U.S. Code, Section 1971) was originally enacted to enforce the Thirteenth Amendment. It was presumed--for over a century-- to apply only to racial discrimination involving actions of a state. The courts have held it also applies to racial discrimination in private employment.

The authors of "Legal Services Manual for Title VII Litigation," a report of the National Employment Law Project, write:

> The increasing acceptance of Sec. 1981 as a remedy for employment discrimination is particularly significant in that Sec. 1981 applies to all private acts of racial discrimination, without limitation. This means that Sec. 1981 is in some ways broader in its coverage than is Title VII. Additionally, the Sec. 1981 claimant is not burdened with the procedural prerequisites of Title VII. For example, Sec. 1981 has been used by plaintiffs who failed to comply with the EEOC prerequisites; it has been used to sue parties not named in the EEOC charge; and it has been used independently and without regard to a Title VII claim. Accordingly, Sec. 1981 is of particular significance to private litigants seeking redress against racial discrimination in private employment. (pp. 91-92)

While the Civil Rights Act of 1866 does not provide for attorney fees to a winning plaintiff (as does Title VII), there is no back pay liability limitation. Title VII limits back pay liability to the two years prior to the filing of an EEOC charge. There was one back pay award under the 1866 Act which went back to the initial date (1960) of the discriminatory act. This meant back pay for about 12 years. The decision came down in 1972.

(Brown v. Gaston County Dyeing Machine Co., 457 F. 2d 1377 (4th Cir. 1972)) cert. denied 409 U.S. 982 (1972))

Civil Rights Act of 1871

The Civil Rights Act of 1871 (42 U.S. Code Section 1983) was enacted to enforce the Fourteenth Amendment. Hence it is applicable to state and local governments.

Since 1972, Title VII also prohibits employment discrimination by state and local governments. Before 1972, however, state and local government agencies were not free from job-bias challenges since Section 1983 and the Fourteenth Amendment were the primary cause of action against the public agencies in both race and sex discrimination areas.

Section 1983 has been applied, for example, against officers of fire departments, police departments, and transportation authorities engaging in discriminatory employment practices.

NATIONAL ORIGIN

I. MEANING OF NATIONAL ORIGIN

The term "national origin" refers to the country in which a person or his/her ancestors were born.

II. EEOC GUIDELINES

In its Guidelines on Discrimination Because of National Origin, the Equal Employment Opportunity Commission cites examples of discrimination based on national origin:

> The use of tests in English when the individual tested came from circumstances where English was not the person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed.
>
> Denial of equal opportunity to persons married or associated with persons of a specific national origin.
>
> Denial of equal opportunity because of membership in lawful organizations identified or seeking to promote the interests of national groups.
>
> Denial of equal opportunity because of attendance at schools or churches commonly utilized by persons of a given national origin.
>
> Denial of equal opportunity because their name or that of their spouse reflects a certain national origin.
>
> Denial of equal opportunity to persons who as a class tend to fall outside national norms for height and weight specifications which are not necessary for the performance of the work involved.

III. ALIENS NOT COVERED UNDER NATIONAL ORIGIN

The Supreme Court has given weight ("great deference") to EEOC Guidelines when, in its judgment, they reflect a proper interpretation of Congressional intent and the language of the Act.

In the case of the EEOC Guidelines on National Origin, the High Court rejected the EEOC position that legal aliens (noncitizens) are covered under the definition of "national origin." In short, the Court held that an employer could discriminate against aliens by requiring that employees be citizens of the United States. (Espinoza v. Farah Mfg. Co., No. 72-671, Nov.19,1973, 6 FEP Cases 933) The Court noted that Congress has denied aliens the right to federal employment while prohibiting national origin discrimination in the federal service. The Court reasoned, therefore, that alienage was not included under the protection of Title VII.

While acknowledging that a citizenship requirement might be a pretext to discriminate because of national origin, the Court found this was not supported by facts in Espinoza.

It was the position of the EEOC that it is impossible to distinguish between employment discrimination based on alienage and that based on national origin. In any event, the EEOC was compelled to amend its Guidelines to comply with Espinoza. In essence, the Guidelines now provide that discrimination based on citizenship is only unlawful if its purpose is to discriminate against persons of a particular national origin. In sum, the citizenship requirement cannot be a pretext to engage in national origin discrimination.

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The Guidelines on Discrimination Because of National Origin are in the Appendix under this tab.

APPENDIX TO TAB M

(Source: Title 29, Code of Federal Regulations

PART 1606—GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

§ 1606.1 Guidelines on discrimination because of national origin.

(a) The Commission is aware of the widespread practices of discrimination on the basis of national origin, and intends to apply the full force of law to eliminate such discrimination. The bona fide occupational qualification exception as it pertains to national origin cases shall be strictly construed.

(b) Title VII is intended to eliminate covert as well as the overt practices of discrimination, and the Commission will, therefore, examine with particular concern cases where persons within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations. Examples of cases of this character which have come to the attention of the Commission include: The use of tests in the English language where the individual tested came from circumstances where English was not that person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed; denial of equal opportunity to persons married to or associated with persons of a specific national origin; denial of equal opportunity because of membership in lawful organizations identified with or seeking to promote the interests of national groups; denial of equal opportunity because of attendance at schools or churches commonly utilized by persons of a given national origin; denial of equal opportunity because their name or that of their spouse reflects a certain national origin, and denial of equal opportunity to persons who as a class of persons tend to fall outside national norms for height and weight where such height and weight specifications are not necessary for the performance of the work involved.

(c) Title VII of the Civil Rights Act of 1964 protects all individuals, both citizen and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin.

(d) Where discrimination on the basis of citizenship against a lawfully immigrated alien residing in the United States has the purpose or effect of discriminating against persons of a particular national origin, such person may not be discriminated against on the basis of citizenship, except that it is not an unlawful employment practice for an employer pursuant to section 703(g), to refuse to employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive Order of the President respecting the particular position or the particular premises in question.

(e) In addition, some states have enacted laws prohibiting the employment of noncitizens. Where such laws have the purpose or effect of discriminating on the basis of national origin, they are in conflict with and are, therefore, superseded by Title VII of the Civil Rights Act of 1964, as amended.

(Sec. 713(b), 78 Stat. 265 (42 U.S.C. sec. 2000(e)-12(b))

RELIGION

I. INTRODUCTION

Race and sex discrimination have been in the forefront of Title VII developments. Comparatively little attention has been given to the dilemma created by the employee whose religious beliefs forbid him or her to work on given days.

The main employment problem involves Sabbath observance -- Seventh Day Adventists, members of the Worldwide Church of God, or Orthodox Jews celebrating their Sabbath from sunset on Friday through sundown on Saturday. And there are members of Protestant sects -- e.g., Faith Reformed Church -- who will not work on Sunday.

In addition to Sabbath observance, members of these various faiths have their religious holidays.

Consequently, when an employer requires overtime work during a worker's Sabbath hours or requires his or her presence on a regular working day which is a religious holiday, the employee finds himself or herself between the "rock and the hard place": to work violates religious beliefs; not to work may result in suspension or possible discharge.

II. BEFORE TITLE VII: ARBITRATION DECISIONS

In a collective bargaining setting, grievances alleging racial discrimination may reach arbitration.

As a result of an excellent research effort, the findings of which are contained in an article, "Title VII and the Religious Employee: The Neglected Duty of Accommodation," the record shows:

> In the two decades prior to the enactment of Title VII, arbitrators generally upheld management's right to discipline workers for refusing to work on their religious holidays or Sabbath on an overtime or full-time basis. The nature of the discipline generally was discharge although lighter forms of punishment were at times used... Typically, discipline was justified by the arbitrator because the contract gave management the right to require overtime, schedule operations, and to approve or disapprove leaves of absence in order to maintain production schedules.
>
> (By Benjamin W. Wolkinson, Asst. Professor, School of Labor and Industrial Relations, MSU. The Arbitration Journal, June 1975, p. 91)

III. AFTER TITLE VII: ARBITRATION DECISIONS

Facing arbitrators today are two issues: contract provisions, and Title VII which bars employment discrimination on the basis of religion. Religion "includes all aspects of religious observance and practice, as well as belief...." (Section 701 (j))

EEOC Guidelines are in accord with Title VII provisions. The Guidelines state:

> ...The duty not to discriminate on religious grounds... includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business...." (emphasis added)

A Guideline example of undue hardship: "Where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer."

There is no definition of "reasonable" accommodations or of "undue hardship." The Commission and the courts are considering these meanings within the factual context of each case.

One of the defenses offered by employers who have failed to accommodate takes this approach: employees are treated equally, and hence to accommodate to one person's religious beliefs is special or preferential treatment, thus discriminatory against the other workers. EEOC rejects the defense: the employer's "good faith" defense (equal treatment) is not enough since it adversely affects the job status of a worker because of his/her religious beliefs. The Commission takes the position that making reasonable accommodations for the religious tenets of a given employee does not discriminate against coworkers simply because the beliefs of such coworkers do not require accommodation.

(EEOC Decision No. 71-463,
3 FEP 385, 1970)

Are arbitrators generally supporting the employers or are they generally supporting the EEOC position?

Again, the Wolkinson article quoted above offers some answers: In an investigation of arbitration decisions since 1972 the author came to the conclusion that

> **it is questionable whether arbitrators are prepared to strike a proper balance between an employee's religious beliefs and the employer's scheduling demands. In five of the seven cases reported since March 1972...arbitrators upheld management suspensions and discharges...in two cases the arbitrators held unwarranted even minor deviations in the work schedule... In another,... [the] arbitrator...maintained that any accommodation would have constituted discriminatory conduct against others. (Id, page 103)**

He also notes that

> it is...possible that as employees recognize the futility of arbitration in religious discrimination cases, they are increasingly turning to the EEOC for relief. Whereas the number of religious discrimination arbitration cases has remained low, the Commission's case docket has ballooned. Thus, in fiscal 1972 the EEOC processed over 1,000 religious discrimination charges, nearly half of which involved discharges. In short, the reluctance and failure of arbitrators to apply Title VII considerations may generate increased litigation for the employer.... (Id., p. 110).

The issue of religious discrimination grievances is but one illustrative aspect of the broader problem: the role of the grievance-arbitration process in employment discrimination. (See Tab A, "Collective Bargaining and EEO.")

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The EEOC Guidelines on Discrimination Because of Religion are in the Appendix under this Tab.

APPENDIX TO TAB N

(Source: Title 29, Code of Federal Regulations,

PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

§ 1605.1 Observation of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

(Sec. 713(a), 78 Stat. 265; 42 U.S.C. 2000e–12)
[32 F.R. 10298, July 13, 1967]

A GLOSSARY OF EQUAL EMPLOYMENT OPPORTUNITY TERMS

The terms in this Glossary are examples of those likely to be encountered by practitioners in the area of equal employment opportunity. The Glossary is intended to present some of the special language of EEO; hence it is not comprehensive in coverage.

A

ADVERSE EFFECT

As used in the context of employee selection, adverse effect is a differential rate of selection which operates to the disadvantage of a particular class. It is computed by dividing the number of class members selected by the total number of class members who were administered the test, and comparing the result with a percentage derived in a similar way for the remaining unselected group. For example, a test which rejected 50 percent of minority group applicants but only 10 percent of nonminority applicants would be determined to have an adverse effect, if the sample were adequate.

In itself, adverse effect may not constitute a violation of Title VII, but its existence usually creates that suspicion. An employer may be able to justify the adverse effect of hiring criteria by showing that they are job-related and neutral in their application, but under EEOC guidelines the employer always bears the burden of proof.

AFFECTED CLASS

Job applicants or employees with a common characteristic (race, religion, sex, national origin, age) who have been denied equal opportunity in violation of Title VII, at any step in the employment process.

AFFIRMATIVE ACTION PLAN

A set of specific and result-oriented procedures required of government contractors/subcontractors to achieve equal employment opportunity. An acceptable affirmative action plan must include: (1) an analysis of the areas in which the contractor is deficient in the utilization of minority groups and women; and (2) goals and timetables to which the contractor must direct his good faith efforts in correcting the deficiencies and increasing the utilization of minorities and women at all levels of the work force where deficiencies exist (Revised Order 4).

B

BFOQ

A bona fide (genuine) occupational qualification which legally permits employer to select or reject employees of a certain religion, sex, national origin, age, etc. This employment exemption must be deemed reasonably necessary to the normal operation of the particular business or enterprise.

C

CLASS ACTION

A court action brought on behalf of other persons of the same affected class.

COMPLIANCE AGENCIES

Under Executive Order 11246 and other executive orders, the OFCC is charged with insuring EEO compliance by non-exempt government contractors and subcontractors. The OFCC has delegated responsibility for enforcement to other agencies, known as "compliance agencies," For example, the Department of Defense and the Department of Health, Education and Welfare.

CONCILIATION	In EEOC procedures, conciliation refers to an attempt by the Commission to resolve a charge of discrimination by voluntary means through consultation and persuasion.
CONSTRUCTIVE SENIORITY	See "Fictional Seniority."
COVERT DISCRIMINATION	Subtle, mostly unintentional, forms of discrimination which pervade an organization. Such "systemic" or "institutionalized" discrimination is founded on artificial barriers which appear "neutral" on their face--often insurmountable barriers for minorities and women to overcome.
CRITERION RELATED	See "Validity."
	D
DISPARATE IMPACT-- DISPARATE EFFECT	See Adverse Effect.
DISTRIBUTION RATE	(1) The degree (percentages) to which a given protected class is employed in the various job titles, job classes, and other units within the employing organization; and (2) the degree (percentages) to which individuals of a given protected class are involved in various employment transactions (for example, application for employment, hiring, placement, promotion, separation, etc.).
	E
EMPLOYMENT TEST	Defined in the EEOC Guidelines as "any paper-and-pencil or performance measure used as a basis for an employment decision and all formal, scored, quantified or standardized techniques of assessing job suitability." (See also Validity)

EQUITABLE REMEDY

A fair way of preventing, redressing, or compensating a violation of the rights of a particular individual or class of individuals.

EXTERNAL LABOR AREA
EXTERNAL LABOR MARKET

A geographic area from which an employer may reasonably recruit new workers.

F

FICTIONAL SENIORITY

Sometimes called "phantom" or unearned" seniority. In layoffs, those who were hired last under an affirmative action program argue that their layoff defeats the goals of affirmative action. Therefore, they maintain that, at the very least, some senior employees should be laid off in order to maintain the ratio, for example, of men to women or whites to blacks that existed before the layoffs occurred.

"FREEDOM NOW" THEORY

An approach to remedy past employment discrimination by giving minorities or women with more plant seniority the jobs of whites or males with less plant but more departmental seniority. That is, minorities or women would displace white or male incumbents who hold jobs -- "but for" discrimination-- minorities or women would be entitled to because of greater plant seniority. (See also "Rightful Place" theory and "Status Quo" theory)

G

GOALS AND TIMETABLES

Measurable targets, directed at achieving prompt and full utilization of minorities and women in the work force. Nonexempt government contractors are required to include goals and timetables in their affirmative action programs and to make every effort to achieve them. But failure to meet goals and timetables will be excused if the contractor can show good-faith efforts have been made. (See also Quotas)

I

INCIDENCE RATE

Measures the degree to which a specific protected class is involved in any of the various steps of the employment process. For example, if there are 80 black males of whom 20 are promoted, the incidence rate is 25 percent. As a measure of compliance, the incidence rate is compared with the degree to which the specific protected class is represented in the external labor market.

L

LIQUIDATED DAMAGES

Payment of back wages plus an additional amount, equal to the back wages found due--in effect, double damages. Liquidated damages can be awarded under the Equal Pay Act and the Age Discrimination in Employment Act of 1967.

O

OVERT DISCRIMINATION

Intentional and obvious forms of discrimination, for example, job assignments by race or sex, resulting in segregated departments or work units.

P

PARITY

In EEO language, parity describes a condition in which the percentage participation of protected classes in an organization (and/or its units, job classes, etc.) is identical to the equivalent percentages in the external labor area. The two types of parity are:

PARITY (Cont'd)	(1) Population parity- compares the percentage participation by the protected classes in an organization with their percentage participation in the appropriate external labor force; (2) Occupational parity- compares the percentage participation of protected classes in distinct occupational categories in the organization with the participation of these classes in the same categories in the appropriate external labor force.
PARTICIPATION RATE	(1) Percentage of incumbents in a job title, class, department or other organizational unit (including the whole organization) who belong to a given protected class; and (2) Percentage of individuals involved in an employment transaction (for example, application for employment, hiring, placement, promotion, separation) who belong to a given protected class.
"PATTERN OR PRACTICE" OF DISCRIMINATION	Situations in which the denial of employment rights consists of more than an isolated, sporadic incident, i.e., is repeated, routine or of a generalized nature. For example, a "pattern or practice" of discrimination would arise if a number of companies or persons in the same industry discriminated; or if a chain of motels or restaurants practiced discrimination throughout all or a significant part of their system; or if a company repeatedly and regularly engaged in prohibited discriminatory acts. Under the 1972 amendments to Title VII, EEOC has the exclusive jurisdiction to bring pattern or practice actions in the private sector.

PHILADELPHIA PLAN

An example of an "imposed" federal plan under a construction contract. Under the plan the Department of Labor and construction contractors came to an agreement on the development, submission, and implementation of affirmative action programs covering construction workers in the Philadelphia area.

PRESENT EFFECTS OF PAST PATTERNS OF DISCRIMINATION

EEOC and the courts have consistently held that employers are liable for correcting situations in which employees continue to suffer the "present effects of past patterns of discrimination." For example, an employer may grant plant-wide seniority to affected employees to promote or transfer them, without loss of their seniority rights under a departmental seniority system.

PRIMA FACIE CASE OF DISCRIMINATION

A case which at "first sight," or "on the face of it," establishes a reasonable cause to believe discrimination exists.

PROTECTED CLASSES

A generic term, with no precise legal meaning, which describes those groups that, in the eyes of Congress and the courts, have suffered the effects of discriminatory employment practices. It applies to individuals who have been discriminated against on the basis of race, color, religion, sex, national origin under Title VII, or on the basis of age under the Age Discrimination in Employment Act of 1967.

Q

QUOTAS

Fixed numbers or percentages of hiring or promoting minorities or females that must be met by the employer. Failure to meet a quota cannot be justified. (See also "Goals and Timetables")

R

RELEVANT LABOR POOL — The total number of incumbent employees who are in position for a specific promotion. All candidates who could conceivably be considered for a promotion.

"RIGHTFUL PLACE" THEORY — An approach fashioned by the courts to remedy past employment discrimination without granting preferential treatment to minorities and women. It forbids the future awarding of vacant jobs on the basis of a discriminatory seniority system. Incumbent employees would not be bumped out of their jobs by minority or female employees with greater plant seniority, but plant seniority would be applied for filling new positions. (See also "Freedom Now" theory and "Status Quo" theory)

S

"STATUS QUO" THEORY — Based upon the interpretation that Title VII is prospective not retrospective. Under this approach an employer satisfies Title VII merely by ending existing discrimination, but does nothing to undo the effects of past discrimination. Status quo has been rejected by the courts in seniority cases in favor of the "rightful place" theory. (See also "Freedom Now" theory and "Rightful Place" theory)

SYSTEMIC DISCRIMINATION — A practice or policy persisting over a period of time, rather than a specific overt action, which results in the denial of equal employment opportunity. Such a result of the "system" is systemic or institutionalized discrimination. The fact that the policy may have been inadvertent or unintentional is no defense under Title VII.

T

TEST — See "Employment Test" and "Validity"

TOLLING THE STATUTE OF LIMITATIONS — A court action which stops the running of a statute of limitations and thereby extends the time period in which one may act to redress a discriminatory or otherwise illegal act.

U

UTILIZATION ANALYSIS — A review of the work force by a government contractor to determine if there are fewer women or minorities employed in each job title than would be expected by their availability for the job. The contractor must make separate analyses for women and minorities. Availability is determined by considering such factors as the percentage of women or minorities in the area's work force, the number of minorities and women having the necessary skills for the job, the existence of training institutions, the number of minorities and females unemployed in the surrounding area, and the availability of promotable and transferable female and minority employees within the organization.

V

VALIDITY — Three types of test validation standards are used to show that the test is job related:

(1) Content validity is a demonstration that the content of the test replicates the job duties. Tests of skills which the applicant must bring to the job (e.g., typing) can be justified on the basis of content validity.

(2) Criterion-related validity is a statistical demonstration of a relationship between a test and the job performance of a sample of workers. Intelligence and aptitude tests usually need to be justified by a criterion-related validity study.

(3) Construct validity is a demonstration that a test measures a personality trait (e.g., "integrity") and that the trait is required for the satisfactory performance of the job.