CHAPTER 2
The Law and Human Resource Management

At a Glance

Comprehensive employment-related legislation, combined with increased motivation on the part of individuals to rectify unfair employment practices, makes the legal aspects of employment one of the most dominant issues in HRM today. All three branches of the federal government have been actively involved in ongoing efforts to guarantee equal employment opportunity as a fundamental individual right, regardless of race, color, age, gender, religion, national origin, or disability.

All aspects of the employment relationship, including initial screening, recruitment, selection, placement, compensation, training, promotion, and performance management, have been addressed by legislative and executive pronouncements and by legal interpretations from the courts. With growing regularity, I/O psychologists and HR professionals are being called on to work with attorneys, the courts, and federal regulatory agencies. It is imperative, therefore, to understand thoroughly the rights as well as obligations of individuals and employers under the law, and to ensure that these are translated into everyday practice in accordance with legal guidelines promulgated by federal regulatory agencies. Affirmative action as a matter of public policy has become a fact of modern organizational life. To ignore it is to risk serious economic, human, and social costs.

Every public opinion poll based on representative national samples drawn between 1950 and the present shows that a majority of Americans—black, brown, and white—support equal employment opportunity (EEO) and reject differential treatment based on race, regardless of its alleged purposes or results. There is agreement about the ends to be achieved, but there is disagreement about the means to be used (Von Drehle, 2003). EEO has been, and is still, an emotionally charged issue. Congress has provided sound legal bases for effecting changes in EEO through sweeping civil rights legislation. Subsequently, thousands of dissatisfied groups and individuals have won substantial redress on many issues by availing themselves of their legal rights. The combination of the motivation to rectify perceived inequities and an easily available legal framework for doing so has made the legal aspects of the employment relationship a dominant issue in HRM today.

It is imperative, therefore, that I/O psychologists and HR professionals understand the rights and obligations of individuals and employers in this most delicate area. They must be able to work with attorneys (and vice versa), for neither can succeed alone.
Each group has a great deal to contribute in order to identify vulnerable employment policies and practices, to make required adjustments in them, and thus to minimize the likelihood of time-consuming and expensive litigation. Let us begin, therefore, with an overview of the legal system, legal terminology, important laws and court decisions, and underlying legal and scientific issues.

**THE LEGAL SYSTEM**

Above the complicated network of local, state, and federal laws, the United States Constitution stands as the supreme law of the land. Certain powers and limitations are prescribed to the federal government by the Constitution; those powers not given to the federal government are considered to be reserved for the states. The states, in turn, have their own constitutions that are subject to, and must remain consistent with, the U.S. Constitution.

While certain activities are regulated exclusively by the federal government (e.g., interstate commerce), other areas are subject to concurrent regulation by federal and state governments (e.g., equal employment opportunity). It should be emphasized, however, that in the event of a conflict between a state law and the U.S. Constitution (or the laws enacted by Congress in accordance with it), the federal requirements take precedence. Thus, any state or local law that violates the Constitution or federal law is, in effect, unconstitutional. Therefore, it is no defense to argue that one is acting according to such a state or local law.

The legislative branch of government (Congress) enacts laws, called statutes, which are considered primary authority. Court decisions and the decisions and guidelines of regulatory agencies are not laws, but interpretations of laws for given situations in which the law is not specific. Nevertheless, these interpretations form a complex fabric of legal opinion and precedent that must be given great deference by the public.

Let us consider the judicial system, one of the three main branches of government (along with the executive and legislative branches), more closely. The judicial power of the United States is vested “in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish” according to Article III of the Constitution. The system of “inferior” (i.e., lower) courts includes the U.S. District Courts, the federal trial courts in each state. These courts hear cases that fall under federal jurisdiction, usually either cases between citizens of different states or cases relevant to the Constitution or federal law.

Decisions of these lower federal courts may be appealed to 1 of 12 U.S. Courts of Appeals, corresponding to the geographical region or “circuit” in which the case arose (see Figure 2-1). In turn, these courts’ decisions may be appealed to the U.S. Supreme Court—not as a matter of right, but only when the Supreme Court feels that the case warrants a decision at the highest level. Generally the Supreme Court will grant certiorari (review) when two or more circuit courts have reached different conclusions on the same point of law or when a major question of constitutional interpretation is involved. If the Supreme Court denies a petition for a writ of certiorari, then the lower court’s decision is binding.

The state court structure parallels the federal court structure, with state district courts on the lowest level, followed by state appellate (review) courts, and finally by a
state supreme court. State supreme court decisions may be reviewed by the U.S.
Supreme Court where a question of federal law is involved or where the judicial power
of the United States extends as defined by the U.S. Constitution. In all other instances,
the state supreme court decision is final.

Equal employment opportunity complaints may take any one of several alter-
native routes (see Figure 2-2). By far the simplest and least costly alternative is to
arrive at an informal, out-of-court settlement with the employer. Often, however,
the employer does not have an established mechanism for dealing with such prob-
lems. Or, if such a mechanism does exist, employees or other complainants are
unaware of it or are not encouraged to use it. So the complainant must choose more
formal legal means, such as contacting state and local fair employment practice
commissions (where they exist), federal regulatory agencies (e.g., Equal
Employment Opportunity Commission, Office of Federal Contract Compliance
Programs), or the federal and state district courts. At this stage, however, solutions
become time-consuming and expensive. Litigation is a luxury that few can afford.
Perhaps the wisest course of action an employer can take is to establish a sound
internal complaint system to deal with problems before they escalate to formal legal
proceedings.
UNFAIR DISCRIMINATION: WHAT IS IT?

No law has ever attempted to define precisely the term *discrimination*. However, in the employment context, it can be viewed broadly as the giving of an unfair advantage (or disadvantage) to the members of a particular group in comparison...
to the members of other groups. The disadvantage usually results in a denial or restriction of employment opportunities or in an inequality in the terms or benefits of employment.

It is important to note that whenever there are more candidates than available positions, it is necessary to select some candidates in preference to others. Selection implies exclusion. As long as the exclusion is based on what can be demonstrated to be job-related criteria, however, that kind of discrimination is entirely proper. It is only when candidates are excluded on a prohibited basis not related to the job (e.g., age, race, gender, disability) that unlawful and unfair discrimination exists. Despite federal and state laws on these issues, they represent the basis of an enormous volume of court cases, indicating that stereotypes and prejudices do not die quickly or easily. Discrimination is a subtle and complex phenomenon that may assume two broad forms:

1. **Unequal (disparate) treatment** is based on an intention to discriminate, including the intention to retaliate against a person who opposes discrimination, who has brought charges, or who has participated in an investigation or hearing. There are three major subtheories of discrimination within the disparate treatment theory:

   1. **Cases** that rely on *direct evidence* of the intention to discriminate. Such cases are proven with direct evidence of
      - Pure bias based on an open expression of hatred, disrespect, or inequality, knowingly directed against members of a particular group.
      - Blanket exclusionary policies—for example, deliberate exclusion of an individual whose disability (e.g., an impairment of her ability to walk) has nothing to do with the requirements of the job she is applying for (financial analyst).
   2. **Cases** that are proved through *circumstantial evidence* of the intention to discriminate (see Schwager v. Sun Oil Co. of Pa., p. 40), including those that rely on statistical evidence as a method of circumstantially proving the intention to discriminate systematically against classes of individuals.
   3. **Mixed motive** cases (a hybrid theory) that often rely on both direct evidence of the intention to discriminate on some impermissible basis (e.g., sex, race, disability) and proof that the employer’s stated legitimate basis for its employment decision is actually just a pretext for illegal discrimination.

2. **Adverse impact (unintentional) discrimination** occurs when identical standards or procedures are applied to everyone, despite the fact that they lead to a substantial difference in employment outcomes (e.g., selection, promotion, layoffs) for the members of a particular group and they are unrelated to success on a job. For example:

   - Use of a minimum height requirement of 5’ 8” for police cadets. That requirement would have an adverse impact on Asians, Hispanics, and women. The policy is neutral on its face, but has an adverse impact. To use it, an employer would need to show that applicants must meet the height requirement in order to be able to perform the job.

These two forms of illegal discrimination are illustrated graphically in Figure 2-3.
LEGAL FRAMEWORK FOR CIVIL RIGHTS REQUIREMENTS

Employers in the public and private sectors, employment agencies, unions, and joint labor-management committees controlling apprentice programs are subject to the various nondiscrimination laws. Government contractors and subcontractors are subject to executive orders. Many business organizations are employers as well as government contractors and, therefore, are directly subject both to nondiscrimination laws and to executive orders. While it is beyond the scope of this chapter to analyze all the legal requirements pertaining to EEO, HR professionals should at least understand the major legal principles as articulated in the following laws of broad scope:

- The U.S. Constitution—Thirteenth and Fourteenth Amendments
- The Civil Rights Acts of 1866 and 1871
- The Equal Pay Act of 1963
- The Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972)
- The Immigration Reform and Control Act of 1986
- The Americans with Disabilities Act of 1990
- The Civil Rights Act of 1991
- The Family and Medical Leave Act of 1993

In addition, there are laws of limited application:

- Executive Orders 11246, 11375, and 11478
- The Rehabilitation Act of 1973
- The Uniformed Services Employment and Reemployment Rights Act of 1994
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THE U.S. CONSTITUTION—THIRTEENTH AND FOURTEENTH AMENDMENTS

The Thirteenth Amendment prohibits slavery and involuntary servitude. Any form of discrimination may be considered an incident of slavery or involuntary servitude, and thus liable to legal action under this Amendment. The Fourteenth Amendment guarantees equal protection of the law for all citizens. Both the Thirteenth and Fourteenth Amendments granted to Congress the constitutional power to enact legislation to enforce their provisions. It is from this source of constitutional power that all subsequent civil rights legislation originates.

THE CIVIL RIGHTS ACTS OF 1866 AND 1871

These laws were enacted based on the provisions of the Thirteenth and Fourteenth Amendments. The Civil Rights Act of 1866 grants all citizens the right to make and enforce contracts for employment, and the Civil Rights Act of 1871 grants all citizens the right to sue in federal court if they feel they have been deprived of any rights or privileges guaranteed by the Constitution and laws. Until the late twentieth century, both of these laws were viewed narrowly as tools for Reconstruction era racial problems. This is no longer so. In Johnson v. Railway Express Agency (1975), the Supreme Court held that while Section 1981 of the Civil Rights Act of 1866 on its face relates primarily to racial discrimination in the making and enforcement of contracts, it also provides a federal remedy against discrimination in private employment on the basis of race. It is a powerful remedy. The Civil Rights Act of 1991 amended the Civil Rights Act of 1866 so that workers are protected from intentional discrimination in all aspects of employment, not just hiring and promotion. Thus, racial harassment is covered by this civil rights law. The Civil Rights Act of 1866 allows for jury trials and for compensatory and punitive damages\(^1\) for victims of intentional racial and ethnic discrimination, and it covers both large and small employers, even those with fewer than 15 employees.

The 1866 law also has been used recently to broaden the definition of racial discrimination originally applied to African Americans. In a unanimous decision, the Supreme Court ruled in 1987 that race was equated with ethnicity during the legislative debate after the Civil War, and, therefore, Arabs, Jews, and other ethnic groups thought of as “white” are not barred from suing under the 1866 law. The Court held that Congress intended to protect identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Under the law, therefore, race involves more than just skin pigment (“Civil Rights,” 1987).

\(^1\)Punitive damages are awarded in civil cases to punish or deter a defendant’s conduct. They are separate from compensatory damages, which are intended to reimburse a plaintiff for injuries or harm.
EQUAL PAY FOR EQUAL WORK REGARDLESS OF SEX

Equal Pay Act of 1963

This Act was passed as an amendment to the Fair Labor Standards Act (FLSA) of 1938. For those employers already subject to the FLSA, the Equal Pay Act specifically prohibits sex discrimination in the payment of wages, 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.

The Equal Pay Act, the first in the series of federal civil rights laws passed during the 1960s, is administered by the Equal Employment Opportunity Commission (EEOC). Wages withheld in violation of its provisions are viewed as unpaid minimum wages or unpaid overtime compensation under the FLSA. Between 1992 and 2002, the EEOC received about 1,200 equal-pay complaints per year, and, in 2002, it won $10.3 million for aggrieved individuals, excluding monetary benefits obtained through litigation (EEOC, 2003). For individual companies, the price can be quite high, since, as the lines of the law (quoted above) indicate, in correcting any inequity under the Act, a company must ordinarily raise the lower rate. For example, Texaco agreed to pay a record $3.1 million to female employees who consistently had been paid less than their male counterparts. That amount included $2.2 million in back pay and interest and $900,000 in salary increases (Bland, 1999).

Equal Pay for Jobs of Comparable Worth

When women dominate an occupational field (such as nursing or secretarial work), the rate of pay for jobs in that field tends to be lower than the pay that men receive when they are the dominant incumbents (e.g., construction, skilled trades). Is the market biased against jobs held mostly by women? Should jobs dominated by women and jobs dominated by men be paid equally if they are of "comparable" worth to an employer? Answering the latter question involves the knotty problem of how to make valid and accurate comparisons of the relative worth of unlike jobs. The key difference between the Equal Pay Act and the comparable worth standard is this: The Equal Pay Act requires equal pay for men and women who do work that is substantially equal. Comparable worth would require equal pay for work of equal value to an employer (e.g., librarian and electrician).

The crux of the issue is this: Are women underpaid for their work, or do they merely hold those jobs that are worth relatively less? Existing federal laws do not support the comparable-worth standard. However, several states have enacted laws that require a comparable worth standard for state and local government employees, and Canada's Ontario province has extended such legislation to the private sector (Milkovich & Newman, 2005).
The ultimate resolution of the comparable-worth controversy remains to be seen, but there is an inescapable irony to the whole episode: The Equal Pay Act was passed for the express purpose of eliminating gender as a basis for the payment of wages. Comparable worth, by its very nature, requires that some jobs be labeled “male” and others “female.” In so doing, it makes gender the fundamental consideration in the payment of wages.

Is it possible that the goals of comparable worth can be accomplished through normal labor-market processes? Consider that in recent years there have been two significant achievements for women: (1) They have made dramatic inroads in jobs traditionally held by men; and (2) as women deserted such low-paying jobs as secretary and nurse, the demand for those jobs held steady or increased, and the pay rates climbed. These are healthy trends that are likely to continue as long as aggressive enforcement of Title VII, intended to ensure equal job opportunities for women, is combined with vigorous enforcement of the Equal Pay Act. The appropriate response is to remove the barriers, not to abolish supply and demand.

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**EQUAL EMPLOYMENT OPPORTUNITY**

**The Civil Rights Act of 1964**

The Civil Rights Act of 1964 is divided into several sections or titles, each dealing with a particular facet of discrimination (e.g., voting rights, public accommodations, public education). For our purposes, Title VII is particularly relevant.

Title VII (as amended by the Equal Employment Opportunity Act of 1972) has been the principal body of federal legislation in the area of fair employment. Through Title VII, the Equal Employment Opportunity Commission (EEOC) was established to ensure compliance with Title VII by employers, employment agencies, and labor organizations. We will consider the organization and operation of the EEOC in greater detail in a later section.

**Nondiscrimination on the Basis of Race, Color, Religion, Sex, or National Origin**

Employers are bound by the provisions of Section 703(a) of Title VII as amended, which states:

It shall be an unlawful employment practice for an employer—(1) to fail or to 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.

Note that race and color are not synonymous. Under federal law discriminating against people because of the shade of their skin—so-called intrarace or appearance
discrimination—is distinct from, but just as illegal as, racial discrimination. For example, whites can be guilty of color discrimination, but not racial discrimination, if they favor hiring light-skinned over dark-skinned blacks. This issue is growing in importance as the sheer number of racial blends increases (Valbrun, 2003).

Apprenticeship Programs, Retaliation, and Employment Advertising

Section 703(b) of Title VII states:

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.

A further provision of Title VII, Section 704(a), prohibits discrimination against an employee or applicant because he or she has opposed an unlawful employment practice or made a charge, testified, assisted, or participated in a Title VII investigation, proceeding, or hearing. Finally, Section 704(b) prohibits notices or advertisements relating to employment from indicating any preference, limitation, specification, or discrimination on any of the prohibited factors unless it is in relation to a bona fide occupational qualification (see p. xxx).

Prior to 1972, Title VII was primarily aimed at private employers with 25 or more employees, labor organizations with 25 or more members, and private employment agencies. In 1973, the Equal Employment Opportunity Act expanded this coverage to public and private employers (including state and local governments and public and private educational institutions) with 15 or more employees, labor organizations with 15 or more members, and both public and private employment agencies. These amendments provide broad coverage under Title VII, with the following exceptions: (1) private clubs, (2) places of employment connected with an Indian reservation, and (3) religious organizations (which are allowed to discriminate because of religion) [Title VII, Sections 701(a), 702, and 703(i)]. The U.S. Office of Personnel Management and the Merit Systems Protection Board, rather than the EEOC, monitor nondiscrimination and affirmative action programs of the federal government. Affirmative action involves a proactive examination of whether equality of opportunity exists. If it does not, a plan is implemented for taking concrete measures to eliminate the barriers and to establish true equality (Crosby, Iyer, Clayton, & Downing, 2003).

Suspension of Government Contracts and Back-Pay Awards

Two other provisions of the 1972 law are noteworthy. First, denial, termination, or suspension of government contracts is proscribed (without a special hearing) if an employer has and is following an affirmative action plan accepted by the federal government for the same facility within the past 12 months. Second, back-pay awards in Title VII cases are limited to two years prior to the filing of a charge. Thus, if a woman
filed a Title VII charge in 1999, but the matter continued through investigation, conciliation, trial, and appeal until 2003, she might be entitled to as much as six years of back pay, from 1997 (two years prior to the filing of her charge) to 2003 (assuming the matter was resolved in her favor).

In addition to its basic objective of protecting various minority groups against discrimination in employment, Title VII extends the prohibition against sex discrimination to all aspects of the employment relationship. It was widely known, however, that this provision was inserted in the bill at the last minute in a vain attempt to make the bill appear ludicrous and thus to defeat it. The volume of sex-discrimination complaints filed with the EEOC and the court decisions dealing with this aspect of discrimination have served subsequently to underscore the importance of this provision.

Several specific exemptions to the provisions of Title VII were written into the law itself. Among these are the following.

**Bona Fide Occupational Qualifications (BFOQs)**

Classification or discrimination in employment according to race, religion, sex, or national origin is permissible when such qualification is a bona fide occupational qualification “reasonably necessary to the operation of that particular business or enterprise.” The burden of proof rests with the employer to demonstrate this, and, as we shall see, the courts interpret BFOQs quite narrowly. Preferences of the employer, coworkers, or clients are irrelevant.

**Seniority Systems**

Bona fide seniority or merit systems and incentive pay systems are lawful “provided that such differences are not the result of an intention to discriminate.”

**Pre-Employment Inquiries**

Such inquiries—for example, regarding sex and race—are permissible as long as they are not used as bases for discrimination. In addition, certain inquiries are necessary to meet the reporting requirements of the federal regulatory agencies and to ensure compliance with the law.

**Testing**

An employer may give or act on any professionally developed ability test, provided the test is not used as a vehicle to discriminate on the basis of race, color, religion, sex, or national origin. We will examine this issue in greater detail in a later section.

**Preferential Treatment**

It is unlawful to interpret Title VII as requiring the granting of preferential treatment to individuals or groups because of their race, color, religion, sex, or national origin on account of existing imbalances. Such imbalances may exist with respect to differences between the total number or percentage of similar persons employed by an employer, or admitted to or employed in any training or apprenticeship program,
and the total number or percentage of such persons in any geographical area or in the available workforce in any geographical area (see *Wards Cove Packing v. Antonio*, 1989).

**Veterans’ Preference Rights**

These are not repealed or modified in any way by Title VII. In a 1979 ruling (*Personnel Administrator of Massachusetts v. Feeney*, 1979), the Supreme Court held that while veterans’ preference rights do have an adverse impact on women’s job opportunities, this is not caused by an *intent* to discriminate against women. Both male and female veterans receive the same preferential treatment, and male nonveterans are at the same disadvantage as female nonveterans.

**National Security**

When it is deemed necessary to protect the national security, discrimination (e.g., against members of the Communist Party) is permitted under Title VII. These exemptions are summarized in Figure 2-4. Initially it appeared that these exemptions would significantly blunt the overall impact of the law. However, it soon became clear that they would be interpreted very narrowly both by the EEOC and by the courts.