



Public Sector HR Essentials



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Module One: Public Sector HR Basics

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Part One: Role of Public Sector HR

Traditionally, public sector organizations are concerned with providing the framework within which all the entities—individuals, companies, groups, etc.—that compose “society” in our country are expected to operate, cooperate, and interact: in effect, to “provide for the common good” of all. The functions typically part of this framework include:

- Promulgation and enforcement of laws, rules, regulations, and ordinances;
- Provision of infrastructure services, such as roads, parks, etc.;
- A system of social services to care for those in need or unable to care for themselves;
- Safety services, such as police, fire, and prisons.

The above is not an all-inclusive list, but is illustrative of the public policy issues within which most public organizations are expected to perform. While there is an expectation that the cost of these services will not be excessive, there is no profit expectation, either.

This lack of a profit motivation in our free-market system creates an interesting dichotomy of perception of the public sector versus private sector workforce. In many areas of the country, public organizations are viewed as “employers of last resort”—organizations sought by job applicants who are unable to locate suitable employment in the private sector. In actuality, the great majority of employees in public organizations possess job skills and capabilities that are equal to, and in some instances greater than, those of their private sector counterparts. The perception of the public sector workforce being somehow inferior to private sector counterparts creates real issues for public HR professionals in terms of their ability to recruit and retain the best and brightest employees for their organization. This perception runs counter to how public service employment is viewed and valued elsewhere in the world, where public sector jobs are in great demand and public employees are viewed in a more positive manner.

There are many similarities between HR functions and roles in public and private organizations, but also numerous differences. A reading of Chapter One in Mathis and Jackson’s book will serve to highlight these similarities. Both HR systems are subject to all of the same laws, regulations, and court decisions. Both HR systems perform similar functions: recruitment, job classification, compensation, employee benefits, workforce planning, etc. How these functions are performed, however, differs markedly due to the unique circumstances and demands of public service. Some of these differences include:

- **Transitional leadership**—Mayors, county executives, and governors are elected for limited terms, usually due to voter approval or agreement with their stated goals or objectives. These goals and objectives may differ considerably from the previous administration, requiring the organization and the HR operation to change direction, provide greater emphasis on programs and operations

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previously deemed less important, and comply with different fiscal, budgetary, and taxation objectives. The leadership stability found in most private sector organizations is generally absent.

- **Transparency**—There is a clear expectation, reinforced with “sunshine” laws (i.e., open meeting/records laws), that business will be transacted in public, subject to oversight and close scrutiny by the citizenry. This requirement extends to all public HR operations. For example, in private firms, discussion or access to salary information is not available. In fact, employees are dissuaded from discussing salary issues with other staff. In most public organizations, however, salary data is considered public information and can be obtained by any citizen upon request for virtually any employee.
- **Merit system requirements**—In your readings for this portion of the course, Berman et al. set forth the rationale for merit selection and coverage for many public employees. The merit system requirements, in regard to testing and selection of applicants in many jurisdictions, are viewed as an impediment to a timely and efficient hiring process. Further, disciplinary procedures, geared to protect employees’ due process rights, inhibit managers’ capability in removing unsatisfactory employees. Merit system requirements, usually set by law, are one of the biggest areas of contention between HR staff and public managers.
- **Compensation**—The salaries for most public officials (e.g., mayor, governor, county executives) are generally set by statute or ordinance and can only be increased through an amendment to the statute or ordinance. This provides a firm ceiling against which all other jobs within the organization are ranked in terms of compensation. Increasing an official’s salary may spark a public outcry to contain costs, while refraining from any action that might increase levels of taxation. As a result, many top-level public officials are reluctant to push for increases despite demonstrable increases in the cost of living. This creates a real challenge for HR in attempting to assure fair and equitable compensation throughout all job levels within the organization.

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Part Two: History of Public Sector HR

The *Pendleton Act*

The *Pendleton Act* introduced the merit system to the federal government. The Act:

- Established the institutional framework for federal human resource management.
- Created a bipartisan Civil Service Commission as a buffer against partisan pressures from the executive and legislative branches.
- Served as a model for reformers seeking to change state and local governments.

The establishment of a merit system reduced partisanship and political sponsorship as the predominant criteria for employment in the public sector. Competitive examinations were introduced, and a nonpartisan, competent, career civil service with legally mandated tenure was expected to carry out the business of government. Entry into civil service was permitted at any level in the hierarchy, unlike systems where new recruits were required to start at the entry level and work their way up.

The reform movement that led to the *Pendleton Act* was clear about what it was against but less clear about what it favored. This led some observers to describe the reformers' efforts as essentially negative. They wanted to get rid of the spoils system (appointment based upon political favor) and the evils (graft, corruption, waste, incompetence) associated with it.

Over the years following the passage of the *Pendleton Act*, the reform movement spread to state and local governments. By the mid-20th century, civil service systems was common throughout public sector organizations. By the mid-to-late 70's, it became clear that the existing federal personnel system aimed at efficiency was, paradoxically, often inefficient. Among the problems were: entrenched civil servants hindering executive initiatives, difficulty in getting rid of incompetent employees, ease of circumventing merit system requirements, managers' frustration at cumbersome rules and red tape, and conflict in the roles of the Civil Service Commission.

A framework for considering the history of the merit system was provided by Paul Light in his book *The Tides of Reform: Making Government Work, 1945-1995* (1997). He provides four philosophies:

- Scientific management;
- War on waste;
- Watchful eye; and
- Liberation management.

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THE FOUR “TIDES OF REFORM”

Philosophy	Characteristics	Examples
Scientific Management	Focus on efficiency via tight hierarchy, specialization, clear chains of command	Brownlow, First Hoover Commissions, CFO Act
War on Waste	Emphasis on economy via inspectors, auditors, cross-checkers, and reviewers	IG Act, hearings on conference spending
Watchful Eye	Fairness via sunshine and openness	Admin Procedures Act, FOIA, FACA
Liberation Management	Puts premium on performance by letting managers manage, with market pressure as supporting tool for accountability	GPRA, Nat'l Security Personnel System, Perf. Based Organizations

Source: Light 1997

Scientific management was introduced by Frederick Taylor in his 1911 paper *The Principles of Scientific Management*. Taylor states that he developed this management theory “to prove that the best management is a true science, resting upon clearly defined laws, rules, and principles, as a foundation. And further to show that the fundamental principles of scientific management are applicable to all kinds of human activities, from our simplest individual acts to the work of our great corporations, which call for the most elaborate cooperation.” This served as the foundation for the scientific principles of administration: planning, organizing, staffing, directing, coordinating, reporting, and budgeting.

This management approach emerged in recommendations from the Brownlow Committee (1936-37), changing the administrative management and government structure to improve efficiency, and the first Hoover Commission Report (1947-49), reorganizing agencies around an integrated purpose and eliminating overlapping services.

Scientific management has a downside, as explained by Berman et al.: “[H]allmarks of scientific management as such job design [sic] (characterized by standard procedures, narrow span of control, and specific job descriptions instituted to improve efficiency) may actually impede achievement of quality performance in today’s organization where customization, innovation, autonomous work teams, and empowerment are required.”

The War on Waste was the second reform movement, with an emphasis on economy, using auditors, investigators, and inspectors general to achieve this goal. The initiators were:

- W.R. Grace (The Grace Commission) who headed President Reagan’s task force (1982-84) to determine how government could operate for less;
- Jack Anderson, a popular journalist who published eye-catching examples of government waste; and
- Senator William Proxmire, who initiated the Golden Fleece Award, presented to public officials in the United States whom the judges feel have perpetrated the

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greatest waste of public funds. Taxpayers for Common Sense have continued the tradition of handing out this award on an annual basis.

The government's reaction to these accusations was the establishment of internal controls: oversight and regulation, management directives, close supervision, and concerns over accountability. This led to a proliferation of rules, regulations and procedures. Multiple reviews of work became characteristic of government bureaucracy. The multiple levels of control/approval drastically reduced the responsiveness and agility of public sector organizations.

The Watchful Eye, the third reform movement, emphasized fairness and openness. The *1947 Administrative Procedure Act (APA)* governs the way administrative agencies may propose and establish regulations. The APA also set up a process for the federal courts to directly review agency decisions. It is the defining statute for the watchful eye reform movement.

Impetus for this reform effort emerged with the call for public access to information, the passage of whistleblower laws, and a watchful media - all with the intent of protecting the public interest. Renewed interest in this reform effort was prompted, in part, by the abuses of the Watergate scandal during the presidency of Richard Nixon that resulted in the indictment of several of Nixon's closest advisors, and ultimately his resignation on August 9, 1974.

Human resource implications from this movement can be found in greater scrutiny within the hiring process to assure integrity and job competence in new recruits. Creating a culture of openness, transparency, careful record keeping, and compliance with full disclosure is consistent with the watchful eye reform movement. All of these new imperatives, coupled with merit system procedures, increased the time and effort needed to accomplish the hiring process for new staff. Also, adopting codes of ethics and providing ethics training are in line with this philosophy. A more detailed discussion of ethics in government appears in Part Nine of this program.

Liberation management has as its goal achieving higher performance in government. This movement puts a premium on performance by allowing managers to manage, with market pressure as the supporting tool of accountability.

There is a focus on results, not rules, and is essentially outcomes management. In advancing this theory, Tom Peters states in his book, *Liberation Management: Necessary Disorganization for the Nanosecond Nineties* (1992), that "in the new economy, hierarchical business structures are being consigned to the shredder and are being replaced with flexible, fast-responding, ad hoc groups of brainworkers. This culture emphasizes the training of businesses and employees to innovate themselves to the top." Peters goes on to state that to stay ahead of the curve, we need to:

- Free the human imagination;
- Get close to and serve the customer;

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- Customize products and services;
- Abandon everything;
- Continuously reinvent yourself;
- Access the brainware around you;
- Know the front line;
- Demolish the monolith; and finally,
- Create teams that allow people to express their personalities.

Liberation management fosters internal freedom and empowerment. Its strength is a focus on measurable progress toward a goal. The primary implementers of liberation management are the individual members, units, and the organization itself. The primary accountability model is performance. One of the inherent weaknesses in liberation management is the loss of individual discipline and responsibility.

Trends in public administration toward employee empowerment, re-engineering, work teams, continuous improvement, customer service, flattened hierarchies, and self-directed employees reflect the breakdown of the bureaucratic machine model and the move toward liberation. ...Although the public sector will not banish bureaucracy, greater flexibility is evident at all levels of government and is likely to increase in the future. (p.13. *Human Resource Management in Public Service*, (2nd Edition) Berman, Bowman, West, and Van Wart)

The implication is the provision of a new method of managing people in government.

Two significant pieces of legislation, the *1883 Pendleton Act*, and the *1978 Civil Service Reform Act (CSRA)*, altered the institutional framework of public HR management. The resulting reforms included in the CSRA ultimately have been adopted in some form by many state and local governments. At the federal level, CSRA created two new institutions: the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB). OPM is charged with the “doing side” of HRM, coordinating the Federal personnel program. Conversely, the MSPB is the “adjudicatory side,” hearing employee appeals and investigating merit system violations.

CSRA also created the Federal Labor Relations Authority (FLRA), which serves as the federal sector counterpart to the private sector’s National Labor Relations Board. The FLRA is charged with overseeing, investigating, announcing, and enforcing rules pertaining to labor management relations in the federal government.

CSRA also established the Senior Executive Service. This program which is comprised of top-level administrators, mostly career civil servants with a lesser number of political appointees. The underlying purpose was to create a cadre of senior executives who may be assigned or reassigned to positions where their specific skills are required based upon the individual’s past performance and ability.

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Understanding the tides of reform and the essence of both the *Pendleton Act* and the *Civil Service Reform Act* provide an essential foundation for understanding the institutional structures, rules, and procedures that HR managers and specialists operate under today.

Collective Bargaining and the Merit System

Merit systems are civil service systems established to assure fair and nonpartisan practices with respect to employment throughout federal, state, and local governments. Their structure includes:

- A system of rules and policies established through formal administrative rules, regulations, and procedures which address employment practices;
- Job classification, compensation, and grievance and layoff procedures.

Many states have *Public Employee Relations Acts* (PERA), which gives public employees the right to organize for purposes of collective bargaining. Typically, most trade, blue collar, security, technical, and clerical employees are covered by the collective bargaining agreement. Their contract defines the specific terms and conditions of employment for such staff and takes precedence over terms established under merit system rules. On those issues not addressed by collective bargaining, the merit system rules still apply to contract-covered merit system employees.

Certain groups of employees are excluded from collective bargaining. One such group are confidential employees, defined as individuals in classifications sometimes covered in the bargaining unit who work in a human resources or other office where they have access to information that may be used in negotiations. Confidential staff generally receive the same salary and benefits as other staff in classifications covered by the collective bargaining agreement.

Two other groups generally exempted under PERA are supervisory and management employees. Merit system supervisory staff defined as supervisory under the PERA are generally exempt from collective bargaining because their responsibilities typically require them to exercise supervisory responsibility over other contract-covered staff. This determination is generally made on the basis of the job classification and the typical duties and responsibilities of that classification. Unless they are permitted bargaining rights, supervisory staff are governed by merit system rules. Supervisory staff who do have bargaining rights would be covered under some type of bargaining agreement that has been negotiated with management. Management employees, typically, are not covered by the provisions of collective bargaining agreements and generally merit system rules still apply to these employees.

There are a number of HR practitioners who believe that current civil service systems are outdated. They believe that with the passage of a host of employment laws and laws allowing for the creation of collective bargaining, these arrangements provide the same protections once offered solely by civil service systems.

These dual systems (i.e., civil service and union coverage) create additional burdens for public HR operations. Two or more sets of rules governing transfers, promotions, changes in job titles, etc., create complexities and, at times, confusion for public

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managers. Berman et al. (p. 18) cite a number of examples of HR practitioners who view merit systems as either necessary or an outdated relic of an earlier age.

Title VII of the *Civil Rights Act of 1964*

Before the *Civil Rights Act of 1964*, an employer could reject a job applicant because of race, religion, gender, or national origin. An employer could turn down an employee for a promotion, decide not to give him or her a particular assignment, or in some other way discriminate against that person because he or she was African-American or Caucasian, Jewish, Muslim or Christian, male or female, or Italian, German or Swedish. And it would all be legal.

When Title VII of the *Civil Rights Act of 1964* was passed, employment discrimination based upon one's race, religion, sex, national origin, or color became illegal. This law protects employees, as well as job applicants. All companies and organizations with 15 or more employees are required to adhere to the rules set forth by Title VII. The law also established the Equal Employment Opportunity Commission (EEOC), which continues to enforce this and other laws that protect against employment discrimination.

Some prohibitions include:

- An employer cannot make hiring decisions based on an applicant's color, race, religion, sex, or national origin. An employer can't discriminate based on these factors when recruiting job candidates, advertising for a job, or testing applicants.
- An employer cannot decide whether or not to promote a worker based on the employee's color, race, religion, sex, or national origin. He or she can't use this information when classifying or assigning workers.
- An employer cannot use an employee's race, color, religion, sex, or national origin to determine pay, fringe benefits, retirement plans, or disability leave.
- An employer cannot harass an employee because of race, color, religion, sex, or national origin.

In 1978, the *Pregnancy Discrimination Act* amended Title VII and made it illegal to discriminate against pregnant women in matters related to employment.

Another offshoot of Title VII was the creation of affirmative action programs. Affirmative action is generally defined as actions taken to overcome barriers to equal employment opportunities and to remedy the effects of past discrimination. This usually consists of comparing local labor market demographics of the potential labor pool with those of the organization's job applicants and employees. If an imbalance occurs, programs are developed and initiated to reach out to minorities and women to fill positions in job categories where they appear to be underrepresented.

While the occasional court case and government initiative made the news and stirred some controversy, affirmative action was pretty far down the list of public

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excitement until the autumn of 1972, when the Secretary of Labor's Revised Order No. 4, fully implementing Executive Order 11246 [Lyndon Johnson's EO establishing affirmative action], was issued. By extending to all contractors the basic apparatus of the construction industry "plans," the Revised Order imposed a one-size-fits-all system of "underutilization analyses," "goals," and "timetables" on hospitals, banks, trucking companies, steel mills, printers, airlines—on virtually scores of institutions, large and small, that did business with the government.

In contention was the nature of the goals and timetables imposed on every contractor by Revised Order No. 4. Were these goals tantamount to quotas? Some argued they were not. Affirmative action did not require (or permit) the use of gender or racial preferences. Others argued that they appeared to be quotas. They argued that affirmative action, if it did not impose preferences outright, at least countenanced them.

In the face of Title VI, which prohibits race-based discrimination by all groups receiving federal funds, and Title VII, how did preferential hiring and promotion ever arise in the first place? Part of the answer lay in the meaning of "discrimination." The *Civil Rights Act* did not define the term. In 1971, the U.S. Supreme Court, in *Griggs vs. Duke Power Co.*, determined that employment selection criteria that had an adverse impact on African Americans were discriminatory. In *Griggs*, the Court defined discrimination as any selection process that resulted in qualification rates of protected groups that are less than 80% of those of the highest group. Employers bear the burden of proof to show that a selection process that results in qualification rates of less than 80% for protected groups is not caused by discriminatory intent. The Court indicated:

- The objective of Congress in the enactment of Title VII was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. 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.
- What Congress required is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to exclude on the basis of racial or other impermissible classification.

Since many practices in most institutions were likely to be exclusionary, rejecting minorities and women in greater proportion than Caucasian men, all institutions needed to reassess the full range of their practices to look for, and correct, discriminatory effect. Against this backdrop, the generic idea of affirmative action took form.

Each institution was charged to effectively monitor its practices for exclusionary effect and revise those that cannot be defended as "necessary" to doing business. In order to make its monitoring and revising effective, an institution ought to predict, as best it can, how many minorities and women it would select over time were it successfully nondiscriminating. These predictions constitute the institution's

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affirmative action goals. Failure to meet the goals indicated the institution needed to revisit its efforts to eliminate exclusionary practices.

What happened when self-monitoring and revising fell short? In early litigation under the *Civil Rights Act*, courts concluded that some institutions, because of their past exclusionary histories and continuing failure to find qualified women or minorities, needed stronger medicine. Courts ordered these institutions to adopt quotas, to take in specific numbers of formerly excluded groups on the assumption that once these new workers were securely lodged in place, the institutions would adapt to this new reality.

Throughout the 1970's, courts and government enforcement agencies extended this idea, requiring a wide range of firms and organizations—from AT&T to the Alabama Highway Patrol—to temporarily select by the numbers. In all these cases, the use of preferences was tied to a single purpose: to prevent ongoing and future discrimination.

By the late 1970's, however, flaws in the policy began to show. Reverse discrimination became an issue, epitomized by the *Regents of the University of California v. Bakke* case in 1978. Allan Bakke, a Caucasian male, had been rejected two years in a row by a medical school that had accepted less-qualified minority applicants. The school had a separate admissions policy for minorities and reserved 16 out of 100 places for such students. The Supreme Court outlawed inflexible quota systems in affirmative action programs, which in this case had unfairly discriminated against a Caucasian applicant. In the same ruling, however, the Court upheld the legality of affirmative action per se.

Through its history, affirmative action has been both praised and scorned as an answer to racial inequality. The term "affirmative action" was first introduced by President Kennedy in 1961 as a method of redressing discrimination that had persisted in spite of civil rights laws and constitutional guarantees. It was developed and enforced for the first time by President Johnson.

Focusing in particular on education and jobs, affirmative action policies required that active measures be taken to ensure that African-Americans and other minorities enjoyed the same opportunities for promotions, salary increases, career advancement, school admissions, scholarships, and financial aid that had been almost exclusively the province of whites. From the outset, affirmative action was envisioned as a temporary remedy that would end once there was a level playing field for all Americans.

As part of this effort to level the playing field, in 1978 the EEOC issued its *Uniform Guidelines on Employee Selection Procedures*. The Statement of Purpose in the *Guidelines* provides insight into why these guidelines were needed:

A. Need for uniformity from issuing agencies. The federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice have jointly adopted these uniform

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guidelines to meet that need and to apply the same principles to the federal government as are applied to other employers.

B. Purpose of guidelines. These guidelines incorporate a single set of principles designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially those operating under merit principles.

C. Relation to prior guidelines. These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. They have been built upon court decisions, previously issued agency guidelines, practical agency experience, and standards from the psychological profession. These guidelines are intended to be consistent with existing law. (CFR-Code of Federal Regulations Pertaining to the U.S. Department of Labor, Title 41, Chapter 60, Part 60-3)

The Uniform Guidelines provide guidance to employers to help them comply with federal laws, which prohibit discrimination in employment based on race, color, religion, gender, and national origin. The guidelines apply to employers who are subject to Title VII of the *Civil Rights Act of 1964* or Executive Order 11246.

An employment selection process is considered discriminatory if it has an adverse impact on the hiring, promotion, or other employment opportunities of individuals because of race, gender, or ethnicity; that is, if the selection rate for any race, gender, or ethnic group is less than 80 percent for the group having the highest selection rate. A selection procedure that results in an adverse impact is allowed to stand if the employer can demonstrate that the test measures a trait necessary for successful performance of the job. Or, the employer can eliminate the factor from the selection process that caused the adverse impact.

The Universal Guidelines also require maintenance of detailed records on employment selection procedures.

The debate about affirmative action has also grown more difficult as the public has come to appreciate its complexity. Many liberals, for example, point to the injustice of affirmative action in a case like *Wygant (1986)*: African-American employees kept their jobs while Caucasian employees with seniority were laid off. And many conservatives would be hard pressed to come up with a better alternative to the imposition of a strict quota system in *Paradise (1987)*, in which the Alabama Department of Public Safety refused to promote any African-American employee above entry level even after a full 12 years of court orders demanded that they do.

The Supreme Court justices have been divided in their opinions in affirmative action cases, partially because of opposing political ideologies but also because the issue

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is complex. The Court approaches most cases in a piecemeal fashion, focusing on narrow aspects of policy rather than grappling with the whole issue.

Even in the famous *Bakke* case in 1978—the closest thing to a landmark affirmative action case—the Court was split 5-4. But in a landmark 2003 case involving the University of Michigan’s affirmative action policies—one of the more important rulings on the issue in twenty-five years—the Supreme Court decisively upheld the right of affirmative action in higher education. In the Michigan case, the Supreme Court ruled that although affirmative action was no longer justified as a way of redressing past oppression and injustice, it promoted a “compelling state interest” in diversity at all levels of society.

In a 2016 case (*Fisher v. University of Texas*) the Supreme Court considered a case involving reverse discrimination. Abigail Fisher, a Caucasian woman, claimed she was denied admission because of her race. Under a provision known as the Top 10 Percent program, Texas high school students who finish near the top of their class are guaranteed admission to the state’s public universities. The universities evaluate the remaining students using a number of criteria, including race and ethnicity. This practice is similar to processes found at other colleges and universities throughout the country. The Court rejected Fisher’s claims in a 4 to 3 decision (Justice Elena Kagan recused herself from the case), and Justice Samuel Alito, Jr. criticized the decision as “affirmative action gone berserk.” The end result is that the university can still consider factors like race and ethnicity in evaluating prospective students.

Many public jurisdictions have moved beyond strict affirmative action compliance policies to broader, more inclusive diversity management policies. We will discuss diversity management in Module Seven: EEO and Diversity.

Contracting Out and Privatization

As mentioned earlier, the public perception is that the private sector operates more effectively and efficiently than its public sector counterpart. Because of this perception, and in an attempt to reduce costs and improve productivity, many public organizations are looking at outsourcing or contracting out activities that would normally or traditionally have been done in-house. Early on, it became clear that HR would play an integral role in this process since this function is most capable of describing what work needs to be done and what outcomes are to be expected.

The benefits of privatization and outsourcing are clear and there appear to be no limits to the type of government activities that could benefit from these processes. In the United States, many cities and local governments use such initiatives to improve efficiency, increase competition, and reduce expenditures. The range of services and functions common to privatization and outsourcing initiatives varies enormously. They include everything from janitorial services to entire management structures.

HR itself is not immune from outsourcing and privatization. Administrative functions are being outsourced to vendors. Areas most commonly outsourced are employee assistance programs, retirement planning, benefits administration, payroll, and outplacement. The primary reason these activities are outsourced is to save money on staffing, take advantage of vendor expertise and technology, and free up time for HR to focus more on strategic activities that potentially benefit the organization.

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Recent reforms in this area have been the target of some critics. For example, public employee unions opposed Indiana’s attempt to privatize data processing, while attempts in Texas explored welfare privatization. George W. Bush administration’s outsourcing initiative, which sought to subject as many of the government’s approximately 850,000 “commercial jobs” as possible to privatization, was opposed by the American Federation of Government Employees, other unions, and some lawmakers. Opponents claim the privatization/contracting out agenda would diminish service quality by substituting low-cost vendors whose focus may be on production versus quality. They protest the designation of certain positions as commercial jobs and seek to shield select jobs from privatization.

Other disadvantages of outsourcing include:

- Outsourcing a business process results in loss of managerial control. It is harder to manage the outsourcing service provider as compared to managing one’s own employees.
- Many times, organizations forget to calculate the potential hidden costs of outsourcing which includes legal costs of putting together a contract between companies and the time spent monitoring and coordinating these contracts.
- Loss of customer focus.
- Loss of internal talent, as employees currently providing this service may be targeted by the outside service provider; and
- Outsourcing can produce security and confidentiality concerns. If an organization is outsourcing a business process such as payroll, confidential employee and financial information will be exposed to the outsourcing service provider. Careful screening of service providers, as well as careful deliberation in choosing which business process to outsource, are essential safeguards in deciding whether or not to acquire these services.

Eliminating Traditional Civil Service Systems

In recent years a number of governmental entities have sought to enact reforms intended to reduce, if not eliminate, civil service systems.

The 1993 report from the *National Commission on the State and Local Public Service (the Winter Commission)*, outlined an agenda that targeted civil service systems. The human resource portion of this report diagnosed “civil service paralysis” as a problem and prescribed deregulation of the government’s personnel system. Favoring a more flexible and less rule-bound system, the commission’s recommendations included the following:

- More decentralization of the merit system
- Less reliance on written tests
- Rejection of the rule of three and other requirements that severely restrict managerial discretion in selecting from a pool of eligible applicants

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- Less weight given to seniority and veteran's preference
- Fewer job classifications
- Less cumbersome procedures for removing employees from positions
- More portable pensions enabling government to government mobility
- More flexibility to provide financial incentives to exemplary performance by work teams.

At the federal level, the National Performance Review (NPR) explicitly attacked civil service protections, arguing that they serve as a major impediment to management reform. In its 1993 report, *Reinventing Human Resources Management*, the NPR stated: "The federal government's current personnel management 'system' must be candidly termed 'management by regulation'.... The federal human resource administrative system contains major impediments to efficient and effective management of the workforce. It's a patchwork of rules and requirements that confound rather than serve customer needs. It's process-driven; results are a byproduct, not a measure of accountability. At the day-to-day operating level, it's not user-friendly—to managers, to employees and their representatives, or to personnel specialists."

At the state level, in 1996, Georgia enacted GeorgiaGain, a comprehensive reform of its civil service system. GeorgiaGain went far beyond other changes made to civil service systems in recent history. The biggest change, which went into effect July 1, 1996, made anyone hired by the state after that date an at-will employee without merit system protection. Gone were competitive testing and scientific methods to classify jobs. Now, each state agency is responsible for creating and administering its own HR system, defining its own job classes, qualifications, pay, and recruiting and hiring standards. The state's central personnel agency now serves primarily as a consultant to those agencies.

In 2001, Florida Governor Jeb Bush announced his plan for civil service reform—Service First. Some of the key proposals in Governor Bush's plan included:

- Removing 16,000 employees from the career-service system and placing them in appointed positions, stripping them of job protections.
- Allowing agency heads to use "sound discretion" in firing workers—a weakening of the just cause standard.
- Eliminating the independence of the Public Employee Relations Commission, the duties of which included hearing disciplinary appeals.
- Eliminating bumping rights—the ability of senior employees to move into the jobs of less-senior employees if they are laid off.
- Allowing agencies to award bonuses to workers for top performance—a change from the system of giving across-the-board increases.

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In Hawaii, the legislature sunset all existing civil service rules as of July 1, 2002, with the intention of creating a “modern” civil service system from scratch. Proponents claim the old system was rigid and led agencies to hire temporary workers in droves as a backdoor way of avoiding the rules. In responding to this challenge, the Hawaii Department of Human Resources drafted a new, updated set of personnel rules which were approved by the governor on November 10, 2003.

In 2012, Arizona Governor Jan Brewer succeeded in obtaining legislative approval to gradually transition the state away from a traditional civil service system toward an at-will system modeled after private sector employment practices. The system will eliminate traditional civil service protections, such as the ability for new employees and some current employees to appeal disciplinary actions and file grievances. Current employees who accept a raise, promotion, or a transfer to another position will automatically convert to the at-will status. The expectation is that the long-term effect of the changes will increase the number of at-will employees from 26% to over 80%.

Also in 2012, *Tennessee implemented the Tennessee Excellence, Accountability and Management (TEAM) Act* that is intended to create a personnel system similar to those in the private sector. The *TEAM Act* created two distinct employee service groups:

- Executive service, which is composed mainly of senior-level staff, who will remain as “at will” employees; and
- Preferred service, which included what were previously known as the “career service” comprised of managers and front line staff. This latter group will have a streamlined appeals process for wrongful terminations.

The *TEAM Act* abolished the existing hiring system, replacing it with one that eliminated ineffective tests. It also established a new performance evaluation system based on performance outcomes established for each position, and eliminated procedures that allowed longer-term employees to bump less-senior staff from similar positions.

There is no denying that civil service and merit systems, in general, face serious challenges. The focus of any reform effort should be how to best deliver cost-effective, high-quality public services. There may well be aspects of existing civil service systems that are antiquated and inefficient. On the other hand, many proposed changes may bring about perceived benefits without addressing the real issues.

Problems with civil service will not be solved by merely freeing management from rules and limits. Managers, given flexibility, may not automatically do what is right. It is important in the public service to retain those principles that protect employees from arbitrary and discriminatory treatment, protect the public from the consequences of patronage, promote fairness, and create a professional and stable workforce.

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Part Three: Basic Laws Governing Public Sector HR

As an HR professional, the number of legal issues you need to be aware of can be overwhelming, especially with the increasingly litigious nature of our society and the many nuances of employment and workplace law. As an HR professional or manager, you will need to become familiar with both the provisions and intent of these and other laws impacting HR in the workplace.

As Berman et al. point out: “People do not have the same rights to liberty on their jobs as they have as citizens.” Workplace laws and regulations impacting human resource management derive from the U.S. Constitution and a variety of other statutes. Their effect is to provide standards for employers dealing equitably with employees, who, in turn, assume certain responsibilities and behaviors in the workplace. The challenges facing managers in complying with applicable workplace laws are many, but the first step in this process is to ensure that all relevant and appropriate facts and information have been garnered before attempting analysis and/or resolution. It follows, then, that some basic understanding of the more significant laws is in order.

The *Civil Rights Act of 1964* has been covered in some detail previously in the discussion of laws impacting merit and civil service systems.

Age Discrimination in Employment Act

The *Age Discrimination in Employment Act* (ADEA) prohibits any employer from refusing to hire, discharge, or otherwise discriminate against any individual because of age. The Act covers compensation, terms, conditions, and other privileges of employment, including health care benefits. This Act specifically prohibits age-based discrimination against employees who are at least 40 years of age. The purpose of the Act is to promote the employment of older persons and to prohibit any arbitrary age discrimination in employment.

The roots of the ADEA can be traced back to 1964, when the U.S. government enacted Title VII of the *1964 Civil Rights Act*. This Act radically changed the nature of the employer/employee relationship in the United States. The core of Title VII was to prohibit discrimination in employment based on race, color, sex, national origin, or religion. This statute provided a way for women and minorities, in particular, to challenge barriers that limited equal opportunities in organizations. States adopted similar legislation. One variable noticeably missing from Title VII was age discrimination. Three years later, the U.S. Senate and the House of Representatives enacted ADEA.

ADEA covers individuals, partnerships, labor organizations and employment agencies, and corporations that: 1) engage in an industry affecting interstate commerce and 2) employ at least 20 individuals. The act also covers state and local governments. Referrals by an employment agency to a covered employer are within the ADEA's scope regardless of the agency's size. In addition, ADEA covers labor union practices affecting union members; usually, unions with 25 or more members are covered. ADEA protects against age discrimination in many employment contexts, including hiring, firing, pay, job assignment, and fringe benefits.

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Under the Act, employers are forbidden to refuse to hire, to discharge, or to discriminate against anyone with respect to the terms, conditions, or privileges of employment because of a person's age. The Act also forbids employees from limiting, segregating, or classifying an individual in a way that adversely affects their employment because of age. All job requirements must be truly job-related and ADEA forbids employers from reducing the wage rate of an employee to comply with the act. It forbids seniority systems or benefits plans that call for involuntary requirements due to age and also makes it illegal for employees to indicate any issue related to age in advertisements for job opportunities.

ADEA was enacted to promote the employment of older persons based on ability rather than age and to help employers and employees find ways to meet problems arising from the impact of age on employment. As a result, the act authorizes the Secretary of Labor to perform studies and provide information to labor unions, management, and the public about the abilities and needs of older workers and their employment potential and varied contributions to the economy.

Americans with Disabilities Act

Having a disability doesn't need to keep one from having a productive career. Many people with disabilities can work and the jobs they can hold vary with each individual's abilities and limitations. What's important to remember is that no one but the individual, in consultation with his or her health care providers, has the right to decide what job he or she can hold.

There are several laws which protect the workplace rights of Americans with disabilities. Included are several sections of the *Rehabilitation Act* of 1973. These sections prohibit federal agencies from discriminating against qualified individuals with disabilities, require contractors and subcontractors who have a contract with the federal government for \$10,000 or more annually to take affirmative action to employ and advance in employment qualified individuals with disabilities, prohibit recipients of federal financial assistance from discriminating against qualified individuals with disabilities in employment and in their programs and activities, and require that individuals with disabilities, who are members of the public seeking information or services from a federal department or agency, have access to and use of information and data that is comparable to that provided to the public who are not individuals with disabilities. Individual states may have similar antidiscrimination laws on the books.

The primary legislation in this area is the *Americans with Disabilities Act (ADA)* which was passed in 1990. ADA's Title I covers employment and requires that employers of more than 15 people must make reasonable accommodations that allow a qualified job applicant with a disability to complete the application process or a disabled employee to carry out the duties of his or her job. According to the Act, "an individual is considered to have a disability if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment."

It's illegal to require a job candidate to take a medical examination prior to a job offer being made. Nor can the employer try to ascertain whether a job candidate has a disability. Therefore, it is sometimes up to the employee to decide whether

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to disclose his or her disability to the employer. The choice is truly the individual's in the case of invisible disabilities. Invisible disabilities are ones which aren't readily obvious to anyone else but yet may keep the individual from performing certain essential job duties. An example may be a chronic illness like arthritis or a mental illness. While one may have reasons for keeping a disability a secret from an employer, revealing it may require the employer to provide certain accommodations that will allow a worker to perform his or her job. The ADA mentions that an employer may refuse to grant an accommodation if the accommodation being sought by the job applicant is not reasonable. The determination of reasonable in the act is ill-defined, and for HR professionals this lack of definition has created a virtual minefield, and is the subject of much ongoing litigation.

The ADA was amended effective January 1, 2009, to expand the definition of a disability by overturning several opinions that had been issued by the U.S. Supreme Court that narrowed the definition of a disability and set a restrictive standard for qualifying as being disabled. The impact of these amendments will be to increase the number of individuals in the workplace who are protected by the ADA. We will discuss different impacts of the ADA, as amended, in more detail in Modules Three and Seven.

Fair Labor Standards Act

The *Fair Labor Standards Act's* (FLSA) basic requirements are:

- Payment of the minimum wage;
- Overtime pay for time worked over 40 hours in a workweek;
- Restrictions on the employment of children; and
- Recordkeeping.

The FLSA has been amended on many occasions since its passage in 1938. Currently, workers covered by the FLSA are entitled to the minimum wage and overtime pay at a rate of not less than one and one-half times their regular rate of pay after 40 hours of work in a workweek. Various minimum wage exceptions apply under specific circumstances to workers with disabilities, full-time students, youth under age 20 in their first 90 days of employment, employees whose income is derived in full or in part from tips, and student learners. Special rules apply to state and local government employment involving fire protection and law enforcement activities, volunteer services, and compensatory time off (in lieu of cash payment). Employers are required to keep records on wages, hours, and other items which are generally maintained as an ordinary business practice.

The FLSA child labor provisions are designed to protect the educational opportunities of youth and prohibit their employment in jobs and under conditions detrimental to their health or safety. The child labor provisions include some restrictions on hours of work for youth under 16 years of age and lists hazardous occupations too dangerous for young workers to perform.

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Wages required by the FLSA are due on the regular payday for the pay period covered. Deductions made from wages for such items as cash or merchandise shortages, employer-required uniforms, and tools are not legal if they reduce the wages of employees below the minimum wage or reduce the amount of overtime pay due under the FLSA.

In order for the FLSA to apply, there must be an employment relationship between an "employer" and an "employee." The FLSA also contains some exemptions from these basic rules. Some apply to specific types of businesses and others to specific kinds of work. We will discuss the legal ramifications of the FLSA in more detail in Module Four of this course.

Occupational Safety and Health Act

This 1970 legislation set federal standards for workplace safety and imposed fines for failure to meet them. A controversial law, it took much of the power from the states for regulating workplace safety. It authorized the U.S. Department of Labor to have federal compliance officers make surprise inspections of business firms. It established the National Commission of State Workmen's Compensation Laws to recommend upgrades of worker protection, including higher disability benefits, compulsory coverage, and unlimited medical care and rehabilitation. Most states adopted the recommendations, which led to increases in workers' compensation insurance premiums. It should be noted that some state and local governments are exempt from the law's requirements; check your organization's current status.

President Richard Nixon signed the *Occupational Safety and Health Act* (OSHA) into law on December 29, 1970. Congress passed OSHA "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." To meet this goal, Congress created a vast federal bureaucracy empowered to regulate most businesses. OSHA touches nearly every American workplace and has become a landmark in the history of labor, employment, and public health law.

Soon after its passage, OSHA became a powerful presence in American workplaces. Many businesses deeply resented the government for telling them how to operate, and the Act provoked much controversy. Despite this, OSHA has remained relatively unchanged. It has only been amended once, in 1998, but these amendments were relatively minor.

Administrative rulemaking has kept OSHA current by responding to changing dangers in the American workplace. After first setting standards for worker safety, OSHA shifted its focus to worker health, setting standards to protect workers from the effects of asbestos, cancer-causing chemicals, beryllium, lead, cotton dust, carbon monoxide, dyes, radiation, pesticides, exotic fuels, and other toxins. In setting such standards, OSHA's jurisdiction has steadily expanded. The nature of workplace injuries has also changed, and OSHA has responded, for example, by setting new standards to alleviate repetitive stress disorders like carpal tunnel syndrome.

OSHA's impact on American business has also varied much in response to evolving administrative rulemaking. Under the administration of President Clinton, OSHA attempted to shift from a top-down, command and control system in

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which the government tells industry what it should do or else, to a partnership between regulators and private businesses. The passage of OSHA resulted in new responsibilities for the HR function as the overseer of internal safety programs and initiatives. This expanded role may place HR at odds with management as HR seeks to promote safety and assure worker protections.

The Family and Medical Leave Act (FMLA)

This act requires employers to provide up to twelve weeks, or 480 hours, of unpaid leave annually to any employee for any serious medical condition of the employee or a member of the employee's immediate family, or for the birth or adoption of a child. The Act was first introduced into Congress in 1985. It passed both chambers of Congress, but was vetoed by President George H.W. Bush in 1991 and 1992 before being signed by President Bill Clinton in 1993.

The FMLA covers all public employers and private companies with more than fifty employees. A central component of FMLA is the requirement that employers who provide their workers with health insurance must maintain group health coverage for any employee while on leave. However, employers may require workers to prepay premiums or pay while on leave. The FMLA is enforced by the Wage and Hour Division of the Department of Labor. FMLA rights are in addition to paid sick leave, but employers may force workers to use vacation or personal leave after FMLA benefits expire. Employers are forbidden to deny benefits to or discharge those employees using FMLA benefits. Some rights coincide with the ADA, although the latter covers employers with fifteen or more workers and requires companies to provide reasonable accommodations for disabled applicants.

The law recognizes the growing needs of balancing family, work, and obligations and promises numerous protections to workers. Some of these protections include:

- Up to twelve (12) workweeks of unpaid, job-protected leave for various reasons such as
 - The birth of a son or daughter or the adoption or placement into foster care of a child
 - Caring for a child, spouse, or parent with a serious health condition
 - An employee's serious health condition
- Restoration to the same position upon return to work. If the same position is unavailable, the employer must provide the worker with a position that is substantially equal in pay, benefits, and responsibility.
- Protection of employee benefits while on leave. An employee is entitled to reinstatement of all benefits to which the employee was entitled before going on leave.
- Protection of the employee to not have their rights under the act interfered with or denied by an employer.

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- Protection of the employee from retaliation by an employer for exercising rights under the act.

Generally, the act ensures that all workers are able to take extended leaves of absence from work to handle their own or an immediate family member's serious health condition without fear of being terminated from their jobs by their employers or being forced into a lower job upon their return.

The leave guaranteed by the Act is unpaid, and is available to those working for employers with 50 or more employees within a 75 mile radius. In addition, an employee must have worked for the company at least 12 months and 1,250 hours in the preceding 12 months. The Act applies to all U.S. government employees and state employees. In 2003, the Supreme Court of the United States, in a 6-3 decision written by Chief Justice Rehnquist, upheld FMLA coverage for state employees in the Nevada Department of Human Resources. The State of Nevada had unsuccessfully challenged the provisions under the Eleventh Amendment to the U.S. Constitution. Effective January 16, 2009, the FMLA was expanded to allow 26 weeks of leave per 12 month period to care for injured/ill military service members. Up to 12 weeks of leave also are provided for "any qualifying exigency" related to a son/daughter, spouse, or parent's call to active duty.

On February 23, 2015, the U.S. Department of Labor's Wage and Hour Division announced a Final Rule to revise the definition of spouse under the FMLA due to the Supreme Court's decision in *United States v. Windsor*, which found section 3 of the *Defense of Marriage Act* (DOMA) to be unconstitutional. The final rule amends the definition of spouse so that eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse or family member, regardless of where they live. More information is available at the Wage and Hour Division's [FMLA Final Rule](#).

One of the biggest areas of concern for HR professionals with this act is determining when a qualifying event occurs that triggers the entitlement to the 12 weeks of leave. Numerous court cases have resulted over the years in regard to an employee's failure to notify the employer of the medical issues, or as a result of a manager's disregard of an employee's absence for several weeks before notifying HR or top management.

Uniformed Services Employment and Reemployment Rights Act

The *Uniformed Services Employment and Reemployment Rights Act* of 1994 (USERRA) was signed into law by President Clinton on October 13, 1994, to protect the civilian employment of non-full-time military service members in the United States called to active duty. The law applies to all United States uniformed services and their respective reserve components.

USERRA applies to all employers in the United States, including federal, state, local, private, and even foreign companies operating within the United States and its territories. USERRA also applies to all U.S. employers operating in foreign countries.

USERRA clarifies and strengthens the Veterans Reemployment Rights (VRR) Statute by protecting civilian job rights and benefits for veterans, members of

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reserve components, and even individuals activated by the president of the United States to provide federal response for national emergencies. USERRA also added federal employees to those employees already eligible to receive U.S. Department of Labor assistance in processing claims of noncompliance.

The cumulative length of time that an individual may be absent from work for military duty and retain reemployment rights is five years. The exceptions to the five-year limit include initial enlistments lasting more than five years, periodic National Guard and reserve training duty, and involuntary active duty extensions and recalls, especially during a time of national emergency. USERRA clearly establishes that reemployment protection does not depend on the timing, frequency, duration, or nature of an individual's service as long as the basic eligibility criteria are met.

USERRA also provides protection for disabled veterans by requiring employers to make reasonable efforts to accommodate the disability. Service members convalescing from injuries received during service or training may have up to two years from the date of completion of service to return to their jobs or apply for reemployment.

Returning service members are to be reemployed in the job that they would have attained had they not been absent for military service (this is known as the "escalator principle") with the same seniority, status, and pay, as well as other rights and benefits determined by seniority. USERRA also mandates that reasonable efforts (such as training or retraining) be made to enable returning service members to refresh or upgrade their skills to help them qualify for reemployment. The law clearly provides for alternative reemployment positions if the service member cannot qualify for the escalator position. USERRA also provides that while an individual is performing military service, he or she is deemed to be on a furlough or leave of absence and is entitled to the nonseniority rights and benefits accorded other individuals on comparable types of nonmilitary leaves of absence.

Health and pension plan coverage for service members is provided for by USERRA. Individuals performing military duty of more than 30 days may elect to continue employer-sponsored health care for up to 24 months; however, they may be required to pay up to 102 percent of the full premium. For military service of less than 31 days, health care coverage is provided as if the service member had remained employed. USERRA clarifies pension plan coverage by making explicit that all pension plans are protected.

The period an individual has to make application for reemployment or to report back to work after military service is based on time spent on military duty. USERRA also requires that service members provide advance written or verbal notice to their employers for all military duty unless giving notice is impossible, unreasonable, or precluded by military necessity. An employee should provide notice as far in advance as is reasonable under the circumstances.

Consumer Credit Protection Act

This 1968 legislation makes it mandatory for lenders to disclose to credit applicants the annual interest percentage rate (APR) and any finance charges.

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This statute is designed to protect borrowers of money by mandating complete disclosure of the terms and conditions of finance charges in transactions, by limiting the garnishment of wages, and by regulating the use of charge accounts.

The *Consumer Credit Protection Act* (15 U.S.C.A. § 1601 et seq. [1972]) was the first general federal consumer protection legislation. Title I of this law, known as the *Truth-in-Lending Act* (15 U.S.C.A. § 1601 et seq. [1968]), requires that the terms in consumer credit transactions be fully explained to the prospective debtors. Title VI, known as the *Fair Credit Reporting Act* (15 U.S.C.A. § 1601 et seq. [1978]), applies to businesses that regularly obtain consumer credit information for other businesses. Its purpose is to ensure that consumer reporting activities are conducted in a manner that is fair and equitable to the affected consumer.

Employee Polygraph Protection Act

The *Employee Polygraph Protection Act of 1988* (EPPA) generally prevents employers from using lie detector tests, either for pre-employment screening or during the course of employment, with certain exemptions. Employers generally may not require or request an employee or job applicant to take a lie detector test, or discharge, discipline, or discriminate against an employee or job applicant for refusing to take a test or for exercising other rights under the act. In addition, employers are required to display a poster in the workplace explaining the EPPA for their employees.

For additional information regarding federal laws and regulations, we suggest that you research the websites for the U.S. Department of Labor (www.dol.gov) and the Equal Employment Opportunity Commission (www.eeoc.gov). You may also want to check the sites for your state and local regulatory agencies to determine more precisely the local and state guidelines with which your organization needs to comply.

Ban-the-Box Laws

Ban-the-box laws prohibit employers from inquiring about an applicant's criminal history on job applications. As of June 2017, 28 states and more than 150 U.S. cities and counties have adopted a law on this issue. These initiatives remove the conviction history question from job applications and delay the background check until later in the hiring. The main variations among these laws are:

- The point during the hiring process at which an employer can inquire about an applicant's criminal history;
- Whether the law applies to state or local government agencies, vendors of government agencies, and/or private employers; and
- The types of positions to which the law applies.

In 2012, the EEOC issued guidance on the use of arrest and conviction records in employment decisions that can be reviewed at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. The ban-the-box movement has been growing in

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popularity, and it is estimated that there are now 211 million people in the United States that live in a state or local government with some form of ban-the-box or fair-chance policy.

Affordable Care Act

The *Affordable Care Act* was signed into law on March 23, 2010. The law is designed to expand health care coverage to those Americans who did not already have employer-sponsored plans or coverage through a program like Medicare. The law authorized the establishment of federal and state marketplaces and expanded Medicaid. The law includes individual and employer mandates and has been subjected to several legal challenges over its constitutionality, as well as to specific provisions of the law. It is estimated that due to the law, over 20 million Americans are getting health care coverage either through participation in the exchanges or due to the expansion of Medicaid.

In 2017, the *American Health Care Act* was introduced in Congress to repeal and replace parts of the *Affordable Care Act*. This legislation had the support of the Republican leadership in the House of Representatives, as well as President Trump and his administration.

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Part Four: Roles and Responsibilities of the HR Analyst

Berman et al. discuss the tides of reform that have impacted the performance of governmental institutions. The influence of these trends can be found in the HR function, and in fact the HR system and operation was frequently the vehicle by which these tides of reform were implemented within public organizations. This is because top management recognized that the HR function within all organizations—public and private—is the only administrative function that has the capability to touch all segments of the organization down to the individual employee.

In many instances, these implementation efforts via the HR function in public organizations were less than successful, not because of a lack of effort or dedication by the HR staff, but because of the lack of positive perception of the HR function and, perhaps, the absence of the required skill set needed to support these initiatives. Mathis and Jackson touch on this perception issue with their discussion of “Why HR Is Not Always Respected.” This lack of respect is not isolated, but an outgrowth of the old perception of HR as paper pushers and keepers of records. Mathis and Jackson discuss this old perception, and then move on to emphasize the transformational roles that characterize new HR operations—“the designers of management systems to ensure that human talent is used effectively and efficiently to accomplish organizational goals.” This transformation of HR roles started in private firms in response to the organizational need to compete in the global marketplace and has spread to the public sector. This transformation of HR continues in both private and public organizations throughout the country and will continue for the foreseeable future.

IPMA-HR has been aware of this transformation and has sought to prepare public HR professionals through a variety of means, including articles in the monthly magazine *HR News*, guest speakers at conferences, forums, and webinars, and formal and online training sessions. One of these courses, *Developing Competencies for HR Success*, deals directly with the transformational roles needed by public HR professionals. The following is a brief summary of these roles and the concomitant competencies needed for success:

- **HR Leader**—There are two dimensions to the HR Leader role. First is the need to provide active leadership within the organization to enlist support and promote efforts to achieve a fully diverse workforce. This also includes sensitivity to merit system principles and the application of ethics and integrity in all of your dealings.

The second dimension is the capability to balance sophisticated employee and workforce concerns with the organization’s short- and long-term goals and objectives. The ability to balance the, at times, competing interests of both groups is absolutely essential to your leadership success.

- **Business Partner**—There are two dimensions to the Business Partner role. The first is the need for the HR professional to go beyond just providing support services, completing transactions, or pushing paper. This requires working with managers to devise solutions to organizational or performance problems.

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The second dimension is understanding and accepting that as an HR professional, you share accountability with line managers for organizational success. This is an action-oriented role as a management partner, assisting in strategic planning activities aligned with achieving the organization's mission and strategic goals.

- **Change Agent**—There are two dimensions to this role as well. The first is the willingness and capability to lead short- and long-term change initiatives within the HR function. This requires the HR professional ensure that all HR staff recognize the need for change, are prepared for it, and at the same time address external customer concerns about the impact of the change on the services they expect from HR.

The second dimension is assisting managers and others in the organization deal with change, specifically as it relates to future recruitment, staffing, and human capital development, along with overcoming the natural resistance to change that most employees exhibit from time to time.

- **HR Expert**—This is a contextual role that is the foundation for the three preceding roles. The HR Expert knows the laws, rules, regulations, and requirements that govern the organization's HR function and is able to apply them creatively to situations that arise. Simply stated, if you don't fully understand the rules of the game, you can't be an effective player—or HR Leader, Business Partner, or Change Agent.

There are twenty competencies that IPMA-HR has identified that support the four roles identified above:

- Knows organization's mission, vision, and values.
- Applies innovation, creativity, and calculated risk taking.
- Knows and applies organizational development principles.
- Is able to align human resource initiatives to the organization's mission and service deliverables.
- Designs and implements change methodologies.
- Leverages return on investment and information technology strategies to human resources management (HRM).
- Develops and implements human resource and organizational processes for customers.
- Designs and delivers marketing programs related to value-added HRM initiatives.
- Maximizes the current and potential contributions of a diverse workforce.

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- Practices integrity and ongoing ethics-based leadership in all circumstances.
- Knowledge of business processes to change and improve efficiency and effectiveness.
- Knowledge of human resource laws and regulations.
- Awareness of the unique nature of the public service environment.
- Understand team behavior and possess the ability to lead teams to high performance.
- Communicate effectively verbally and in writing and make persuasive public presentations on behalf of the human resources function.
- Assess and balance competing values found within the organization (e.g., the greater mission and vision, various department values, values as demonstrated by executive and mid-management leadership).
- Use of business systems skills, including the ability to think strategically and creatively.
- Analyze organizational issues to develop collaborative solutions that meet the needs of all stakeholders.
- Use negotiating skills, including consensus-building, coalition-building, and dispute resolution.
- Build and sustain trust-based relationships.

Additional information regarding the HR Competency course, including options for registering to take the course can be obtained at IPMA-HR's website, www.ipma-hr.org.

The transformation described by Mathis and Jackson is not limited to public and private sector HR operations in this country. For example, IPMA-HR's course on *Developing Competencies for HR Success* that embodies the roles and competencies described above has been taught successfully around the world, such as China, the Philippines, Thailand, and Sri Lanka. Public HR professionals in these countries understand that a transformation in the manner in which public HR work is performed is underway. That is because we are increasingly interconnected; changes and transformations in one corner of the globe will quickly spread elsewhere.

Exercise

Evaluate the extent to which the four roles that compose the IPMA-HR's model are present in your organization. Do you feel these roles could be expanded further within the HR function?

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Part Five: Basic Organizational Structures

Berman et al. briefly discuss the issue of centralized/decentralized human resource operations, pointing out that there has been a movement away from a centralized delivery model for HR services. The authors specifically mention the decentralization efforts of the U.S. Office of Personnel Management.

Before we delve into the merits of both structures, it might be advisable to define terms:

- A **centralized system** is one where all important HR decisions, activities, and services originate from a central point. Examples of important activities/services would include recruitment, selection, classification and compensation, benefits, and labor and employee relations. There may be some HR processing activities performed off-site from the central HR hub.
- A **decentralized system** is one where some or a majority of the important HR decisions, activities, and services listed previously are performed separately from central control and oversight. A local professional HR staff provides direct and continuing HR services, subject to central oversight and direction for conformance to broad policies.

There has been continuing controversy for years over which model is most effective and efficient. The quick and easy answer is that it depends on a number of factors:

- If the organization is small, with a central administrative hub where decision-making activities are concentrated, a **centralized** HR system would probably be most effective.
- A **centralized** HR system would also be potentially effective in a medium-sized organization with a few small offsite locations, with a central administrative hub where decision-making activities are concentrated.
- In a medium-sized organization with many decentralized work locations, where the majority of staff is permanently assigned to decentralized locations, a **decentralized** system may be more effective.
- A large organization, with several thousand employees, a central administrative hub, and few decentralized operations might be able to make a **centralized** system work effectively. The key would be whether the HR operation utilized a “one-stop shopping” methodology where designated HR units provided a complete range of services to designated line units within the organization, usually coupled with a sophisticated system of automated HR services.
- A decentralized system would probably be more effective in large organizations with multiple local decentralized operations, even if there is a central administrative hub within the headquarters.

Others factors that need to be considered in centralization versus decentralization would include physical distance of the decentralized operations (i.e., administrative

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freedom and discretion in directing local operations), the effective application of IT to HR processes, and the amount of decentralization that exists within the organization for administrative functions other than HR.

There are very few “pure” centralized or decentralized HR operations, as technology, budgetary, and staffing limitations have prompted other means of providing HR services:

- Shared service models, where HR services are provided from a central location in a decentralized system because of economies of scale that can be realized through the combination of all similar activities. The State of Michigan’s Civil Service Commission and the Commonwealth of Massachusetts are examples of shared service models.
- Employee self-service centers/kiosks provide an opportunity for employees to obtain basic HR services, get answers to questions, and update employee information.

The above innovations can be used as part of a centralized or decentralized system. Also, it is important to keep in mind that as the needs, size, and structure of the organization changes, the centralized/decentralized nature of the HR function may need to be reconsidered, and perhaps modified. In summary, there are many models that can be used to organize HR operations—choosing the one that best fits the needs of your organization at a given point in time presents the real challenge.

Exercise: Consider your organization and HR operation

- Does the existing centralized/decentralized system meet the current and anticipated needs of the organization? What factors led you to that conclusion?
- Would a shared service or employee self-service component complement your existing HR function? What factors led to that conclusion?
- If your organization is currently using shared services or employee self-service, how would you evaluate its effectiveness, and should it be expanded?

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Part Six: Systems Approach and Use of Information Technology to Enhance Service Delivery

For many years, the HR function was viewed within most organizations as the “people” function: those folks who kept the records, processed the payroll, and made the employees feel good about the organization. In the book, *The Rise of HR*, David Ulrich discusses the “historical myth” and “modern reality” of the human resource function that are detailed in the chart below:

HISTORICAL MYTH	MODERN REALITY
HR professionals go into HR because they like people	HR is not just about liking people, but about understanding and solving people related problems in organizations
HR professionals don't believe in or rely on numbers	HR has relied on data for years; now more than ever, analytics guide HR decision making
HR professionals want to get to the table where business decisions are made	HR professionals are now invited to the table and the challenge is knowing what to contribute to stay
HR's customers are the employees in the company	HR's customers are the customers of the organization; HR work helps both internal employees and external customers
HR's measure of success comes from delivering the practices related to HR	HR is about delivering business results
HR is responsible for the organization's talent, leadership, and capability	Line managers are the primary owners of talent, leadership, and culture; HR professionals are the architects who design blueprints and inform choices
HR's primary role is to keep the organization compliant with laws and regulations	Good HR leaders help the organization make good business decisions

Accomplishing Ulrich's modern realities requires the HR function to move away from a social science model to a business model that fully integrates its mission, goals, and objectives with the organization's mission, goals, and objectives. This requires, and in fact demands, HR to become more strategic in its approach. HR must also critically evaluate its internal systems to align with organizational imperatives: where the organization is now, where it is going short term, and what are its long-term goals and objectives. These alignment and evaluative activities require HR to adopt a systems approach in determining if its services meet the organization's (a.k.a, the customer's) needs. Some examples of the type of HR system reviews that should be considered include:

- Do current recruitment and selection processes provide the job applicants needed by the organization? Will these processes need to be modified in light of future workforce needs?
- Does the current job classification system capture the essential tasks and responsibilities the organization requires? Will the capabilities, competencies, and skillsets outlined in the existing job standards continue to meet the

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organization's future needs in light of globalization, technological change, and the public's desire for new or expanded public services?

- Is the existing compensation system adequate to attract and retain the talent needed for organizational success? What changes may be needed to assure future competitiveness?
- Whether unionized or not, what is the nature of the relationship between the organization and its employees? What could or should be done to engender more positive perceptions of the organization and foster greater commitment?

As mentioned previously, the above are just a few examples of the HR system reviews that need to be conducted to assure alignment with the current and future direction of the organization. Otherwise, misalignment of the HR system will imperil the organization's ability to achieve its mission, goals, and objectives.

An important aspect of the systems approach to HR operations is the application of technology to HR systems and processes. Mathis and Jackson discuss the use of technology, and more specifically human resource management systems (HRMS), and defines these systems as "an integrated system providing information used by HR management in decision making." Mathis and Jackson also define the purposes for which HRMS should be used:

- Improve administrative/operational efficiency
- Increase effectiveness of decision-making

In regard to the first issue, Mathis and Jackson are referring to the use of automation to eliminate or reduce the amount of manual time and effort required to accomplish HR tasks, such as transactions. Effectiveness relates to HR becoming more strategic in performing planning activities related to HR functions and activities that are aligned with organizational goals and objectives.

Mathis and Jackson later provide examples of other uses of HR technology that are organizationally beneficial, such as bulletin boards, employee self-service, data access, and extended linkages. Information technology is an important component of a systems approach, as it frees HR professionals from tasks and processes that do not add value, while also providing the information base needed for strategic planning—both in support of the HR function itself and the strategic planning needs of the organization.

There are a multitude of HRMS available commercially that, to a greater or lesser degree, purport to meet HR and organizational needs. There are some simple concepts to keep in mind when evaluating these technology systems for use in your organization:

- Most importantly, what are your needs—be clear about what you want the system to do. Critically evaluate any vendor who advises that their system does not fully meet your needs, but can be "tweaked" to do "similar" tasks.

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- Require vendors to provide lists of current users that you can contact to obtain information. If possible, contact as many of these clients as possible to talk with them directly and discover firsthand what applications of the system they are using successfully.
- Include your IT staff in the review of HRMS to use their expertise. This assures that the system ultimately selected is compatible with the organization's existing systems. If your organization does not have an internal IT staff, you may wish to hire an IT consultant to assist in evaluating HRMS.
- Research what other HR operations in your area are using. This may be particularly useful if you are looking for best practices that you can model.

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Part Seven: Strategic Human Resources

In the opening to Chapter One, Mathis and Jackson mentioned a frequently uttered criticism of HR operations: “HR managers are seen as more concerned about *activities* than *results*. They tell how many people were hired, the number of performance appraisals completed, and whether employees are satisfied with their orientation sessions. But too seldom does HR link those details to employee, managerial, and business performance measurement and metrics.” In short, we are criticized as a profession for being concerned about the **process** of HR work rather than the **value** we create for our respective organizations.

Strategy is defined by *Webster’s New World College Dictionary* as “a skill in managing or planning, esp. by using stratagems; a stratagem or artful means to some end.” Clearly, managing and planning are key components in developing strategies within organizations. Equally important is the use of an artful means to some end. Becoming a strategic HR professional requires a different orientation to our respective organization—tying what we do, and how we do it, to where the organization currently is and where it is going in the future. It is **not** about the importance of HR, but how HR can assist the organization achieve its goals and objectives.

In his book, *HR From the Outside In*, David Ulrich outlines six paradoxes that HR professionals need to master in order to be effective:

- **Outside and Inside**—understand the external factors the organization must function in, along with internal staff needs and capabilities;
- **Business and People**—overemphasizing either role is potentially damaging for the organization;
- **Organization and Individual**—managing the complexities of issues like talent and teamwork, competence, and organizational culture;
- **Process and Event**—HR innovation needs to be linked to organizational sustainability;
- **Future and Past**—learning from the past, and adapting those lessons to the future;
- **Strategic and Administrative**—having the capability to accomplish the administrative functions while not losing focus on the need for adapting to changing organizational needs.

IPMA-HR recognized many years ago that HR professionals needed to become more strategic, less focused on process, and more focused on organizational outcomes and results. This led to the creation of the IPMA-HR’s course, *Developing Competencies for HR Success*, discussed in Part Four, with a focus on four HR roles:

- **HR Expert**—understands the laws, rules, and regulations that govern the HR system within which the organization must function;

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- **Change Agent**—becoming the agent for change within the HR function and also within the larger organization;
- **HR Leader**—exercising appropriate leadership within the organization, raising issues for management’s attention, and proposing solutions to organizational problems;
- **Business Partner**—proactively partnering with managers and supervisors to use the organization’s HR systems to resolve problems and suggest means to improve performance.

Being a strategic HR professional requires that we function effectively in all of the above roles and that we artfully apply our expertise to the achievement of the organization’s mission, goals, and objectives. This requires:

- Moving outside our narrow focus on the needs of HR to focus on the needs of the larger organization.
- Gaining a clear understanding of the mission, goals, and objectives of the whole organization **and** all of its component work units.
- Understanding the problems and issues of individual managers and meeting with them routinely to discuss the HR services they **need**, rather than what we are prepared to **offer**.
- Acquiring a big picture outlook in performing or responding to managers’ requests for HR services. A simple example: a request to fill a job might lead the HR professional to explore with the manager whether the existing pool of candidates possess the requisite skills for success on the job; further, are the current education and experience requirements still suitable.
- Sharing information among all of the HR staff on all HR specialties will equip the staff to answer managers’ basic questions about the range of services that are available from HR. Referrals should always be made to the HR practitioner who specializes in that HR function for more detailed information and assistance. One of the potential uses for this course is to provide basic information about all of the HR specialty areas.
- Proactively providing information to top management and others throughout the organization on recent changes within the HR field (e.g., court cases, new or revised federal or state laws or regulations, etc.) with thoughts and ideas on how this may impact the organization and ways to assure compliance. Being proactive means that the HR staff does not wait for a request, but takes the initiative to provide management with information.
- Conducting organizational scans and providing top management with potential issues that need to be addressed. Examples may include outdated job standards that no longer reflect the skill sets required for successful performance; workforce planning analyses that highlight potential short skill areas due to anticipated retirements, or reviews of completed performance evaluations that

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indicate the need for additional managerial training and/or for revisions to the performance management system. All of these types of activities need to include concrete recommendations to correct identified deficiencies.

If we want to be strategic, we need to act strategically by addressing the issues that are important to managers throughout the organization, providing targeted HR services that meet genuine organizational needs, assisting the organization in meeting its short- and long-term goals and objectives, addressing employees' issues and concerns, and where appropriate, raising the matter to top management's attention. If your HR function routinely performs in this manner, then the move to strategic HR has either already been accomplished or is a work in progress.

All of the above sounds easy, but it is not easy in practice. If the HR function is viewed by managers as the "necessary evil" to keep the organization out of trouble, or whose first response to most managers' ideas is "no," the road to strategic HR involvement will be long and difficult. In this latter scenario, HR professionals will first have to overcome all the negativity, and that may require more time and considerably more effort. It will require the HR staff to change. That is where the "artful means to some end" will become important. The HR staff, collectively, will need to evaluate and change their methods and practices in dealing with managers throughout the organization. Listening, evaluating, "walking in the manager's shoes," and collaborating in solution-finding, will become critical skills that will, over time, change perceptions and reduce the negativity.

Exercise: What actions could be taken in your organization to improve HR's role as a strategic partner with management?

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Part Eight: Professional Organizations

For many HR managers and specialists, the question is: What professional associations in human resources should I join?

We feel your **first** choice should be the International Public Management Association for Human Resources. IPMA-HR's vision is to be the leading organization for public sector human resources. For those engaged in public human resource management, our mission statement clearly sets us apart from other associations: "Enhance public sector performance by providing human resource leadership, advocacy, professional development, and a community of HR professionals for the sharing of resources and ideas." For more information about IPMA-HR, visit www.ipma-hr.org.

Beyond IPMA-HR, your membership in a professional association, related to your area of concentration in the human resources field, will be dependent upon your interests and professional development needs. Certainly, you can attend meetings and training and conference events, but your most significant payback will accrue from serving in leadership roles within these organizations or associations. As you make professional networking contacts and find solutions to problems you face that have been developed by others with whom you come in contact, your involvement may help direct the course of your professional association's work.

Many professional associations have local chapters. Depending upon their convenience to your location, you can obtain valuable leadership and professional experience serving in leadership and volunteer roles within your local organizations.

The human resources professional associations and human resource organization websites are often rich with human resource management, training, and employee-related information. Many human resources sites require membership in the human resource association to access their most comprehensive information.

As a practitioner or manager, you may have a more specific focus in the organization or association of interest to you. Following is a listing of additional organizations, that may be of value to you:

AARP

Formerly known as the American Association of Retired Persons, AARP appears to be the name of choice as the organization's mission now includes any issues for people in their middle years and older. A great resource for people over the age of fifty.

Academy of Management

This professional society fosters the advancement of research, learning, teaching, and practice in the management field. It has subdivisions for human resources, management consulting, and organization development.

American Arbitration Association

This organization dispenses information about mediation, arbitration, and other forms of alternative dispute resolution.

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American Association for Access, Equity and Diversity

A professional association serving the needs of people who manage affirmative action, equal opportunity, diversity, and other human resource programs. AAAED is dedicated to the elimination of discrimination based on race, gender, or ethnic background.

American Management Association

AMA is dedicated to the advancement of effective management principles, covering a broad range of areas of interest and offering an extensive list of seminars, conferences, and books.

American Productivity and Quality Center

APQC is a resource for organizations interested in improving processes, performance management, knowledge management, management benchmarking and best practices through business research and advisory services.

American Staffing Association

This association is the voice for the U.S. staffing, recruiting, and workforce solutions industry. ASA and its affiliated chapters advance the interests of the industry across all sectors through advocacy, research, education, and the promotion of high standards of legal, ethical, and professional practices.

American Society for Public Administration

This association is committed to the advancement of excellence in public service through the development and exchange of public administration and information and advocacy on behalf of public service and high ethical standards in government.

American Society for Quality

ASQ's mission is to increase the use and impact of quality in response to the diverse needs of the world by making quality a global priority, an organizational imperative, and a personal ethic.

Association for Quality and Participation

This is an international, not-for-profit organization whose mission is to assist people and organizations to change their view of work, their relationships with people, and their organizational structure in support of employee participation.

American Society for Talent Development

Formerly the Association for Training and Development, their mission is to be a worldwide leader in workplace learning and development. It sponsors conferences, publishes books and course materials on training and staff development, and conducts research on public policy issues.

College and University Professional Association for HR

As the association for HR professionals in higher education, CUPA-HR provides leadership on higher education workplace issues in the U.S. and abroad. This association monitors trends, explores emerging workforce issues, conducts research, and promotes strategic discussions among colleges and universities.

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Employee Assistance Professionals Association

The Employee Assistance Professionals Association (EAPA) is the world's largest, oldest, and most-respected membership organization for employee assistance professionals. With members in over 40 countries around the globe, EAPA is the world's most-relied-upon source of information and support for and about the employee assistance profession.

Employee Benefit Research Institute

This is a nonprofit organization that produces original research on health, savings, retirement, and economic security issues, including 401(k) and retirement plan coverage data, postretirement income adequacy, health coverage and the uninsured, and economic security of the elderly.

Equal Employment Advisory Council

The EEAC is a nonprofit employer association founded in 1976 to provide guidance to its member companies on understanding and complying with their EEO and affirmative action obligations. EEAC today is comprised of nearly 300 major corporations and is staffed by experienced lawyers and HR professionals with in-depth knowledge in handling EEO and affirmative action compliance issues.

HR Policy Association

HR Policy Association is the lead public policy organization of chief human resource officers representing the largest employers doing business in the United States and globally. The association leverages the combined power of the membership as a positive influence to improve public policy, increase returns on human capital, and advance the human resource profession.

Human Resource Information Management Foundation

The HRIM Foundation is an independent, charitable, 501(c)(3) organization chartered with promoting scholarships, research, and education to drive innovation and the use of technology and information management in the human resource (HR) profession.

International Foundation of Employee Benefit Plans

This nonprofit organization is dedicated to being a leading objective and independent global source of employee benefits, compensation, and financial literacy education and information.

Labor and Employment Relations Association

The Labor and Employment Relations Association (LERA) is where professionals interested in all aspects of labor and employment relations network to share ideas and learn about new developments, issues, and practices in the field. Founded in 1947 as the Industrial Relations Research Association (IRRA), the National LERA provides a unique forum where the views of representatives of labor, management, government, and academics, advocates and neutrals are welcome.

National Academy of Public Administration

This nonpartisan organization was chartered by Congress to help public organizations improve their effectiveness. The Academy provides training and advice to public agencies, and conducts research into public policy issues and concerns. Membership is by invitation only.

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National Human Resources Association

The National Human Resources Association (NHRA) is focused on advancing the individual career development, planning, and leadership of human resource professionals.

National Public Employer Labor Relations Association

NPELRA provides professional development, networking, and advocacy services to labor relations and human resource professionals so that public sector employers may deliver the most efficient and effective services to citizens and taxpayers.

The Organization Development Institute

This educational association is committed to promoting the understanding of organizational development (OD) and is known for its international commitment and dedication to building the OD profession.

Organization Development Network

This is a professional society for organization development practitioners to improve an organization's sustained effectiveness and health by introducing solutions and interventions that impact an organization's strategic objectives and bottom line.

Recognition Professionals International

RPI works to promote the role of human resources as a profession and provide networking, education, and certification in workplace recognition.

Scanlon Leadership Network

This is a nonprofit association involved in the promotion of employee involvement, gain sharing, employee suggestion systems, and other methods of increasing employee participation. Current members recommend others for membership.

Society for Human Resource Management

SHRM's mission is to provide training and resources to advance the capabilities of the human resource profession and the capabilities of human resource professionals. Prior to 1989, the organization was known as the American Society for Personnel Administration (ASPA).

WorldatWork

WorldatWork (formerly the American Compensation Association) is a global association for human resources management professionals and business leaders focused on attracting, motivating, and retaining employees. WorldatWork works to promote the role of human resources as a profession, offering training and certification in compensation, benefits, work-life, and total rewards.

IPMA-HR does not endorse any of the above organizations. This listing is not complete, but illustrative of the variety of professional associations that are available as sources of information and ideas for public human resource professionals. You may be aware of other professional associations and organizations that may be of value to human resource professionals. Additionally, there may be numerous local or state associations and organizations that promote or further the interests of public human resource management.

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Part Nine: Statement of Ethics

Ethics is a huge concern—not only for public sector organizations, but their private sector brethren, as well. It is also not just an issue in the United States, but an international issue and concern.

Many of the existing ethics laws were enacted in response to instances of corruption or misdeed by public officials. One example of this is the *Ethics in Government Act of 1978* passed in the wake of the Watergate scandal that sets financial disclosure requirements for federal officials and restrictions on former government employees' lobbying activities.

Members of the upper levels of all three branches of government (including the president, vice president, members of Congress, federal judges, and certain staff members in each branch) must file annual public financial disclosure reports that list:

- The sources and amount of all earned income; all income from stocks, bonds, and property; any investments or large debts; the same information for spouse and dependent children.
- Any position or offices held in any business, labor, or nonprofit organization (whether compensated or uncompensated)

Former employees of executive branch agencies may not:

- Represent anyone before an agency for two years after leaving government service on matters that came within the former employees' sphere or responsibility, even if the employees were not personally involved with the matter.
- Represent anyone on any matter before their former agency for one year after leaving it, even if the former employees had no connection with the matter while in the government.

Most states and local governments have enacted similar ethics regulations for public employees. Some of these requirements exceed the federal requirements by requiring employees to obtain approval from their public employer prior to accepting outside, supplemental employment. These supplemental employment requirements are typically not found in private sector organizations but are common in many public sector organizations for one main reason—transparency.

In Part One, we discussed the need to conduct the public's business in the open; one of the major aspects of most public ethics requirements is the need to avoid not only actual or potential conflicts of interest, but also actions that give the appearance of a conflict of interest. Avoiding the appearance of conflicts sets a much higher bar for public employees than their private sector counterparts.

Berman et al. statet: "Typical provisions might include conflict of interest, gift giving/receiving, confidentiality, sexual harassment, political activity, equal employment opportunities, and moonlighting." The authors continue: "Understanding the work culture and the ethical imperatives of public service is

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crucial. Cultures vary from agency to agency and government to government, but the ethical imperatives remain constant and provide continuity. The following approaches to ethics management are repeatedly suggested:

1. Modeling exemplary moral leadership to top officials.
2. Adopting an organizational credo that promotes aspirational values.
3. Developing and enforcing a code of ethics.
4. Conducting an ethics audit.
5. Using ethics as a criterion in hiring and promotion.
6. Including ethics in employee and management training programs.
7. Factoring ethics into performance appraisal.

In regard to ethics, the HR operation is ground zero for assuring and enforcing compliance. As Mathis and Jackson point out, “HR management plays a key role as the keeper and voice of organizational ethics. HR departments can help develop ... compliance efforts and an ethical culture by coordinating ethics training and creating policies that encourage employees to report misconduct.” This HR role as the ethics police will only increase in the future as the public becomes more aware and concerned with the behavior and actions of its public workforce.

Exercise: On the next page we have included a copy of IPMA-HR Statement of Principles and Values for your review. Please review this document and answer the following questions.

- What constitutes a conflict of interest in your organization?
- Which values/principles do you feel are easiest or most difficult to comply with?
- Does your organization require periodic ethics training?

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**INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION
FOR HUMAN RESOURCES (IPMA-HR)
PRINCIPLES AND VALUES STATEMENT**

To support the Association's goals and objectives for developing the human resource management professional and the public's understanding of the role of human resource management;

To maintain the highest standards of professional competence and of professional and personal conduct;

To respect the dignity of all individuals, and to protect people's rights to fair and equitable treatment in all aspects of employment without regard to race, sex, religion, age, national origin, disability, or any other non-merit or non-job related factor, and to promote affirmative action;

To support my employer's legitimate efforts for a qualified and productive workforce to accomplish my employer's mission;

To emphasize the importance of addressing the impact of management plans and decisions on people;

To support, mentor, and counsel individuals pursuing a career in human resource management;

To treat as privileged and confidential information accepted in trust;

To uphold all federal, state, and local laws; ordinances and regulations; and endeavor to instill in the public a sense of confidence and trust about the conduct and actions of my employer and myself;

To avoid a conflict of interest; and,

To not compromise, for personal gain or benefit or special privilege, my integrity or that of my employer.

Note. This Code of Professional Principles and Statement of Values for the International Public Management Association was adopted as reviewed by the Executive Council in October 2005.

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Module Two: Recruitment

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Reading Assignment for Recruitment Module

Chapter Six, *Human Resource Management*, Fifteenth Edition, by Robert L. Mathis, John H. Jackson, Sean R. Valentine, and Patricia A. Meglich

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Part One: Workforce Planning

As defined in *IPMA-HR's Workforce Planning Guide for Public Sector Human Resources Professionals*, "Workforce planning is the strategic alignment of an organization's human capital with its business direction. It is a methodical process of analyzing the current workforce, determining future workforce needs, identifying the gap between the present and the future, and implementing solutions so the organization can accomplish its mission, goals, and objectives."

In Part Four of Module One we discussed the importance of HR professionals partnering with managers to assist in meeting the organization's strategic goals and objectives. Performed properly by the HR staff and working in concert with the organization's management, workforce planning is an integral piece of the recruitment process as it answers the question **who** we need to recruit. Through the workforce planning process, we will gather the necessary information needed to determine:

- Potential employee attrition resulting from retirements, resignations, etc.
- Current and anticipated staffing needs.
- Bench strength, which means, current employees in other job titles who may possess the requisite skills and capabilities to move into jobs in short-skill areas.
- Anticipated or planned programmatic or organizational changes that will substantially affect the composition of the workforce. These may include changes to experience and educational requirements resulting from new or different work functions, legislative changes that add new programs or combine previously disparate activities, etc.
- Anticipated or planned changes in funding that will impact the number and skill sets of the staff needed by the organization.

The workforce planning process should be performed by the HR staff in a series of sequential steps, with the active involvement of management.

Step One

The first consideration in a workforce planning effort is to obtain a picture of the organization's current workforce in regard to its demographic composition. This should include an analysis that at a minimum includes age, job title, work unit, geographical location, and years of service.

Step Two

The information gathered in Step One should be matched with termination data, specifically statistical data that illustrates typical retirement trends (e.g., do employee retirements cluster around eligibility dates for Social Security benefits and/or the organization's retirement eligibility requirements). Data on voluntary and involuntary separations should also be gathered to obtain a total picture of the organization's turnover. If the organization has a systematic means of gathering exit data from employees, this should be reviewed to determine if there are hot spots

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in certain job titles, work units, or geographical locations that may require further analysis. In regard to termination data, more is better. Two to three years would be the minimum; five years of data, if obtained without excessive efforts and cost, would be ideal.

Step Three

The HR staff should share all of the information gathered in Steps One and Two with management as a beginning point for determining future staffing needs, because this would be an expectation of an effective HR Business Partner (refer to Part Four of Module One). Working together, the HR staff and management need to discuss and determine:

- Expected increases or decreases in workload by job title, work unit, and geographical location;
- The continued efficacy of the existing educational and experience requirements, coupled with special skills/capabilities needed for successful performance;
- Potential changes in legislation or state, local, or federal mandates that may occur, with estimates on its impact on specific work units, job titles, or programs;
- Potential changes in funding due to budget surpluses, or shortfalls that may impact specific work units, job titles, or programs;
- Other external factors such as technology that may impact the future skill sets, competencies, or required qualifications or employees in specific job titles, work units, or geographical locations.

It is at this point that the activities described above may differ between public and private organizations. Precise data regarding some of the above factors may not be available or totally reliable in public sector organizations for a variety of reasons:

- Leadership transition—The election of new leadership may result in changes in policies, programs, areas of emphasis, etc;
- Changes in federal or state funding priorities resulting from budgetary surpluses or shortfalls;
- Unexpected revenue shortfalls due to declining tax receipts or changes in taxation policies, which require future activities to be scaled back. Public organizations tend to rely on a variety of use taxes on gasoline, real estate transactions, sales, etc. that are subject to frequent shifts in collection levels.
- Unexpected increases in services, particularly in regard to social service programs which can be greatly influenced by rises in jobless claims, influx of emigrants, increases in the number of homeless or indigent citizens, etc.

All of the above occurrences can play havoc with future predictions of staffing needs, programmatic activities, and operations. In private sector organizations

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there tends to be more stability in regard to planning year to year, or for multiple years into the future. This is an interesting dichotomy, as public sector organizations are perceived as stable operations, with little year-to-year changes; while their private sector counterparts are perceived to be more subject to change, resulting from the influence of market conditions. For many of the reasons cited above, public organizations can experience considerable change in a relatively short period of time.

Step Four

This is the step where all of the above information comes together to determine the gaps, or potential shortages between the existing staff needs and capabilities and anticipated future needs. Using all the data gathered thus far, HR and management should carefully assess and determine where there are significant differences in:

- Numbers of staff needed; and
- Staff competencies and educational and experiential requirements.

If possible these gaps should be identified by year (i.e., one, two, three, four, and five years) into the future. For planning purposes, gap analyses for longer than five years are unrealistic given the vagaries of public organizations as described previously. In fact reanalysis, based upon updated data should be performed at least annually for the out years, beyond the first year. Constant updating of the workforce data is essential in order to assure that the gap analysis, and resultant recruitment strategies, continue to meet the organization's best estimates on future workforce needs.

Exercise

1. Briefly describe your organization's workforce activities in terms of analyzing the current composition of the organization's workforce.
2. Briefly describe how workforce data in your organization is currently used.

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Part Two: Planning the Recruitment Strategy

Mathis and Jackson define recruiting as “the process of generating a pool of qualified applicants for organizational jobs.” This sounds like an easy, process. And, for most private sector organizations, it is Recruitment for public sector jobs, however, is neither as easy or straightforward as perhaps it first appears to be. That is because in public sector organizations a number of issues, some of which discussed previously in Part One of Module One, may come into play:

- Merit system requirements, which typically require some form of examination;
- Presence of union bidding or seniority provisions that must be satisfied;
- Presence of local community groups who may play a role in recruitment processes, such as minority or public interest groups;
- The transparency issues as they relate to conducting business publicly with the potential for oversight and comment by local interest or community groups, the media, an elected council or legislature, etc.

The requirements and strictures that the above may place on the recruitment efforts need to be accounted for as we plan our actions.

Mathis and Jackson continue by discussing “strategic recruitment” and define “strategy” as “a general framework that provides guidance for actions.” The guidance has been partially provided for us by the workforce planning activities described previously. Current vacancy information should be matched with the reasonably accurate vacancy data on what can be anticipated in the next year gathered in Step Three of Part One. It is also important to determine the timing for filling both current and the projected vacancies, and a number of factors may be important considerations:

- If applicants will need to take a competitive merit system examination, the timeframe for the development and availability of the exam needs to be accounted for in developing the recruitment timeline.
- If there are extensive internal approval processes that need to be accomplished prior to the ability to extend an employment offer, sufficient time needs to be built into the schedule to accomplish this.
- Is the intent to recruit applicants for promotion from internal sources, exclusively from outside the organization, or a combination of both sources? Promotion or lateral movements internally can many times be accomplished more quickly than outside, open recruitment efforts. Recruiting both internal and external applicants will require careful coordination to assure that applicants from both groups get equal consideration. If the efforts for both groups are not coordinated, one group may end up receiving the bulk of the jobs, to the exclusion of the other group. Recruiting from both groups provides an obvious advantage to the organization in being able to compare the relative

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merits of applicant from both groups and should result in selecting the best applicants from both groups. Relying exclusively on outside recruiting efforts may create morale problems if there are existing employees who possess the requisite qualifications. This could ultimately result in additional, unplanned terminations as disgruntled employees leave because of the perceived lack of internal promotion opportunities.

- If the bulk of the vacancies will be occurring later, it may be advisable to conduct open recruiting over a period of time. Conversely, if most of the vacancies to be filled already exist, then limiting the recruitment period may be more appropriate. Recruiting now for a large numbers of applicants for future vacancies which may not exist for several months may be counterproductive in that many of these applicants may find suitable employment in the intervening months.

Part of any sound recruitment strategy is to review past efforts. Recruitment sources that have been used successfully in the past may be an effective starting point in answering the question what strategies would be most effective. There are a few caveats to relying on past recruitment strategies, regardless of their success:

- **Generational differences**—Younger workers are far more technologically savvy, and many rely on the internet as the preferred means of seeking employment, to the exclusion of traditional recruitment sources such as newspapers, trade journals, etc. Relying on old, successful strategies such as newspapers and trade publications may cut you off from younger workers with potentially more current skill sets. Using both internet and printed media may provide more complete coverage and potential exposure to job candidates in different age groups.
- **The past does not guarantee future success**—Labor markets are ever-changing, dynamic systems, so what was a successful recruiting strategy a year or two ago may not be as effective this time. This is particularly true if the labor market conditions have recently changed. For example, you may have had considerable past success because unemployment was higher and, now, in a tight labor market, jobs in your organization are less attractive.
- **Revised skillsets**—If your experience and/or educational requirements have changed in the interim, the previous strategies may be less effective in reaching and attracting potential applicants who meet the new criteria.

The last point regarding skillsets is an important issue that warrants discussion as part of our strategic recruitment planning process. The HR staff, in collaboration with management, should conduct a job analysis of the positions included in this recruitment effort. This analysis may result in changes that may dramatically affect the nature and scope of the recruitment plan, and ultimately the success of the entire endeavor. This analysis should concentrate on the identification of:

- **Important functions**—What are the important and critical functions that the job(s) will be routinely expected to perform? This information will form the basis for the job information that is ultimately used as part of the recruitment

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effort. If the nature and mix of job functions has changed, this information must absolutely be incorporated into a revised job description or standard.

- **New or revised KSAs**—New or revised functions may also herald the need for new or revised knowledge, skills, and abilities (KSAs). Changes may occur in the KSAs even if there is no substantial change in job functions or duties, but as a result of new work methods, automation, policies, regulations, etc. KSAs may also come into play in developing selection processes that may be used as part of a merit or civil service examination process. We will discuss the selection ramifications in the following Module on Selection (Parts Five and Seven).

The importance of conducting a proper job analysis cannot be stressed enough. Jobs tend to be dynamic creatures. They may change significantly over time in response to a host of factors. These changes may occur incrementally and the cumulative effects ignored or discounted in order to respond quickly to the need to develop a recruitment plan. Shortcutting the strategic recruitment planning process may meet management's short-term objectives for speed.

Ultimately, as the saying goes, "Speed kills." Basing a major recruitment effort on old job data is a recipe for failure, potentially resulting in a pool of applicants ill-equipped for effective job performance. Current, updated job data provides the basis for developing a profile of the ideal candidate in terms of the important functions to be performed and the skillset and competencies needed for successful job performance.

In developing an effective recruitment strategy, we need to delve more deeply into the turnover rate for the targeted position(s). In Part One, we discussed the need for workforce data as part of the planning process and mentioned the importance of turnover data. Reliable turnover data is absolutely essential; equally important is some understanding as to the causes for the turnover. This information is generally gathered through an exit interview program.

Exit Interview programs come in all shapes and sizes. Some are voluntary, while others attempt to elicit responses from all terminating employees. Some systems incorporate face-to-face interviews; others rely on mailed forms. There has been considerable research done as to the efficacy of voluntary/involuntary participation, and personal interviews versus mailed forms. The debate continues to rage. There are some common areas for consideration, however, when establishing an exit interview program:

- **All-inclusive**—All jobs, in all work locations must be included if the data is to have any true relevance and utility.
- **Automation**—Even a small organization can be quickly overwhelmed with data, so use of an automated system for data capture and storage is essential. One solution to the mailed form versus personal interview might be to have the employee complete the exit questionnaire online as part of the termination out-processing.

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- **Use of the data**—It is great to have data, but what do you do with it? Periodically (we suggest at least annually) the exit data should be summarized by the HR staff and provided to management for review and discussion. It is at this time organizational factors that contribute to increased turnover should be identified discussed, and a determination as to whether remedial action or further investigation into the cause(s) should be conducted.

As part of developing a recruitment strategy, we should be concerned about data that indicate employees are terminating employment because of a perceived lack of internal advancement opportunities and/or lack of information and internal support for employees. In the former case, the lack of advancement opportunities may signal a need to review career ladders within the organization both within each job family and organizational or geographic unit and across job classifications and organizational and geographical units.

The lack of information and internal support is a tougher problem to deal with and may require the implementation of mentoring programs coupled with staff development initiatives intended to highlight and direct employees toward career and promotional opportunities. If perceptions are allowed to continue regarding the lack of advancement or organizational interest and support promoting advancement capabilities, no recruitment strategy, regardless of its design and efficacy, will ultimately be successful. What will follow will be an endless round of recruit/select/train/terminate scenarios.

Mathis and Johnson identify a number of potential metrics that can be used to evaluate the effectiveness of the overall recruitment strategy. These metrics may be useful in identifying the specific types of recruitment strategies that were most effective from the standpoint of cost, selection methodology, acceptance, and success base rates. There are some situational factors that also need to be considered when developing the recruitment strategy:

- **Employer competition**—Specifically, how many other employers considered competition within the labor market for employees with the same skill sets and work requirements? How do you compare with these other employers in terms of salary, benefits, access to performance or signing bonuses, prestige (remember, many public employers are viewed by job applicants as employers of last resort), working conditions, access to career advancement and training opportunities, etc.? What are your organization's strengths in terms of job security, enhanced pension benefits, opportunity to serve the public good, interesting and challenging work assignments, etc.?
- **Market profile of desirable applicants**—This is really a quality issue. We discussed the importance of the job analysis and using this data to develop a profile of the ideal candidate. How does your profile stack up versus the profile of the typical applicants available in the labor market? Can you reasonably expect to find sufficient qualified applicants that match your profile in the local labor market, or must the organization cast a wider recruitment net to secure sufficient applicants—regionally, statewide or nationally?

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- **Number of targeted hires**—This is a quantity issue and there are a number of issues to consider:
 - Is it reasonable to expect that a sufficient number of applicants exist within the labor pool?
 - How many graduates with the required education are expected within the current year, the following year, and the out years encompassed in your recruitment strategy?
 - Is your area perceived as an attractive place to live, raise families with access amenities such as shopping centers and cultural events and opportunities, cost of living, etc.?
 - Are there underutilized groups, such as women or minorities, that could be tapped as potential sources of applicants?
 - Could some of the work be performed by disabled employees and what are the potential ADA impacts?
 - Are there professional organizations that can be used as recruitment sources? Would access to these professional organizations enhance your organization's ability to attract and retain staff?

One final consideration for your recruitment strategy involves the extent to which your organization employs technology to enhance and speed up the recruitment process. Some examples include:

- **An online application** is attractive, particularly to younger workers who tend to be more tech-savvy, while at the same time reducing manual work effort for the HR staff and management.
- **Online notification** of interviews, exam procedures, and application status makes the process appear more transparent to the applicant and also saves mailing costs, telephone calls, and manual effort.
- **An online exam** creates a perception of transparency while saving time required to train test proctors, score paper tests, etc. It will also assist in making your timeframes more competitive with private employers.
- **An online onboarding process** saves time and effort and permits the new employee to complete their in-processing at their convenience.

All of the above factors need to be taken into consideration in planning your recruitment strategy to, as Mathis and Jackson state, provide “a general framework that provides guidance for actions” designed to develop a “process of generating a pool of qualified applicants for organizational jobs.” Done completely and correctly, it will produce the needed results.

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Part Three: Development of Recruitment Strategies

In Part One we defined the steps and processes needed to gather the information and data regarding the number and types of positions for which we need to recruit. In Part Two we defined some of the most important considerations in structuring our recruitment strategy. In this section, we will discuss how we will accomplish the recruitment effort; specifically what means we use to attract applicants for our positions. There are a variety of methods available to us and we could use any single method or combination of methods that will be attractive to our potential candidate pool. Some of the more common strategies include:

- **Professional associations/societies/membership organizations**—This method can be particularly effective when seeking professional staff such as engineers, accountants, nurses, doctors, etc. If you refer back to Part Eight in Module One, we listed a number of professional organizations that might be useful contacts as recruitment sources. For example, IPMA-HR publishes a listing of job vacancies in *The IPMA News*, and you will find that many other professional organizations also offer this service to their membership. The HR staff should develop a listing of professional organizations that the organization itself is a member of, or that individual employees belong to, as this can be the means to gain access to their membership.
- **Internet**—As noted previously, there a number of websites where job applicants can post resumes that you would be able to review and determine whether there are suitable candidates for your positions. You can also post your recruitment notices to these websites that will give you national and, perhaps, international access to job applicants. There are numerous recruitment sites available, examples of which include:

- Monster.com
- Job.com
- Linkedin.com
- USAJobs.gov (federal government)
- SimplyHired.com
- Indeed.com
- Glassdoor.com
- Idealist.com

IPMA-HR does not endorse or recommend these websites to the exclusion of others. If your posting notice is not carefully crafted, however, you may end up receiving numerous applications/resumes from people who do not meet the profile you established for the position. That could result in having to screen literally hundreds (and potentially thousands) of applications/resumes to locate those that are qualified for your positions.

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- **Print media (newspapers, magazines, journals)**—All of these forms of recruitment have proven to be effective, depending upon the size of the audience you are attempting to reach. Newspapers are most effective for local/regional recruitment efforts, while magazines and journals have the potential to reach national, and perhaps even international, job applicants. Some of the problems with this recruitment strategy are that advance planning is required to develop the advertisement and meet the publication deadline. Cost may also be a factor depending upon the size and location of the advertisement in the publication. This type of recruitment strategy can be effective, but it requires time that needs to be built into your recruitment timeline.
- **Conferences**—Recruiting at conferences has advantages in that a conference is arranged for practitioners in the subject area you are seeking (e.g., accountants, HR specialists, engineers) and you get to discuss the positions directly with the potential applicant and determine his/her interest. There are some downsides to this method, however. The first is cost. If you have to travel an extensive distance to attend the conference, it may not be an attractive or cost-effective method. Also, the recruitment staff sent to the conference should include a subject matter expert who can describe and discuss the jobs in some detail, as well as an HR specialist who can provide employment information and perhaps assist the applicants in completing their applications. All of this assumes, of course, that the dates for the conference coincide with the organization's recruitment timeline.
- **Job announcements/bulletins**—In order to comply with union or merit selection procedures, organizations may be required to post or distribute announcements that indicate the intent to recruit for certain positions. Depending upon the nature of the job, union affiliation, etc., this notice may only be posted internally. You may have the option of sending it to other organizations, community groups, professional organizations, and the like. The distribution can be designed specifically around how wide an audience the organization wishes to attract. Announcements/bulletins should be attractive and allow sufficient space to describe the positions in some detail along with instructions on application procedures.
- **Direct mailings**—This can be an effective way to target recruitment efforts to a specific geographical area. For a fee, many professional organizations will make mail lists of their membership available. One of the advantages is the ability to usually specify via zip codes for those areas that you identified as part of your recruitment plan. This method probably is most effective for professionals, such as engineers, accountants, etc. The downside of this process is that it is essentially a shotgun approach to recruitment. Many of the notices may end up being received by qualified applicants who are already employed and may not be interested in pursuing other employment opportunities.
- **Billboards**—These are most effective in providing basic information, such as informing the general public your organization is hiring. Information needs to be short and to the point, such as a website or contact telephone number, because people will generally be viewing the billboard as they pass by in their cars. Billboard advertising can probably be most effective when the

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organization is seeking part-time or seasonal workers, but will not typically be effective for professional jobs. The most important consideration for billboard advertising is location, location, location. The billboard needs to be located in high traffic areas, preferably near or at large intersections where many people will be able to view it while stopped or slowing down due to traffic conditions.

- **Radio spots**—As with billboards, these can be effective if the organization wants to merely inform the general public of employment opportunities and supply basic contact information. Many radio stations will provide some spots for free as part of their community service efforts, so cost may be minimal. The key is the time of day that the spots are played—best times are during the morning and afternoon commute, as these are when most people are potentially listening to radio. Stations tend to reserve these period for paid advertisements. As with billboards, radio and streaming music services (spots would probably best if the organization is recruiting seasonal or part-time workers.
- **Project groups**—If your organization has used project or work groups composed of internal or external staff to accomplish major work activities, these groups may suitable sources of potential, qualified applicants. Some of these folks may have been independent consultants who might be interested in employment with your organization. One advantage is that you have had an opportunity to observe their work and can determine their fit with the organization's staff. One word of caution, however—if these people were working as subcontractors on behalf of a firm hired by your organization, there may be contractual constraints on your ability to recruit them to work for you.
- **Job fairs/career days/open houses**—This can be an effective recruitment modality that may be initially be announced via billboards, radio spots, or direct mailings. The main advantage is the ability to target these activities to specific organizations, community groups, or workers who fit your established recruitment profile. As with conferences, the organization has an opportunity to speak directly to the potential job applicants and provide more detailed information than can typically be delivered through printed media. This can be particularly effective with school groups, as a means of exposing and interesting them in a career in public service. Additional information on career days is provided in Part Five.
- **Employee referrals**—Mathis and Jackson outline many of the advantages of employee referrals. The main advantage is that it is a low-cost recruitment strategy, while the main disadvantage is that relying solely on employee referrals may violate equal employment requirements. If used, it is suggested that referrals be used as part of a multipronged approach, perhaps also using internet, print media, and job announcements. Many organizations offer a bonus to employees who refer others for employment, although the bonus may not be payable until the new employee has finished a probationary period or first year of employment.
- **Search firms**—This method can be very effective, particularly for senior executives and hard-to-fill, one-of-a-kind-positions. These firms typically have expertise in recruitment strategies and can be very effective in providing a pool

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of candidates who will meet your profile. Many can assist in developing the recruitment profile for your ideal candidate. The major advantage is that they typically assume responsibility for developing the recruitment strategy, with your input and usually prescreen candidates. Many also assist in developing selection criteria. The key is getting a firm that has experience in recruiting the type of candidate you are seeking. For example, if you are seeking a new county manager, using a search firm that has specialized in IT or engineering positions is probably not a good match. Also, depending upon the level of involvement (e.g., assisting in development of the recruitment profile, development of selection criteria, prescreening applicants), the services can be expensive.

The above listing of potential recruitment methods is not exhaustive but does cover most of the major choices from which your organization will have to select. One method may not be as effective as a combination of two or more in order to reach as wide a potential pool of qualified applicants as possible. Also, within a category you may have a number of options. For example, you may be able to select from a number of newspapers or magazines, or if using the internet, determining which websites would be best for the type of positions for which you wish to recruit. In Part Two, for example, we discussed the influence of generational differences and its effect on recruitment activity along with continuing to use the same methodology repeatedly to the exclusion of other, perhaps more effective, methods. Sometimes the best source of information on the most suitable technique(s) may be your own staff. Ask some current employees what they think might be the best technique(s) to use to recruit new employees.

Finally there are some other considerations:

- **Appropriate materials**—The materials to be used as part of any of the above methods must be appropriate for that medium. For example, we mentioned there is a limited amount of information that can be placed on billboards. People will not be able to read long paragraphs regarding the nature and scope of the job, coupled with a full statement of necessary qualifications, while continuing to operate a motor vehicle. Printed advertisements on the other hand, allow for full disclosure of virtually all significant employment information.
- **EEOC considerations**—You need to assure that whatever strategies you decide to use reach a wide, representative audience. As Mathis and Jackson point out, “Employers demonstrate inclusive recruiting by having diverse individuals represented in company materials, in advertisements, and as recruiters.”

All organizations typically have some types of positions that are less desirable or attractive. This may be due to working conditions (road maintenance operations), physical requirements (heavy lifting or carrying), or working with individuals who may be difficult or stressed (working in a tax collections office). You need to properly prepare prospective applicants for the “real world” they will encounter in the workplace.

One way to do this is to use a realistic job preview of the working conditions and situations typically encountered in the workplace. This can be done through use of

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a video that depicts reenactments of actual situations that occurred, or by having the prospective employees tour the actual worksite and observe operations for a period of time. If you do not prepare these prospective employees for their real work life, you will be constantly recruiting replacements, which is both expensive and time-consuming.

Finally, all organizations have some highly specialized positions, such as IT specialists, engineers, medical staff, and so on. Recruiting for these positions can be difficult, perhaps because of less-competitive wages or other particulars. For these positions it is essential that you clearly define and identify the applicant pool and plan how you will reach out for recruiting purposes. Also, it is essential that if you find a few individuals who appear interested in your organization, you maintain contact with them by telephone, email, letter, personal visits, etc. to demonstrate **your** continued interest in them. Assume for the moment that you are a college football coach who is attempting to recruit a star quarterback for your team. The analogy and the actions you take in either case are exactly the same. Communicate often and maintain that contact to demonstrate your interest.

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Part Four: Executive Recruitment

Human capital is widely perceived as the most valuable asset in an organization, and the retention of your organization's best people should be high on the list of organizational priorities. This is even more important for senior and top management staff. The cost of high attrition can be staggering. As Mathis and Jackson point out, "Recruiting can be expensive, but an offsetting concept that must be considered is the cost of unfilled jobs. For example, consider a company in which three important related jobs are vacant. These three vacancies cost the company \$300 each business day the jobs remain vacant. If the jobs are not filled for four months, the cost is about \$26,000 for failure to recruit for those jobs in a timely fashion."

Not only are you dealing with replacing a valuable asset, there are numerous hidden costs in lost productivity, recruitment expenses incurred, training a replacement, and bringing the new hire up to speed. Initially, there is the cost of managing the business when an individual leaves; quite often the role will be left empty until the replacement is found. This stretches other individuals to cover essential parts of the former incumbent's role. There are many factors to consider when recruiting for key positions. Filling the position quickly is critical, since this vacancy detracts from the service provided to both internal and external customers, not to mention the intangible cost of lowered employee morale and motivation, which can easily occur when you lose a key player.

Finding a replacement with the required qualifications can be difficult and time-consuming. The job of executive recruiting involves doing a large amount of research, as executive and top managerial positions require thorough referencing and verification. Precise job responsibilities and personal qualities and attributes are of utmost importance.

The first decision that needs made is whether the executive position is to be filled through internal recruitment from among existing staff, or externally, perhaps through a national recruitment effort, which may require the services of an executive recruitment firm, sometimes referred to as a headhunter. Your organization may choose to consider both internal and external candidates. Mathis and Jackson provide a clear and succinct listing of the advantages and disadvantages of internal versus external recruiting sources.

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RECRUITING SOURCE	ADVANTAGES	DISADVANTAGES
Internal	Improves morale of promoted.	Inbreeding may lead to less diverse workforce.
	Provides more accurate performance history.	Tunnel vision thinking may lead to a lack of new ideas
	Lowers recruiting costs.	May lower morale for individuals not promoted.
	Offers hope and motivation to employees.	Employees may engage in “political” infighting for promotions.
	Facilitates succession planning, future promotions, and career development.	Employee promoted may need to be trained or developed.
	Improves organizational fit because current employees understand the company’s culture, hierarchy, and policies/practices.	Some managers may block the internal movement of good performers.
External	New employees bring new perspectives that can be applied to business.	The firm may not select someone who will fit well with the job and the organization.
	Training new hires may be cheaper and faster because of prior external experience.	The process may cause morale problems for internal candidates not selected.
	New hires are likely to have fewer internal political issues/challenges in the firm.	New employees may require longer adjustment periods and orientation time.
	New hires may bring new industry insights and expertise.	The recruiting process may take more time and resources.
	Potentially larger applicant pool generated by search efforts.	Recruiters often must evaluate more applications.

The internal/external recruitment issue needs to be raised by the HR staff in their initial discussions with whoever will be making the ultimate hiring decision. The above can serve as a guide for reaching consensus on which approach will best serve the needs of the organization and result in a superior appointment. Some issues to keep in mind include:

- **Assessing the internal pool of candidates**—Are there sufficient high-quality internal applicants who could perform the job?
- **Using an executive search firm can be expensive, depending upon their level of involvement**—We discussed some of the pros and cons of executive search firms earlier (refer back to Part Three). There may also be fiscal constraints that may preclude the use of search firms due to the expense.
- **Time needed to find the right firm**—If you have previously used search firms, your organization may already have a firm under contract or may have previously pre-qualified a number of search firms that the organization can access. Access to a prequalified list of firms will save the time and effort needed to produce a Request for Proposal (RFP) and the subsequent evaluation of the merits of the responding firms, before beginning the actual recruitment process.

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As with any recruitment effort, the executive recruitment process starts with conducting a job analysis and developing a profile. The process is essentially the same as previously discussed (Refer to Part Two: Planning the Recruitment Strategy). These are used for any position for which the organization wishes to recruit. The only difference is that the person/group making the ultimate decision may involve the organization's executive or the county/city's personnel subcommittee of the larger council or legislative group.

Now that we have an updated job description and employee profile in hand, a determination of the actual recruiting methods, to be used can be made. These may include internal and external methods as indicated earlier, and internet/web-based approaches. The organization must now make a decision about organization-based versus outsourced recruiting.

If you decide to stay internal and recruit from within the organization, you have the benefit of readily available information on the job a specific candidate has been performing, including their salary history and a copy of their most current performance evaluation, and you can solicit supervisor/manager comments on a specific employee. The primary question, however, is do any existing employees have the requisite knowledge and skillsets required by the targeted executive vacancy? Even if there are potential internal candidates, is the organization searching for more than this? Is the organization looking for a candidate who brings a different perspective, perhaps a different viewpoint or manner of doing things? If this is the case, then we will need to cast a wider recruitment net and look at external candidates.

If the organization decides to recruit externally, refer to Part Three, Development of Recruitment Strategies for a review of the alternatives and options available to the organization in recruiting candidates. If the organization decides to use a search firm as part of the effort. There are some basic principles we need to keep in mind. As Diane Krebs (*New York Law Journal*, March 30, 2009), points out,

There are three principal hurdles in navigating the recruitment outsourcing landscape:

1. Understanding your motivation for outsourcing recruitment for this position.
2. Recognizing the root problems that outsourcing will and will not solve.
3. Identifying, selecting, monitoring, and managing the outside recruitment organization.

Ideally, outside firms will provide high-quality, expeditious, and comprehensive support for recruiting candidates for the executive/senior manager job opening, and all HR needs to do is sit back and wait for results.

The first hurdle, understanding your motivation for outsourcing executive recruiting, may mean that the HR staff simply does not have the time or the expertise to take on this project. As William Finlay and James E. Coverdill point out in *Headhunters, Matchmaking in the Labor Market*

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“Headhunters provide a better service than HR in three respects. First, they are willing to perform the awkward and difficult tasks associated with a candidate search, such as making cold calls to potential candidates. Second, headhunters, as outsiders, owe their loyalty solely to the hiring managers for whom they are working. HR, in contrast, has multiple ties within an organization and its own set of priorities that may or may not coincide with what the hiring manager needs. Headhunter’s status as loyal outsiders is also an asset when hiring must be conducted in secrecy. This occurs most commonly when a hiring manager seeks to replace an employee but wishes to keep the firing a secret until a replacement has been hired. Third, headhunters do not undermine the organizational stature of hiring managers. A practical consequence is that if searches are entrusted to HR, members of this department may end up recruiting, screening, and selecting candidates who earn more than them, an uncomfortable reversal of the normal organizational hierarchy.”

The second hurdle in navigating the executive recruitment outsourcing landscape is recognizing the root problems that outsourcing will and will not solve. If there is high turnover, for example, we need to examine and analyze the reasons causing this. We discussed the use and importance of turnover data in Part One of this module, along with the use of exit interviews to gain insight into why people are leaving.

The third hurdle in navigating the executive recruitment outsourcing landscape is identifying, selecting, monitoring, and managing the outside recruitment organization. Merely hiring an excellent firm or organization for executive recruitment is not enough. Several essential monitoring requirements are provided below so the organization can assure that:

- The consultant prepares a detailed contract and recruitment plan that is approved in advance by the organization;
- There is a clear delineation of responsibilities *vis-a-vis* screening applications, interviewing candidates, acknowledging applications, and proper notification to applicants is provided regarding progress and final employment decisions; and
- The search firm assures the recruitment process is accomplished with full compliance with all legal requirements, to include the interviewing and selection methods used to screen applicant.

Additionally, someone needs to be appointed to oversee and manage the day-to-day contact with the search firm and monitor the contract to assure that the search firm is complying with all of the contractual mandates and fulfilling all of the requirements of the process. The best and most logical organizational unit to perform this function is HR, and as Business Partners, we should be prepared to step forward and assume this role.

In her *Inc.* article “How to Work With an Executive Search Firm,” Elizabeth Wasserman provides valuable insights into properly using executive search firms:

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Before looking for an executive search firm to help you fill key positions, you need to understand the different types of search firms and how they structure fees. There are typically three types:

- **Contingency Firms.** Contingency firms are transaction-oriented—they are paid only if you hire a candidate they present to you, and generally focus on mid- to lower-level positions. Contingency firms work on a percentage (typically 20-30 percent) of the candidate's first year total cash compensation. "Hiring managers must provide timely feedback to contingency firms, thus illustrating your firm's commitment to hire a candidate," says Timothy J. Augustine, principal of Atwell LLC, a national land development consulting firm, and author of *How Hard Are You Knocking? The Job Seekers Guide to Opening Career Doors*. "As with any service-based business, contingency firms will focus their efforts based on the real potential to generate revenue and will prioritize their time and energy on realistic opportunities."
- **Retained Firms.** A retained search firm typically has an exclusive relationship with the employer and is hired for a specific period of time to find a candidate. Retained firms are paid a higher percentage (typically 30-35 percent) of the estimated first year compensation regardless of whether a candidate is hired. "Most assignments are paid in three installments, typically one-third of the total fee to initiate the search, one-third when quality candidates are presented and interviewed, and one-third when the position is filled," Augustine says. "Retained search firms are often more focused on a consultative relationship, and invest the appropriate time to learn about your company, the details of the position and the characteristics of the right candidate, and provide a research team with various resources to assist you with the search." Retained firms are best-suited for senior-level management positions where there are fewer qualified candidates.
- **Container Firm.** A container firm blends the fee structure of contingent and retained services. "Container firms are paid an upfront fee, typically \$5,000 to \$8,000 to initiate the search and require a percentage (typically 20-25 percent) of the candidate's first year compensation once the position is filled," Augustine says.

Different recruiters may find their candidates in different locations or screen them in different ways. You need to understand these differences and make sure that they meet your company's criteria in vetting job candidates. Here are factors to consider, according to Wasserman:

- **Sourcing.** The recruiter's sourcing strategy and the resources they utilize to locate candidates is critical. "The recruitment firm should leverage an extensive resource network that includes industry research, internal research teams, candidate databases, industry information, competition, and internet tools to help them identify the target market," Augustine says. Felix adds that a firm should also consult with the business' executives to see if they have preferences—for example, if they want to consider candidates currently employed by competitors or not. Provide a list of companies you want them to approach. Chances are you know your competition better than they do.

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- **Screening.** “The firm must be able to qualify potential candidates after conducting a number of telephone and face-to-face interviews, which should allow them to present a more defined list to the employer,” Augustine says. In addition, some recruitment firms utilize selection assessment tools that are benchmarked against your firm’s criteria.
- **Interviewing.** The recruiter should present you with a short list of the best candidates for face-to-face interviews with your firm. These candidates should have already been thoroughly assessed and interviewed and your recruiter should be able to discuss each candidate’s resume, qualifications, personal strengths, and motivation. It is critical to meet candidates so that your interview team can compare and select the best person for the position. But the recruiter should help you prepare for the interviews. “Prior to scheduling interviews, the recruiter should present and review any interview notes, the candidates’ qualifications, and expectations for the firm and position,” Augustine says.
- **Evaluation and selection.** Once the interviews are complete, review your notes with the recruiter and discuss the strengths and weaknesses so that you can zero in on the right candidate. Sometimes it’s obvious. Sometimes you may need to broaden the search. “Follow-up communication is critical to a solid relationship with a recruiter,” Augustine says. “Many firms maintain agreements which establish specific parameters of communication and conduct, such as response time and evaluation within 48 hours of resume receipt or interviews, and clear evaluations and expectations from the hiring manager. A strong partnership cultivates open feedback about your company such as competitiveness of your salary structure, incentive programs, market share within a certain geographic area, new competitors, and market perception.”

Wasserman concludes:

“Before making an offer to a candidate, the search firm can help you conduct background checks, checking educational and employment references although many will farm out criminal and civil background checks to third parties that specialize in this work,” Felix says. If you have narrowed the list down, you should participate in some of the reference checks, he adds.

“Work with the recruiter to determine who will present and close the offer,” Augustine says. “This process should include notes from the interviews and a solid closing strategy to address financial questions and expectations, opportunities within the firm and the outlook of their career growth.”

The most fruitful search firm partnerships are founded on trust, open communication, and a commitment from each party. Cultivating a true partnership with a recruiter will enable you to attract, hire, and retain the best people in your industry. “Remember to realize that these are consultants in human capital and strategic issues as well as being recruiters for a particular position,” Felix says.

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In the crowded field of employment and recruitment, there are reputable specialists in recruiting executives. This involves recruiting for middle to upper management positions. These agencies are skilled at supplying people who are fit for executive positions for both public and private sectors. Recruitment outsiders may have significant differences in technology, processes, staff, and approach. This is a highly consultative function, so be sure to select the one that best aligns with your company's culture, management style, and goals. Some will merely work with you to refine your current process, use your existing technology, and incorporate your staff in conjunction with their own to make this a learning experience in addition to a focused, immediate effort to fulfill your current staffing needs. Others have a more independent orientation, asking the employer or client to stay out of the process until the short list of candidates is developed, providing a more complete end-to-end solution.

Since this is a very specific and specialized area of recruitment, more of these agencies realized the need for developing specific schemes that cater to the needs of their clients. Every recruitment process is different and because of this diversity, agencies consult experts who are experienced in the public sector or specific industries. Having an expert is very important to every company that offers executive recruitment services. Agencies in this field work hard to keep in touch with the latest from the industries and public organizations to constantly increase their knowledge about the sectors they deal with. Some companies have gone to the level of establishing a panel of public sector or private industry experts who can be quickly called upon to fill a specific recruitment need.

Executive recruitment is a highly charged assignment since it involves providing highly qualified and skilled staff and a recruiting solution to fill critical gaps in the management structure of the company or organization. So, whether recruiting internally or going outside, be aware that your actions and response time will be subject to scrutiny all of the way through this process. Hopefully, the information and material provided above will make this process less painful, and ultimately, successful.

Exercise

1. Briefly describe your organization's experience with executive recruitment efforts for senior or top management positions.
2. If your organization utilized the services of an executive search firm, describe whether the organization found the experience to be a positive one.

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Part Five: Long-Term Strategies

We have spent the majority of this module discussing immediate or near-term, recruiting strategies. As business partners, we also need a longer perspective on possible recruiting sources that may assist in meeting our organization's workforce needs. One of these areas is internships, and Mathis and Jackson provide a number of cogent recommendations on making internships a potentially valuable recruitment tool for your organization:

- **Determine organizational needs**—This could be built into the workforce planning steps outlined in Part One. If management would like to use interns, there need to be specific work projects identified for the interns to work on during their tenure. This is an important detail and it needs to be determined early on, before schools or colleges are contacted. Ideally, the proposed project should be developed into the general form of a position (job) description that that can be given to prospective candidates and the organization can in turn use it as part of the selection process.
- **Meaningful work**—The work to be performed by the intern should generally match the educational level (i.e., seniors in high school or trade school, juniors or seniors in college, or currently working on advanced degrees) and area of educational study (e.g., engineering, business or public administration, chemistry, etc.). There is a tendency for organizations to hire interns to do mundane or routine tasks for workers on leave, or to supplement the workforce, without regard for their future career interests. It is important to remember that the intern came to work for your organization because he or she perceives it as an attractive, potential employer. Conversely, you want to be able to evaluate their potential as a future employee. Neither objective is achieved if the intern is not given an opportunity to perform meaningful work.
- **Pay well**—Most interns seek paid internships, and as a public sector employer, you may not be able to match the pay that a private sector employer may be able to offer to an intern. Despite pay differentials, you may still be an attractive employer for those who are interested in public service. If your organization has an established mission, vision, and goal statements, these may be valuable recruitment tools which, in effect, will “brand” you as effective organization, worthy of consideration.
- **Treat the intern as an employee**—Make sure their onboarding experience models that given to permanent staff. Also, assure that they are afforded sufficient work space and equipment to perform their work assignments. The intern will seek and should receive feedback on their work, just like that afforded any new employee. Mentoring the interns will help prepare them for the real world and also assist you in making a determination as their suitability for future employment.
- **Look at several candidates**—As with any recruitment effort, the organization needs to develop a pool of candidates from which to select interns. Contacts with multiple schools and colleges will probably be needed to generate a sufficiently large number of candidates.

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The best recruitment tool for both interns and permanent staff involves the creation of long-term relationships with educational institutions in your immediate area. There are a number of actions the organization can take:

- **Job fairs**—This is an obvious first step for most. The problem is many organizations stop visits when few jobs are available or experiencing budgetary problems. The key is to maintain contact, even in difficult times. Many educational institutions tend to steer their students away from organizations that participate sporadically.
- **Guest lecturers**—Every public organization has experts in a variety of areas—law enforcement, public finance, administration, engineering, etc. Contacting department heads at local colleges and schools and offering to provide speakers on specific issues may build credibility and provide access to their programs and students. There are two caveats to this outreach initiative—your speakers need to have good presentation skills and should be prepared by the HR staff to provide brief “commercials” on the benefits of working for your organization.
- **Grants**—You may want to determine if any of the schools and colleges would like to join your organization in applying for specific grant programs. This would forge a working relationship, which would most likely actively involve some teachers/professors and students working on the grant program with your organization’s staff.
- **Career days**—Offer open houses to students at local educational institutions to spend a day meeting with members of the organization in specific program areas to gain a real-life perspective on public employment in their area of interest. Such events need to be carefully planned in advance to assure that the presentations are meaningful, properly presented, and that the HR staff is available to answer employment questions.
- **Work improvement programs**—If you have identified a need for additional employee training in any areas as a way to build the bench strength mentioned in Part One, you may want to consider contracting this training to a local college or school that has the capability of meeting your needs. This will strengthen existing relationships or assist in forging new ones.
- **Start early**—Some types of positions may require special background and physical requirements, such as law enforcement and public safety. Meeting these requirements will mean advance preparation by potential applicants. For that reason, it is important that the organization proactively reaches out to the educational institutions to fully inform potential applicants of these requirements. Some public organizations have modeled their recruitment efforts after the military, whose efforts typically start in high schools.

The final area for developing long-term recruitment strategies is succession planning. Both public and private organizations are bracing for the pending outflow of the baby boomers from the American workforce. In Part One, we identified the need to determine retirement patterns in the organization and locate potential hot

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spots where significant number of employees in specific job titles, geographical locations, or work units will shortly be eligible for retirement. Identifying these areas and determining **now** what your potential needs will be is absolutely essential. Once this data has been accumulated and discussed with management, planning needs to be implemented to meet these future needs.

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Part Six: Conducting Background and Reference Checks

Some organizations pay lip service to background and reference checking, some view it as a necessary evil, and others believe it is an essential requirement of the recruitment process that needs to be rigorously performed. According to the Privacy Rights Clearinghouse, an employer's need to know about potential employees arises from a number of factors. These include:

- False or misleading information given by job applicants, estimated by some sources at 30 to 40 percent of all information given on resumes and job applications.
- Federal and state legal requirements for certain jobs, including those that involve contact with children, the elderly or disabled, as well as some government positions.
- Fallout from corporate scandals, such as Enron and WorldCom.
- The September 11 attacks.
- Negligent hiring lawsuits, where a company is sued because an employee caused harm to someone else.

Most employer background checks focus on employment history, educational background, credit history, motor vehicle history, and criminal background. Employment and educational background checks verify information that employees have provided in resumes and on job applications.

Background investigations typically take place after the in-depth interview. Although the process requires time and money, it generally proves beneficial when making selection decisions. The value of background investigation is evident when the investigation reveals that applicants have misrepresented their qualifications and backgrounds. Some of the more common types of false information given during the application process are the dates of employment and academic study, past jobs, and academic credentials. Universities also report that inquiries on former students often reveal that "graduates" never graduated or did not attend the university. The only protection is to get verification on applicants either before or after hire, and to never assume that applicant information is accurate. If hired, an employee can be terminated for falsifying employment information.

Background checks, when used appropriately, can assist with the selection of a candidate. Indeed, it is advisable for all employers to do some due diligence in the hiring process to protect against negligent hiring claims. Some industries are required to investigate prospective employees. Nevertheless, as with all personnel-related activities, there are guidelines and limits to what an employer may do.

At a minimum, most employers want to check with a former employer. This type of background check is typically called a reference check. Employers usually wish to be assured that the person about to be hired has no criminal record. For some jobs an employer may want to know if the person has shown responsibility in financial

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dealings. Some employers also consider personal interviews with the applicant's business associates, friends, or neighbors of value in assessing character and reputation. Such inquiries seem routine enough, but some things are worth bearing in mind.

For certain jobs, specific laws make a background check mandatory rather than discretionary. Often the laws that require a background check are limited to a check of criminal records. Examples of jobs that require a criminal background check are those in the trucking industry and many jobs that involve contact with children, the elderly, and disabled persons. Employers need to be aware that, if used incorrectly, criminal background investigations could contradict federal law indicating that checks should not be an absolute bar to hiring. Furthermore, background checks have some candidates and employees concerned because the information reported might be inaccurate or outdated. As Mathis and Jackson caution, care should also be exercised in using "social media websites and the internet to conduct background checks on employees. They go on to state that "anyone on the internet can post damaging information about individuals, further complicating the process of performing fair and legitimate background checks if this information is utilized in job selection."

Immigration laws also call for employers to verify a person's eligibility for employment. This requires a form called an Employment Authorization Document (EAD), sometimes referred to as an I-9 check. For more on this process and an employer's obligations, visit the website for the U.S. Citizenship and Immigration Services, formerly the Immigration and Naturalization Service and now a part of the Department of Homeland Security. Go to www.uscis.gov.

The questions to be answered, then, are what information should an organization gather, and how should it gather it? Reference information is usually collected by mail, by telephone, or in person. Reference checks requested by mail require a written questionnaire or a letter. While checks done by mail can be a systematic and efficient means of collecting data, one of the big problems associated with mail questionnaires is their low return rate by reference givers. One means of encouraging the return of a mail check is to enclose a signed statement from the applicant authorizing a former employer to give the requested information and stating that all information received will be kept confidential. Typically asked questions in a mail reference check, as reported by Robert D. Gatewood and Hubert S. Field in the third edition of *Human Resource Selection*, are:

- When was he/she employed with your firm?
- Was he/she under your direct supervision?
- If not, what was your working relationship with him/her?
- How long have you had an opportunity to observe his/her work performance?
- What was his/her last job title with your firm?
- Did he/she supervise any employees?

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- What was his/her gross income?
- Why did he/she leave the company?
- For him/her to perform best, how closely should he/she be supervised?
- How well does he/she react to working with details?
- How well do you think he/she can handle complaints from customers?

Telephone reference checks are favored by many employers. Some of the reasons for this include:

- Reference givers can be questioned and ambiguous comments clarified;
- Information may be given orally that would not be given in writing;
- The reference checking process can be expedited;
- It is easier to ensure that reference comments are being given by the person named rather than a clerk or secretary;
- The way oral comments are given (e.g., voice inflections, pauses) may be revealing of what a person really thinks;
- A telephone reference check can yield a better reference return rate; and
- The personal nature of the telephone check contributes to greater responsiveness of the reference giver.

Personal references provided by the candidate can be another source of obtaining background information, but be aware that in most instances, the personal references were provided to convey a positive evaluation.

From legal and practical perspectives, Gatewood and Field have a number of suggestions to offer:

- Reference data are most properly used when the data involve job-related concerns. Thus requested data should address KSA's or any other characteristics of the applicant that are necessary for successful job performance.
- Because we are tailoring the content of our reference check to the content of a specific job, we will likely need more than one general form for the various positions in an organization.
- Reference checks are subject to the Uniform Selection Guidelines. Thus, as for any selection measure, we will need to monitor the fairness and validity of the reference check.

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- An objective rather than a subjective reference checking system is less likely to be open to charges of discrimination.
- Applicants should be asked to give written permission to contact their references.
- Reference takers collecting information by telephone or in person should be trained in how to interview reference givers.
- All reference check information should be recorded in writing.
- If a job applicant provides references but reference information cannot be obtained, go back to the applicant for additional references.
- Check all application form and resume information.
- A caveat on the use of negative information. Negative information received during a reference check frequently serves as a basis for rejecting an applicant. Caution is certainly advised in using any negative information as a basis for excluding applicants. Before negative information is employed, we should verify its accuracy with other sources, be sure that disqualification on the basis of the information will distinguish between those who will fail and those who will succeed on the job, and use the same information consistently for all applicants.

With the information age upon us, it is easy for employers to gather background information themselves. Much of it is computerized, allowing employers to log on to public records and commercial databases directly through dial-up networks or via the internet. Mathis and Jackson also discuss computerized sources of applicant information:

“Managers involved in selection are beginning to browse the internet for non-traditional sources of employee background information, such as personal websites, on-line networking groups, and web search engines. Many believe that these websites provide a more in-depth snapshot of a job candidates individual characteristics, despite the information that has been submitted to the company through traditional means with the application form or resume. More specifically, managers are using Google.com to obtain data such as demographics and other highly personal information that cannot be covered in the interview session. Online network sites such as Twitter and Facebook are being utilized to obtain personal information, some of which involves sexual activity, drug use, and other questionable behavior.”

“There are a lot of things that potential employers can find out about you,” says Tena Friery, research director at the Privacy Rights Clearinghouse. “This goes far beyond credit information and can include information about your personal characteristics and mode of living. One of the privacy concerns related to this is that there is no standard of relevance. The information that is gathered and disseminated doesn't have to apply to the specific job.”

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Employers can either decide to search for this information themselves, or opt to hire a third party to gather data and develop a report for them. Finding one of these online companies is as easy as using an internet search engine to find websites that specialize in background checks. There are many companies that specialize in employment screening. Companies conducting background checks fall into several broad categories. This can range from individuals commonly known as private investigators to companies that do nothing but employment screening, as well as online data brokers. The National Association of Professional Background Screeners provides a directory of its members on its website, www.napbs.com.

Employers should beware of companies advertising on the internet that they can find everything about anyone. They may not be in strict compliance with federal and state laws, especially the provisions that require accuracy of background check reports. Such third parties are companies known as consumer reporting agencies. Many have been established for a number of years, while others have sprung up as more information has become available on the internet.

In performing background and reference checks, organizations need to assure compliance with applicable federal and state laws. We have provided a summary of these for your reference.

The Federal Fair Credit Reporting Act: FCRA put national standards in place for background checks. However, these standards only apply to companies that hire a consumer-reporting agency to do the background check. If a company does the background check in-house, it is exempt from the provisions of this act.

Before obtaining background history information on employees/prospective employees, keep in mind that the FCRA, may regulate how you obtain and use background history information. The law governs the acquisition and use of background information regarding employees and prospective employees.

The FCRA applies to consumer reports and investigative consumer reports prepared by consumer reporting agencies (which includes background check vendors, private investigators, and detective agencies) for the purpose of providing information to a third party (typically, the employer). Consumer reports may consist of background reports, credit history checks, and motor vehicle records. Investigative consumer reports contain information regarding an applicant or employee's character, general reputation, personal characteristics or mode of living obtained through personal interviews with friends, neighbors and/or business associates, as well as through employment verification with prior employers.

If you use a consumer reporting agency to procure background history information, then you will be required to adhere to the FCRA's steps for compliance, including disclosure and authorization, certification, advance notice of adverse action, and notice of adverse action.

Employers who intend to obtain background checks on employees and applicants need to:

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- Provide a written notice to the employee/applicant explaining that a consumer report will be obtained; if an investigative consumer report is to be obtained, then the notice must specifically indicate that fact.
- Obtain the employee's signed consent for the background check in a document separate from an employment application or an employee handbook.
- Certify to the consumer-reporting agency that the above steps have been followed and that the employer will comply with FCRA.
- Provide advance notice of any intended adverse action to the individual and provide a copy of the report to the individual, along with the "Summary of Your Rights under the Fair Credit Reporting Act" written by the Federal Trade Commission prior to taking adverse action. The purpose of the notice is to give the individual an opportunity to dispute or explain any inaccurate or incomplete information in the background check report.
- Supply the applicant, upon taking adverse action, with a copy of the report, the "Summary of Your Rights" document, and the contact information for the consumer-reporting agency that furnished the report, as well as a statement that the consumer reporting agency did not make the adverse decision and cannot explain why it was made.

Failure to comply with the FCRA provisions can subject employers to damages, including actual damages, punitive damages, costs, and attorneys' fees. Employers may also be liable for fines and/or imprisonment if they knowingly and willfully obtain a consumer report under false pretenses.

Should you decide to conduct background checks in-house, the type of information you are eligible to obtain—and ultimately use—will vary by state. As indicated previously, FCRA sets national standards for employment screening. However, your state may have stronger laws, such as California's *Investigative Consumer Reporting Agencies Act* (Civil Code §1786) and the *California Consumer Credit Reporting Agency Act* (Civil Code §1785). In addition, many state labor codes and state fair employment guidelines limit the content of an employment background check.

Under the FCRA, a background check report is called a "consumer report." This is the same official name given to your credit report, and the same limits on disclosure apply. The FCRA says the following *cannot* be reported:

- Bankruptcies after 10 years.
- Civil suits, civil judgments, and records of arrest, from date of entry, after seven years.
- Paid tax liens after seven years.
- Accounts placed for collection after seven years.
- Any other negative information (except criminal convictions) after seven years.

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Criminal History: Criminal history checks also are covered by FCRA, and care needs to be exercised in obtaining and using this information. The most recent change to the FCRA made criminal convictions reportable indefinitely. California still follows the seven-year rule (CA Civil Code 1786.18) as do some other states. To find the limit for reporting criminal convictions in your state, contact your state employment agency or office of consumer affairs.

No federal law explicitly prohibits employers from inquiring into an applicant's past criminal history. The Equal Employment Opportunity Commission (EEOC) has opined, however, that disqualifying an applicant because of an arrest or conviction record could violate Title VII of the *Civil Rights Act of 1964*, which prohibits employment discrimination based upon race, color, religion, gender, and national origin, because such a blanket policy has a disparate impact on African-Americans and Latinos, who are arrested and convicted in higher proportions than Caucasians. According to recent statistics, African-Americans are 15 times more likely to be arrested for low-level offenses than whites and are incarcerated at a rate six times that of Caucasians. Additionally, Latinos are three times more likely to be arrested than Caucasians and are incarcerated at a rate more than twice that of Caucasians.

In recent years, there has been an international movement to eliminate the yes/no question, inquiring as to an applicant's criminal history from application forms. Referred to as the Ban-the-Box movement, the premise of this campaign is that anything that makes it more difficult for an ex-offender to find a job increases the likelihood that they will reoffend.

According to the EEOC, an employer may deny employment to an applicant with a criminal record only if the decision is job-related and justified by business necessity—the typical standard in disparate impact cases. The factors relevant to this determination include the nature and gravity of the offense(s), the time passed since the arrest or conviction, and the nature of the job sought. Moreover, for arrests, it must also appear that the applicant engaged in the conduct for which he/she was arrested, since "it is the conduct, not the arrest or conviction per se, which the employer may consider in relation to the position sought" (*EEOC Arrest Guidance*). An employer need not conduct an extensive investigation to determine an applicant's guilt or innocence but must give the person a meaningful opportunity to explain and make follow-up inquiries necessary to evaluate his or her credibility.

Most states do prohibit employers from using arrest information when determining eligibility for employment. For example:

- New York prohibits employers from inquiring into or acting on information about an arrest not resulting in a conviction or that resulted in a favorable outcome for the person involved. [See N.Y. Exec. Law §296(15) and (16).]
- California similarly prohibits employers from even asking prospective employees to disclose information concerning an arrest or detention that did not result in conviction, with limited exceptions. Although arrest record information is public record, in California and other states, employers cannot seek from any source the arrest record of a potential employee. However, if the arrest resulted in a conviction, or if the applicant is out of jail pending trial, that

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information can be used. [California Labor Code §432.7 and 8.] In California, an exception exists for the health care industry where any employer who has an interest in hiring a person with access to patients can ask about sex-related arrests. And, when an employee may have access to medications, an employer can ask about drug related arrests.

- Pennsylvania will not release arrest information when 3 years have elapsed since the arrest, there was no conviction, and there are no proceedings pending. [See 18 Pa. Con. Stat. Ann. §9121.]
- Illinois will allow employers of 15 or more employees to access prospective employee's criminal records subject to restrictions. [See 775 Ill. Comp. Stat. 5/5-101 and 103.]

How organizations use this information in rendering employment decisions will also vary by state. New York prohibits employers from denying employment because of a prior conviction, unless the offense has a direct bearing on the employee's fitness or ability to perform the job sought. [See N.Y. Correct. Law §§750-755.] Pennsylvania has a similar limitation. [See 18 Pa. Con. Stat. Ann. §9125.]

Some states also mandate that employers obtain employee consent prior to conducting background checks. For example, New Jersey requires employers to obtain signatures of prospective employees prior to obtaining criminal history information and to provide prospective employees with adequate notice and an opportunity to confirm/deny the accuracy of the information. Similarly, Pennsylvania and New York require employers to notify applicants if the decision not to hire is based in whole or in part upon criminal history. It is an excellent practice to obtain the applicant's permission in writing to contact previous employers, reference, and educational institutions.

Workers' Compensation: In most states when an employee's claim goes through the state system or the Workers' Compensation Appeals Board, the case becomes a public record. An employer may only use this information if an injury might interfere with one's ability to perform required duties. Under the *Americans with Disabilities Act*, employers cannot use medical information or the fact an applicant filed a workers' compensation claim to discriminate against applicants. [See 42 USC §12101.]

In California, employers may access workers' compensation records after making an offer of employment. To gain access, employers must register with the Workers' Compensation Appeal Board and confirm that the records are being accessed for legitimate purposes. Although the agency may not reveal medical information, and the employer may not rescind an offer due to a workers' compensation claim [see California Labor Code 132a], employers sometimes discover that applicants have not revealed previous employers where they had filed claims. In such situations, employers often terminate the new hire because it appears they falsified the application.

Bankruptcies: Bankruptcies are public record. However, employers cannot discriminate against applicants because they have filed for bankruptcy. [See 11 USC §525.]

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Credit Reports: An employment background check often includes a copy of your credit report. The three major credit reporting agencies (Experian, TransUnion, and Equifax) provide a modified version of the credit report called an employment report. An employment report includes information about your credit payment history and other credit habits from which current or potential employers might draw conclusions about you.

An employment report provides everything a standard credit report would provide. However, it does not include your credit score or date of birth. Nor does it place an inquiry on your credit file that may be seen by a company looking to issue you credit. Having too many credit inquiries tends to lower your credit score.

Employers often use your credit history to gauge your level of responsibility. Whether this is a valid assumption or not, some employers believe if you are not reliable in paying your bills, then you will not be a reliable employee. Unfortunately, a bad credit report can work against a job applicant in his/her search for employment.

In addition to your payment history, a credit report typically includes information about your former addresses and previous employers. Employers can use this as one way to verify the accuracy of information you provide on an application or resume.

The following is a listing of sources that can be used as a resource to obtain additional guidance on the legal and regulatory requirements surrounding reference and background checks.

Federal and State Laws:

Fair Credit Reporting Act, 15 USC §§1681 et seq., www.ftc.gov

Federal Trade Commission Regulations. 16 CFR 601 et seq., www.ftc.gov

- California *Investigative Consumer Reporting Agencies Act*, Civil Code §1786 et seq., as amended by Assembly Bill No. 1399, approved by the Governor July 31, 2003. www.leginfo.ca.gov

For information on other laws might cover background checks

In addition to labor or employment laws, screening of job applications or current employees may overlap other laws, such as:

- *Family Educational Rights and Privacy Act* (FERPA) (20 U.S.C. §1232g; 34 CFR Part 99). FERPA controls the release of information from education records. For more on FERPA, see the website for the U.S. Department of Education, www.ed.gov/offices/OII/fpco/ferpa.
- *Americans with Disabilities Act* (42 USC §12101), www.ada.gov
- Title VII of the *Civil Rights Act of 1964* (42 USC 2000e), www.eeoc.gov/laws/statutes/titlevii.cfm
- *Age Discrimination in Employment Act of 1967* (29 USC §621), www.eeoc.gov/laws/statutes/adea.cfm

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- Consumer Information on Background Check, www.consumer.ftc.gov/articles/0157-background-checks

Information on Professional Background Search Companies:

National Association of Professional Background Screeners

110 Horizon Drive, Suite 210

Raleigh, NC 27615

Telephone: (919) 459-2082

Fax: (919) 459-2075

Web: www.napbs.com

Articles and Resources of Interest: Findlaw, employment.findlaw.com

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Part Seven: Assisting in Negotiations with Selected Candidate

The organization has now worked through the entire recruitment and selection process (see Module Three for more information on selection) and has settled on the best candidate for the job. The last hurdle in bringing this person on board is negotiating with him/her to satisfy his/her specific needs in the face of the organization's policies on pay and benefits, leave, parking, housing, etc. As a business partner, HR should be prepared to assist managers in performing this function and, perhaps, in guiding them through the negotiation process.

As Mathis and Jackson point out, "After the company goes through all the effort to screen, interview, and make job offers, hopefully, most candidates accept job offers. If they do not, then HR might want to look at reasons why managers and HR staff cannot 'close the deal.' It is common for HR staff members to track the reasons candidates turn down job offers, which helps explain the rejection rate in order to learn how competitive the employer is compared with other employers and what factors are causing candidates to choose employment elsewhere."

Closing the deal for public organizations can be problematic in that there is little (in some instances infinitesimally small) room for negotiations over salary, benefits, leave, and bonuses. The nature of most public sector compensation systems is that one size fits all, and the ability to modify these requirements may be extremely limited. The areas in which there is usually room for public organizations to negotiate, with some limitations, are salary, bonuses, and benefits.

Most public organizations have procedures in place for hiring above the minimum rate of pay assigned to the pay range/group. Typically requests for a starting salary above the minimum must:

- Be approved in advance by the city/county council or executive;
- Be supported with documentation regarding the fact that the applicant's salary in his/her previous position was above the minimum salary established by the organization.

Most public sector employers have the capability to provide an appropriate increase above the applicant's current salary—usually in the 5 to 10% range, as long as the agreed upon salary does not exceed the maximum for the applicant's assigned pay range/group.

If the organization has a bonus program, there may be some limitations placed on negotiations over its use:

- The amounts are usually predetermined and not subject to negotiation;
- May be payable only after six to twelve months of satisfactory performance, and this requirement may apply even to signing bonuses;
- The amounts may be based upon the level of performance, e.g., higher performers receive more than average performers, without the ability to modify the amounts.

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In regard to benefits (e.g., health insurance, ancillary health care services, leave, etc.) the one-size-fits-all approach is almost universally true. The only exception would be if the organization has a cafeteria-style benefit plan that allows employees flexibility in determining the mix and levels of benefit coverage. These plans frequently allow the employee to acquire additional coverage for which they pay additional premium costs. Cafeteria plans are not universally available in public sector organizations, so the ability for the applicant to modify benefits to suit his/her personal needs and tastes is somewhat limited.

Other potential areas for possible negotiation include housing and use of an automobile. Some public organizations may be able to provide housing and/or use of an automobile as a perk for new employees. These types of perks typically are available to an applicant for the organization's top executive or for positions that are extremely difficult to recruit for, and for which the capability to travel is a major component of the position. Housing and automobile perks, however, have a potential downside in that they are considered taxable items whose value must be stated by the organization and for which the employee will have to pay taxes.

As Mathis and Jackson point out, "Many individuals typically know little about organizations before applying for employment. Consequently, when deciding whether or not to accept a job, they pay particularly close attention to the information received during the selection process, including compensation data, work characteristics, job location, and promotion opportunities." It is extremely important, therefore, that during the selection process, your organization needs absolute clarity regarding salary, benefits, and the ancillary perks that are possible. This may cause some applicants to opt out of further consideration for employment, and while that may be regrettable, it is better for the organization in assuring that the candidates in the final group for employment selection understand the limitations within which the organization must operate.

Exercise

Describe the ability of your organization to negotiate with potential employees over the terms and conditions of their employment.

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Part Eight: Evaluation of Recruitment Strategies

There are costs associated with all of the activities performed by HR professionals in their respective organizations. Given the limited funding available in most public sector agencies, maximizing the “bang for the buck” is an increasingly important requirement. Also, given the changes occurring in the workforce (e.g., replacement baby boomers, fewer new workers joining the workforce) and the rapidly changing methodologies for accessing and attracting new workers, it is absolutely critical that HR professionals critically evaluate their recruitment tools, methodologies, and strategies.

As Mathis and Jackson point out: “The primary way to discover whether recruitment efforts are financially effective is to conduct formal analyses as part of recruiting evaluation ... Information about job performance, absenteeism, cost of training, and turnover by recruiting source helps adjust future recruiting efforts.” They continue by providing a list of “recruiting measurement metric areas” that includes the following:

- Quantity/quality
- Recruitment satisfaction analyses
- Time to fill openings
- Cost per recruiting method
- Process metrics
- Yield ratios
- Selection rates
- Acceptance rates
- Success base rates

Mathis and Jackson describe the activities associated with each of these evaluation methods in some detail and we do not intend to elaborate further on their comments. We do want to provide a number of suggested questions that can be used as guidance in evaluating each of these factors. These factors will also provide a cost/benefit analysis regarding the effectiveness of the recruiting strategies from a number of different perspectives.

Quantity of Recruits

- Are recruiting efforts producing sufficient numbers of applicants to fill current and projected vacancies? A broad candidate pool provides more than just numbers; it offers the organization the chance to be more selective by screening and winnowing resumes and job applications. Answering whether the number of applicants provided is sufficient sets the direction you will take. If the current recruitment source is not providing the applicants needed, it is time to try a different approach.

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- Does the organization do a great deal of in-house recruiting? If so, it may be time to look outward.
- Was local market newspaper, radio, or television advertising the primary recruitment source? It may be time to consider using the internet/web-based job postings sites listed earlier in this section.
- One issue mentioned by Mathis and Jackson that we think needs special emphasis is “Does recruiting at this source provide enough qualified applicants with an appropriate mix of diverse individuals?” Carefully review your recruitment brochures to ensure that they include EEO/diversity considerations, and that you are providing a multicultural image of the company.

Quality of Recruits

Quality-of-hire focuses on how satisfied an organization is with the person hired and how satisfied the hired person is with the hiring organization. A good hire enhances the overall performance of an organization. Quality-of-hire is probably one of the most difficult recruiting components to measure.

- Is the pool of applicants extensive enough to give us the number of qualified candidates needed to fill empty positions?
- Can these applicants successfully perform their job duties and related tasks?
- How successful have previous applicants who were hired from this recruitment been?
- What was the turnover rate for new hires?
- What do their performance appraisals look like? Since the cost of training new workers is substantial, it is important to attract the right individuals.

Recruitment Satisfaction Analyses

Essentially this involves determining the satisfaction of both parties—both the employer and the employee—with the job fit from both perspectives. Managers can be surveyed to determine their satisfaction with a number of aspects of the entire process. For example:

- What is the manager’s perception of the employee’s job fit?
- How satisfying was the experience of working with the HR staff?
- How accommodating was the HR staff in meeting the manager’s expectations?

From the new employee’s perspective:

- How informative and time-consuming was the onboarding process?
- How effective was the employee’s introduction to the worksite and job duties?

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- To what extent did the job, as described in the recruitment materials and qualifications match the actual work requirements?

Some potential actions to assess organizational satisfaction regarding recruitment success include:

- Periodic surveys of managers who have recently hired staff who have completed their initial probationary period to assess their performance against the recruitment profile initially developed as part of the recruitment planning process, as well as overall satisfaction with the new employees' performance.
- Length of time each hire maintained employment and an analysis of their performance.
- Tracking promotions over a five- to ten-year period following hiring to determine any trends in terms of recruitment sources used, promotional patterns, etc.

Time to Fill Openings

This metric refers to the total time it takes to hire someone for a job from the time it was posted. Longer times mean lost productivity and reduced morale for employees who are assigned essential tasks and responsibilities for the empty positions, many times without any increase in pay.

Mathis and Jackson offer the following guidance: "Looking at the length of time it takes to fill positions is a common means of evaluating recruiting efforts. If openings are not filled quickly with qualified candidates, the work and productivity of the organization are likely to suffer. ...Unfilled positions cost money. Generally, it is useful to calculate the average amount of time it takes from contact to hire for each source of applicants, because some sources may produce recruits faster than others."

Some questions to ask include:

- What strategies did the organization use to fill their critical vacancies?
- What was the average time from initial contact/application to hire date? Did the method of recruitment (e.g., internet, mailings, media advertisements, etc.) have any effect on the time required from contact/application to date of hire?
- Was the timeline established for the recruitment effort adhered to? If not, what caused the delays or deviations from the established timelines?
- Should the delays have been anticipated? How will these issues be addressed in future recruitment planning efforts?

Cost Per Recruiting Method

Cost-per-hire relates to the total cost associated with a given position and hire. Costs to be considered are advertising, recruiting, resume processing, candidate identification and screening, candidate interview time, travel costs, assessment testing, and hiring administration.

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No matter what approach you take to fill empty positions, the recruiting process will come with costs. Mathis and Jackson provide the following information on evaluating the cost of recruiting:

“The calculation most often used to measure such costs divides total recruiting expenses for the year by the number of hires for the year. The problem with this approach is accurately identifying items that should be included in recruiting expenses. Should expenses for testing, background checks, relocations, or signing bonuses be included, or are they more properly excluded? Once such questions are answered, the costs can be allocated to various sources to determine how much each hire from each source costs, ... Recruiting costs might include employment agencies, advertising, internal sources, and external means. The costs also can be sorted by type of job—costs for hiring managers, secretaries, bookkeepers, and sales personnel will all be different.”

Acquiring all data necessary to capture recruiting costs can be time consuming and labor intensive, if the organization is relying on manual processes to accomplish all of the recruitment tasks. Obviously, organizations using automated systems, such as an HRIS system, will be able to accomplish this more easily. Absent the automated processing, our advice is to keep some simple rules of measurement in mind:

- At some point, the costs of measurement efforts will exceed the value of what is being measured.
- Repeated efforts to measure everything creates increasing resistance to measure anything.
- It is better to have a rough measure of the right factor(s) than a precise measure of the wrong factor(s).

The key is to identify what recruitment costs you are going to track and then consistently track them for all your hires to have an internal comparison from one hire sequence to the next.

Be sure you review your cost analysis and each of these other measures to identify what you can capitalize on next time and what you need to do different. For example, what was the success of your recruitment sources? Which ones provided the most candidates and, more importantly, the quality candidates? Which ones did not?

Process Metrics

This can involve considerable work, as it involves critically evaluating all of the components of the recruiting process. The most frequently used manner in which this is accomplished is by flow-charting all the steps, determining approximate timeframes for each, and determining where and how steps can be eliminated and or timeframes can be reduced. Using this in conjunction with the recruiting cost and time-to-hire strategies discussed previously may provide the information to streamline steps and processes and eliminate redundancies in the whole recruitment process. In many instances, it can be used as a precursor to automation efforts to justify the expenditures to automate manually performed tasks.

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Yield Ratios

As Mathis and Jackson state, this methodology essentially is a comparison “with the number of applicants at one stage of the recruiting process with the number at the next stage.” It is essentially a way to evaluate the continued effectiveness of a multistage recruitment process that might involve multiple steps in the selection process leading to the ultimate decision to hire. Also, if one of the stages appeared to have an adverse impact on minorities and/or women, that might mean that the stage should be reviewed to determine how or why that is occurring. This type of analyses would require careful recordkeeping on each stage of the recruiting and selection process but could provide potentially critical information regarding the efficacy of the entire process.

Selection Rates

As described by Mathis and Jackson, the selection rate “equals the number hired divided by the number of applicants.” As Mathis and Jackson go on to point out, “Selection rate measures not just the recruiting but the selection issues as well.” This is a relatively simple calculation, but as we will discuss in Module Three, selection can be compromised by a number of nonmerit factors, rater biases, and systemic problems.

Acceptance Rates

As the name implies, this is simply the number of applicants hired divided by the total number of applicants who were offered jobs. It is another relatively simple calculation, but it could be a useful tool as public sector hiring processes tends to be longer in duration, often requiring multiple approvals, than in the private sector. As Mathis and Jackson point out, this type of analysis “helps to explain the rejection rate by learning how competitive the employer is compared with other employers and highlighting what factors are causing candidates to choose employment elsewhere.”

Success Base Rates

In the end, how do we know we made the right hiring decision? Have we added to the organization’s pool of successful performers?

Mathis and Jackson provide some suggestion for evaluating success: “A longer term measure of recruiting effectiveness is the applicants’ success rate. The success base rate can be determined by comparing the number of past applicants who have become successful employees against the number of applicants they competed against for their jobs, using historical data within the organization. Also, benchmarking data can be used to compare the success base rate with the success rates of other employers in the geographic area or industry. This rate indicates whether the quality of the employees hired results in employees who perform well and have low turnover. For example, assume that if ten people were hired at random, four of them would perform satisfactorily. Thus, a successful recruiting program should be aimed to attract the four in 10 who are capable of doing well at the particular job. Realistically, no recruiting program will attract only people who will succeed in a particular job. However, efforts to make the recruiting program attract the largest proportion possible of those in the base rate group can make recruiting efforts more productive in both the short and long term.”

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Exercise

Briefly describe what actions your organization has taken in the recent past to evaluate the effectiveness of its recruiting efforts?

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Reading Assignment for Selection Module

Chapter Seven, *Human Resource Management*, Fifteenth Edition, by Robert L. Mathis, John H. Jackson, Sean R. Valentine, and Patricia A Meglich

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Part One: Selection in the Public Sector

In Module One, we discussed the forces that led to the passage of the *Pendleton Act of 1883*, which created the Federal Civil Service System and initiated the movement toward merit-based selection for public sector positions. Merit-based selection also satisfies one of the unique characteristics of public sector organizations that we discussed in Module One—the need for transparency. Competitive selection processes theoretically provide a level playing field, allowing people of diverse backgrounds, education, culture, and experience to compete equally for employment with public organizations.

This need for transparency, equal access, and opportunity is an essential component of public employment; if we are to conduct the public’s business we need to ensure that all citizens have equal access and opportunities for employment. The selection methods must also be able to withstand public scrutiny and evaluation, and be judged to be fair and consistently applied to all applicants.

The establishment of merit systems removed partisanship and party affiliation as the main criteria for employment in the public sector. Competitive examinations were introduced, and entry into civil service was permitted at various levels in the organization. Job openings were posted; anyone with the requisite qualifications who applied would be allowed to compete for the position.

By the mid-20th century, civil service/merit systems in some form and open competitive testing for job vacancies were common throughout the public sector.

Despite its critics and supposed shortcomings (refer to our discussion in Module One), civil service/merit-based systems are still utilized as the predominant method of employee selection in the public sector. At one time, public sector selection systems relied almost exclusively on written examinations, but that emphasis has shifted in the past 40 years to other, perhaps more appropriate, selection modalities. We will discuss many of the most common selection methods later in this module. This diversity in approach to selection methodology is captured by Mathis and Jackson in their definition of selection as the process of choosing individuals with the correct qualifications to fill the jobs in an organization.” While a definition is easy to devise, the determination and development of appropriate selection methods continues to be a challenge for many public and private organizations.

We indicated earlier in Module One that two significant pieces of legislation, the *Pendleton Act* and the *Civil Service Reform Act of 1978* (CSRA), altered the institutional framework of public HR management. To understand the current context of testing and selection, we need to be mindful of a number of other laws and regulations that continue to influence the public sector employment process. These include:

- **Title VII of the Civil Rights Act of 1964**—Before the *Civil Rights Act of 1964*, an employer could reject a job applicant for virtually any reason, including his/her race, religion, sex, or national origin. An employer could turn down an employee for a promotion, decide not to give him or her a particular

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assignment, or in some other way discriminate against that person because he or she was African-American or Caucasian, Jewish, Muslim, or Christian, a man or a woman, or Italian, German, or Swedish; and it would all be legal. When Title VII was passed, employment discrimination based upon one's race, religion, sex, national origin, and color became illegal. This law protects employees of all private and public employers, as well as job applicants. All companies and organizations with 15 or more employees are required to adhere to the rules set forth by Title VII. The law also established the Equal Employment Opportunity Commission (EEOC) which continues to enforce this and other laws that protect against employment discrimination. In 1978, the *Pregnancy Discrimination Act* amended Title VII and made it illegal to discriminate against pregnant women in matters related to employment.

- **Age Discrimination in Employment Act of 1967**—The *Age Discrimination in Employment Act* (ADEA) prohibits any employer from refusing to hire, discharge, or otherwise discriminate against any individual because of age. The Act covers compensation, terms, conditions, and other privileges of employment, including health care benefits. This Act specifically prohibits age-based discrimination against employees who are at least 40 years of age. The purpose of the Act is to promote the employment of older persons and to prohibit any arbitrary age discrimination in employment.
- **Equal Employment Opportunity Commission**—Title VII of the *Civil Rights Act of 1964* also created the EEOC, a five-member, bipartisan commission whose mission is to eliminate unlawful employment discrimination. The law provides that the commissioners, no more than three of whom may be from the same political party, are appointed to five-year terms by the president and confirmed by the Senate. The chair of the commission appoints the general counsel. The EEOC began operation on July 2, 1965—one year after Title VII's enactment into law.
- **Uniform Guidelines on Employee Selection Procedures**—In 1978 the EEOC issued Uniform Guidelines on Employee Selection Procedures. The Uniform Guidelines provided guidance to employers to help them comply with federal laws which prohibit discrimination in employment based on race, color, religion, sex, and national origin. The guidelines apply to employers who are subject to Title VII of the *Civil Rights Act of 1964* or Executive Order 11246. We will discuss the EEOC's impact on public employment practices, as well as that of the Uniform Guidelines on Employee Selection, in Part Two of this module.
- **Americans with Disabilities Act of 1990 (ADA)**—Title I of the ADA covers employment and requires that employers of more than 15 people must make reasonable accommodations that allow a qualified job applicant with a disability to complete the application process or a disabled employee to carry out the duties of his or her job. According to the ADA, “an individual is considered to have a disability if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.”

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- **Title I of the Civil Rights Act of 1991**—Congress passed the *Civil Rights Act of 1991* to address several Supreme Court decisions rendered in the late 1980s that made it more difficult for plaintiffs to prevail in their employment discrimination suits and to recover fees and costs when they won their lawsuits. The law procedurally and substantively amends Title VII, the ADEA, and the ADA. The amendments provided for the first time that parties can request jury trials and successful plaintiffs can recover compensatory and punitive damages in intentional employment discrimination cases. The CRA also expands Title VII’s protections to include congressional and high level political appointees and eliminates the two and three year statute of limitations period for filing private lawsuits under the ADEA.

The ADA was amended in 2008 to emphasize that the definition of a disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally should not require extensive analysis. The amendments made important changes to the definition of the term “disability” by rejecting the holdings in several Supreme Court decisions and portions of EEOC’s ADA regulations. The effect of these changes has been to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

The basic definition of disability as a condition that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, the way these statutory terms should be changed in several ways. Most significantly, the amended ADA:

- Directs EEOC to revise that portion of its regulations defining the term “substantially limits.”
- Expands the definition of “major life activities” by including two nonexhaustive lists:
 - The first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
 - The second list includes major bodily functions (e.g., “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”).
- States that mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a disability.
- Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- Changes the definition of “regarded as” so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is “regarded as” disabled if he or she is subject to an action prohibited by the

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ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor. and

- Provides that individuals covered only under the “regarded as” requirement are not entitled to reasonable accommodation.

These amendments to the ADA became effective January 1, 2009.

As explained in the publication *Testing and Assessment: An Employer’s Guide to Good Practices* (U.S. Department of Labor, Employment and Training Administration, 2000): “The general purpose of employment laws and regulations is to prohibit unfair discrimination in employment and provide equal employment opportunity for all. Unfair discrimination occurs in employment when employment decisions are made based on race, sex, religion, ethnicity, age, or disability rather than on job-relevant knowledge, skills, abilities, and other characteristics. Employment practices that unfairly discriminate against people are called unlawful or discriminatory employment practices.”

Selection in the public service has the same primary goal as the private sector when it comes to employee selection. Both sectors are hoping to attract and hire the best and the brightest candidates, and to retain them as productive employees. If there is a competition between both sectors to attract a specific candidate, the speed at which private industry can move to hire often overshadows the relative merits of employment offered by a career in public service.

All is not lost, however, in this ongoing competition for talent. Despite lingering differences in the manner in which public and private sector employment is viewed, by and large, the public service offers more challenging, make-a-difference job opportunities by virtue of the fact that the roles of public servants differ markedly from those in private industry. Jobs such as park rangers and wildlife conservation officers, child welfare specialists and social workers do not exist or are vastly different in private industry.

The public sector must continue to provide for transparency in their selection practices. Equal access and opportunity must continue to be an essential component of public employment. The public sector needs to continue to pursue selection methods that are able to withstand public scrutiny and evaluation. The difficulty stemming from these unfaltering commitments is that we have an ongoing obligation to recruit and hire quality employees quickly and efficiently, and to conduct and execute the public’s business. To accomplish this, we may need to radically alter our selection practices, processes, and strategies if we are to attract and select quality individuals for public service jobs. The development of selection strategies will be discussed in detail in a later section of this module.

Public sector employment is not lacking in appeal. What is required in order to compete with the private sector is a streamlining of selection methods and practices to enable public organizations to:

- Quickly announce job vacancies,

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- Fast-track sifting and screening of candidates, and
- Move more quickly in making and executing hiring decisions.

One possible solution may be to continue to push current initiatives, such as those listed in the U.S. Office of Personnel Management's Operational Goals for 2010. A few pertinent examples follow:

- By April 1, 2010, increase number of CHCO agencies using the USAJOBS announcement format and integrating online applications with their assessment systems to 50% by April 1, 2007; 75% by April 1, 2008; and 100% by April 1, 2010.
- By October 1, 2010, work with CHCO Council to roll out a more targeted (by learning institution, profession) job fair process in 2006 and expand through strategic planning period. Decrease hiring decision timeframes to 45 days from closing date of job announcement to date of offer for 50% of hires by end of FY 2006, increasing by 10% per year thereafter to 90% in 2010.

Public organizations realize that having an effective, legally sound system in place is crucial to helping them select the right people for the right jobs. Better selection strategies result in improved organizational outcomes. The more effectively organizations recruit and select quality candidates, the more likely they are to hire and retain satisfied employees. In addition, the effectiveness of an organization's selection system can influence productivity and organizational performance. Hence, investing in the development of a comprehensive and valid selection system is money well spent.

In his presentation at the 2006 IPMA-HR International Training and Development Conference, Dr. Norman Maharaj discussed selection processes and the steps needed for accomplishment:

The selection process that follows the recruitment drive is the key phase in deciding on the most competent candidate for a post. If done well, its results will yield an employee that will be able to add value to the work environment, and a person that will not require a lot of attention, guidance or motivation to get a job done. The image of the employee 'hitting the tarmac running' immediately comes to mind. The choice you make at the end of the selection process is the one you will have to live with and must therefore be approached with the necessary attention.

Generally, the selection process is constituted of a sifting phase, followed by a selection test or interview, or both. Each phase of the selection process requires evaluation or selection criteria in respect to which each candidate is measured.

Dr. Maharaj went on to define the phases as such:

- The first in line is the sifting phase. The selection criteria to be utilized for this phase is taken from the recruitment means, let us agree that this is an advertisement. Amongst the requirements set in the advertisement will

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be minimum requirements. These are normally statutory requirements, for example citizenship and no prior criminal convictions. Amongst them will also be the tertiary training of a type and level necessary to enter a certain post level. The objective of the sifting phase is to eliminate all those candidates who do not meet the minimum set requirements and in respect of whom it will serve no purpose to consider their applications any further.

- Next in line is the short-listing phase where the very best amongst the applicants are selected for further consideration. The selection criteria to be utilized for this phase are also taken from the advertisement, but now much more is looked at than the mere minimum requirements. During this phase, the objective is to identify candidates that best conform to all the requirements set, or even exceed these. They will constitute the short list of applicants to be subjected to further or final selection. Further selection would entail subjecting the applicants to psychometric testing and/or competency testing/evaluation.
- The final selection phase is popularly done by means of an interview, where a selection of panelists, fully apprised of both the job content and the set requirements subject each short-listed candidate to a predetermined set of questions. These questions are designed to test the depth and width of each candidate's knowledge, skills and abilities with respect of the set requirements in order to identify the most suitable candidate. It stands to reason that in order to thoroughly assess candidates to this extent requires careful planning and phrasing of questions and further probing questions to obtain enough knowledge on which to draw a responsible conclusion on the profile of each candidate. So thorough does this process have to be that it will be able to withstand legal scrutiny.

As discussed in *Testing and Assessment: An Employer's Guide to Good Practices* "The entire selection process can produce a great deal of informal job candidate contact and interaction. Being human, it is very easy to develop opinions of candidates based upon how they dress, how they speak, and their mannerisms which may reflect an air of confidence. Tests are used to make inferences about people's characteristics, capabilities, and future performance. The inferences should be reasonable, well-founded, and not based upon stereotypes."

In the course of this module, we will explore public sector selection processes, some of the constraints within which these systems operate, and the methodologies employed in an effort to assure equal access and opportunity for all applicants.

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Part Two: Merit System

When Title VII of the *Civil Rights Act of 1964* was passed, employment discrimination based upon one's race, religion, sex, national origin, and color became illegal. This law protects employees and job applicants of all private and public employers. Companies and organizations with 15 or more employees are required to adhere to the rules set forth by Title VII. The law also established the Equal Employment Opportunity Commission which continues to enforce this and other laws that protect against employment discrimination.

Some prohibitions include:

- An employer cannot make hiring decisions based on an applicant's color, race, religion, sex, or national origin. An employer cannot discriminate based on these factors when recruiting job candidates, advertising for a job, or testing applicants.
- An employer is prohibited from deciding whether or not to promote a worker based on the employee's color, race, religion, sex, or national origin. He or she cannot use this information when classifying or assigning workers.
- An employer cannot use an employee's race, color, religion, sex, or national origin to determine his or her pay, fringe benefits, retirement plans, or disability leave.
- An employer cannot harass employees because of their race, color, religion, sex, or national origin.

In 1978, the *Pregnancy Discrimination Act* amended Title VII and made it illegal to discriminate against pregnant women in matters related to employment. Equal employment opportunity considerations extend from the very beginning of the application process in selection to the very end when the actual hiring decision is made.

Fair and equitable tests and other applicant screening methods are an area of concern in assuring equal employment opportunity. Regardless of the chosen selection method, the organization is expected to "use assessment instruments that are unbiased and fair to all groups, use only reliable assessment instruments and procedures, use only assessment procedures and instruments that have been demonstrated to be valid for the specific purpose for which they are being used, and that you use assessment tools that are appropriate for the target population" (*Testing and Assessment*, U.S. Department of Labor, 2000).

As part of the effort to level the playing field, in 1978 the EEOC issued Uniform Guidelines on Employee Selection Procedures. The Statement of Purpose provides insight into why these guidelines were needed:

- A. Need for uniformity.** The federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department

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of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the federal government as are applied to other employers.

B. Purpose of guidelines. These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

C. Relation to prior guidelines. These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.(CFR-Code of Federal Regulations Pertaining to the U.S. Department of Labor, Title 41, Chapter 60, Part 60-3)

The Uniform Guidelines provided guidance to employers to help them comply with federal laws which prohibit discrimination in employment based on race, color, religion, gender, and national origin. The guidelines apply to employers who are subject to Title VII of the *Civil Rights Act of 1964* or Executive Order 11246.

An employment selection process is considered discriminatory if it has an adverse impact on the hiring, promotion, or other employment opportunities of individuals because of race, sex, or ethnicity; that is, if the selection rate for any race, gender, or ethnic group is less than 80 percent for the group having the highest selection rate. A selection procedure that results in an adverse impact is allowed to stand if the employer can demonstrate that the test measures a trait necessary for successful performance of the job. The employer has the option of eliminating the factor from the selection process which has caused the adverse impact. The guidelines also require maintenance of detailed records on employment selection procedures.

The results of these attempts to level the playing field can be seen across the country, as reflected in higher numbers and percentages of minorities in the public sector workforce. As an example, the following is an excerpt from U.S. Office of Personnel Management's Federal Equal Opportunity Recruitment Program (FEORP) Report to Congress for Fiscal Year 2013:

The percentage of minorities in the federal workforce increased by 0.3 percent from 34.6 percent (670,835) in FY 2012 to 34.7 percent (669,831) in FY 2013. The federal workforce is 18 percent Black, 8.3 percent Hispanic, 5.5 percent Asian, 0.4 percent Native Hawaiian/Pacific Islander, 1.7 percent American Indian/Alaska Native, 1.1 percent Non-Hispanic/Multi-Racial, and 65.1 percent White. Minorities as a whole constitute 34.7 percent of the federal workforce. Men comprised

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56.6 percent of all permanent employees and women 43.5 percent. Notably, the federal government still faces challenges with regard to the utilization of Hispanic talent, as Hispanic employees constitute 8.3 percent of the federal workforce as compared to 14.3% of the civilian labor force.

The Senior Executive Service (SES) is more diverse than ever before. The SES is 10.8 percent Black, 4.1 percent Hispanic, 3.0 percent Asian, 0.1 percent Native Hawaiian/Pacific Islander, 1.2 percent American Indian/Alaska Native, and 0.7 percent Non-Hispanic/Multi-Racial. In addition, Women now make up 33.7 percent of the SES.

As indicated earlier in the discussion on equal employment opportunity, there are other laws addressing employment discrimination that organizations need to be aware of in selecting candidates for employment. We have discussed several of these laws in previous modules, but the brief summary of these laws from the EEOC website are listed below to sharpen our awareness of these other governing laws:

- The *Equal Pay Act of 1963* (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;
- The *Age Discrimination in Employment Act of 1967* (ADEA), which protects individuals who are 40 years of age or older;
- Title I and Title V of the *Americans with Disabilities Act of 1990* (ADA), which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments;
- Sections 501 and 505 of the *Rehabilitation Act of 1973*, which prohibit discrimination against qualified individuals with disabilities who work in the federal government; and
- The *Civil Rights Act of 1991*, which, among other things, provides monetary damages in cases of intentional employment discrimination.

The EEOC enforces all of these laws, and also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies.

Under Title VII, the ADA, and the ADEA, it is illegal to discriminate in any aspect of employment, including:

- Hiring and firing;
- Compensation, assignment, or classification of employees;
- Transfer, promotion, layoff, or recall;
- Job advertisements;
- Recruitment;

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- Testing;
- Use of company facilities;
- Training and apprenticeship programs;
- Fringe benefits;
- Pay, retirement plans, and disability leave; or
- Other terms and conditions of employment.

Discriminatory practices under these laws also include:

- Harassment on the basis of race, color, religion, sex, national origin, disability, or age;
- Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
- Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities; and
- Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

Employers are required to post notices to all employees advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading. Many states and municipalities also have enacted protections against discrimination and harassment based on sexual orientation, status as a parent, marital status, and political affiliation.

Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex. Under Title VII:

- It is illegal to discriminate against an individual because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group.
- A rule requiring that employees speak only English on the job may violate Title VII unless an employer shows that the requirement is necessary for conducting business. If the employer believes such a rule is necessary, employees must be informed of when English is required and the consequences for violating the rule.

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- An employer is required to reasonably accommodate the religious belief of an employee or prospective employee, unless doing so would impose an undue hardship on the employer.

Title VII's broad prohibitions against sex discrimination specifically cover:

- **Sexual Harassment**—This includes practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment for persons of either gender, including same sex harassment. (The hostile environment standard also applies to harassment on the basis of race, color, national origin, religion, age, and disability.)
- **Pregnancy-Based Discrimination**—Pregnancy, childbirth, and related medical conditions must be treated in the same way as other temporary illnesses or conditions.

Additional rights are available to parents and others under the *Family and Medical Leave Act* (FMLA), which is enforced by the U.S. Department of Labor.

The ADEA contains a broad ban against age discrimination and specifically prohibits:

- Statements or specifications in job notices or advertisements of age preference and limitations. An age limit may only be specified in the rare circumstance where age has been proven to be a bona fide occupational qualification;
- Discrimination on the basis of age by apprenticeship programs, including joint labor-management apprenticeship programs; and
- Denial of benefits to older employees. An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

The *Equal Pay Act* (EPA) prohibits discrimination on the basis of sex in the payment of wages or benefits, where men and women perform work of similar skill, effort, and responsibility for the same employer under similar working conditions. Note that:

- Employers may not reduce wages of either gender to equalize pay between men and women,
- A violation of the EPA may occur where a different wage was/is paid to a person who worked in the same job before or after an employee of the opposite sex, and
- A violation may also occur where a labor union causes the employer to violate the law.

Titles I and V of the ADA prohibits discrimination on the basis of disability in all employment practices. It is necessary to understand several important ADA definitions to know who is protected by the law and what constitutes illegal discrimination:

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- **Individual with a Disability**—An individual with a disability under the ADA is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Major life activities are activities that an average person can perform with little or no difficulty such as walking, breathing, seeing, hearing, speaking, learning, and working.
- **Qualified Individual with a Disability**—A qualified employee or applicant with a disability is someone who satisfies skill, experience, education, and other job-related requirements for the position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of that position.
- **Reasonable Accommodation**—Reasonable accommodation may include, but is not limited to, making existing facilities used by employees readily accessible to and usable by persons with disabilities; job restructuring; modification of work schedules; providing additional unpaid leave; reassignment to a vacant position; acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials, or policies; and providing qualified readers or interpreters. Reasonable accommodation may be necessary to apply for a job, to perform job functions, or to enjoy the benefits and privileges of employment that are enjoyed by people without disabilities. An employer is not required to lower production standards to make an accommodation. An employer generally is not obligated to provide personal use items such as eyeglasses or hearing aids.
- **Undue Hardship**—An employer is required to make a reasonable accommodation to a qualified individual with a disability unless doing so would impose an undue hardship on the operation of the employer's business. Undue hardship means an action that requires significant difficulty or expense when considered in relation to factors such as a business' size, financial resources, and the nature and structure of its operation.
- **Prohibited Inquiries and Examinations**—Before making an offer of employment, an employer may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in the same job category. Medical examinations of employees must be job-related and consistent with business necessity.
- **Drug and Alcohol Use**—Employees and applicants currently engaging in the illegal use of drugs are not protected by the ADA when an employer acts on the basis of such use. Tests for illegal use of drugs are not considered medical examinations and, therefore, are not subject to the ADA's restrictions on medical examinations. Employers may hold individuals who are illegally using drugs and individuals with alcoholism to the same standards of performance as other employees.

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The *Civil Rights Act of 1991* made major changes in the federal laws against employment discrimination enforced by EEOC. Enacted in part to reverse several Supreme Court decisions that limited the rights of persons protected by these laws, the Act also provides additional protections. The Act specifically

- Authorizes compensatory and punitive damages in cases of intentional discrimination,
- Provides for obtaining attorneys' fees and the possibility of jury trials, and
- Directs the EEOC to expand its technical assistance and outreach activities.

Title VII and the ADA cover all private employers, state and local governments, and education institutions that employ 15 or more individuals. These laws also cover private and public employment agencies, labor organizations, and joint labor management committees controlling apprenticeship and training.

The ADEA covers all private employers with 20 or more employees, state, and local governments (including school districts), employment agencies, and labor organizations.

The EPA covers all employers who are covered by the *Fair Labor Standards Act*. Virtually all employers are subject to the provisions of the FLSA.

Title VII, the ADEA, and the EPA also apply to the federal government. In addition, the federal government is covered by Sections 501 and 505 of the *Rehabilitation Act of 1973*, as amended, which incorporate the requirements of the ADA. However, different procedures are used for processing complaints of federal discrimination.

Other federal laws, not enforced by the EEOC, also prohibit discrimination and reprisal against federal employees and applicants. The *Civil Service Reform Act of 1978* (CSRA) contains a number of prohibitions, known as prohibited personnel practices, which are designed to promote overall fairness in federal personnel actions. The CSRA prohibits any employee who has authority to take certain personnel actions from discriminating for or against employees or applicants for employment on the basis of race, color, national origin, religion, sex, age, or disability. It also provides that certain personnel actions cannot be based on attributes or conduct that do not adversely affect employee performance, such as marital status and political affiliation.

The Office of Personnel Management (OPM) has interpreted the prohibition of discrimination based on conduct to include discrimination based on sexual orientation. The CSRA also prohibits reprisal against federal employees or applicants for whistle-blowing, or for exercising an appeal, complaint, or grievance right. The CSRA is enforced by both the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB).

The *Immigration Reform and Control Act of 1986* (IRCA) requires employers to ensure that employees hired are legally authorized to work in the U.S. However, an employer who requests employment verification only for individuals of a particular

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national origin or for individuals who appear to be or sound foreign may violate both Title VII and IRCA; verification must be obtained from all applicants and employees. Employers who impose citizenship requirements or give preferences to U.S. citizens in hiring or employment opportunities also may violate IRCA.

The civil service/merit systems are, in fact, the portal through which most job applicants must pass to access the vast majority of public jobs.

The civil service/merit system concept began in the federal government with the passage of the *Pendleton Act* in 1883 to improve the government workforce previously staffed by the political patronage or spoils system, which allowed the political party in power the opportunity to reward party regulars with government positions.

Very simply, a civil service/merit system is a method of personnel management designed to promote the efficiency and economy of the workforce and the good of the public by providing for the selection and retention of employees, in-service promotional opportunities, and other related matters on the basis of merit and fitness. Civil service/merit systems use educational and occupational qualifications, testing, and job performance as criteria for selecting, hiring, and promoting employees. This methodology is used by federal, state, and many local governments for hiring and promoting employees to public sector positions on the basis of competence. The civil service/merit system process is used to promote and hire employees based on their ability to perform a job, rather than on their political connections. It is the opposite of the patronage system.

Merit selection is characterized by its fairness to candidates, its openness to public scrutiny, and its insistence on minimum competencies and qualifications. States and local governments took their cue from the federal experience with civil service/merit system operations in developing their systems. While the specific rules and regulations may differ, there are some essential characteristics or principles of civil service/merit systems that are similar. Many of these principles were embodied in Standards for a Merit System of Personnel Administration, which was published a final OPM rule in the February 16, 1979 *Federal Register*:

(b) federal personnel management should be implemented consistent with the following merit system principles:

1. Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge and skills, after fair and open competition which assures that all receive equal opportunity.
2. All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

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3. Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.
4. All employees should maintain high standards of integrity, conduct, and concern for the public interest.
5. The federal work force should be used efficiently and effectively.
6. Employees should be retained on the basis of adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.
7. Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.
8. Employees should be:
 - A. Protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and
 - B. Prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.
9. Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences:
 - A. A violation of any law, rule, or regulation, or
 - B. Mismanagement, a gross waste of funds, an absence of authority, or a substantial and specific danger to public health or safety.

The development and extension of civil service/merit systems was spurred by the *Social Security Act* amendments of 1939, which compelled states desiring to receive federal funds for welfare programs to develop state merit systems for employees paid in whole or in part by those funds. Approved overwhelmingly by Congress, the amendments went into effect on January 1, 1940.

In the same year the original the *Hatch Act*, or, more properly, An Act to Prevent Pernicious Political Activities, was extended to cover state and local government positions receiving funding from the national government. The statute imposed on the states the obligations to adopt merit principles designed to ensure neutral competency by limiting the partisan political activities of employees in state civil service systems. The *Hatch Act* applies to all federally aided agencies except educational institutions.

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There was also a requirement in the provisions of Title II of the *Intergovernmental Personnel Act of 1970* (IPA), as amended, relating to federally required merit personnel systems in state and local agencies, in a manner that recognizes fully the rights, powers, and responsibilities of state and local governments and encourages innovation and allows for diversity among state and local governments in the design, execution, and management of their systems of personnel administration, as provided by that Act. The IPA states, in part, that “certain federal grant programs require, as a condition of eligibility, that state and local agencies that receive grants establish merit personnel systems for their personnel engaged in administration of the grant-aided program.” These merit systems are in some cases required by specific federal grant statutes and in other cases are required by regulations of the federal grantor agencies. Title II of the IPA gives the U.S. Office of Personnel Management authority to prescribe standards for these federally required merit personnel systems.

Despite its critics and supposed shortcomings, (refer to our discussion in Module One), civil service/merit-based systems are still utilized as the predominant method of employee selection in most public sector organizations.

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Part Three: Selection Methods and Their Uses—Tools, Videos, Conference Calls

Determining the best selection method to be used to screen the candidates gathered through a recruitment program may be the biggest single contributor to organizational success or failure. The following is a listing of the most typical considerations regarding the choice of a selection method:

- **The level of detail regarding the job analysis**—Do we have accurate, current data gathered from a knowledgeable group of subject matter experts?
- **Time**—How urgent is the need to fill these positions?
- **Number of applicants**—Do we have only a few (less than a hundred) or many applicants (more than a thousand) who need to be tested?
- **Number of positions to be filled**—Is it a single position or is there an expectation of filling a hundred or more positions from the applicant pool?
- **Recruitment difficulty**—Is this a professional position requiring special licensure or educational attainment, which is difficult to recruit for in the current labor market?
- **Competencies/skill sets**—What specific competencies or skill sets are essential to successful job performance, and will that need to be evaluated by the selection method?

The answers to these questions will assist in determining which selection method, or combination of methods, would be most appropriate.

We will review some of the more common selection methods and advantages and disadvantages typically associated with each:

- **Paper and pencil exams**—As mentioned earlier, this is probably the most common selection method in use. Mathis and Jackson refer to “ability tests” that are intended to measure “an individual’s thinking, memory, reasoning, verbal, and mathematical abilities.” Typically, paper and pencil exams are used to evaluate these capabilities. The major advantages are that this selection method is relatively easy to administer and, through use of answer forms that can be optically scanned, are easy to score. This type of exam can be administered quickly to large groups of applicants with only minimal training needed for the test proctors.

Some of the disadvantages include the lack of depth of information gleaned from the results regarding the applicants’ personal capabilities, such as decision-making, judgment, and leadership skills. Also, since these exams are largely aptitude-type tests, applicants who have good test-taking skills tend to do extremely well but may not be the most desirable candidates for employment.

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Finally, this selection method typically requires the applicants to report to a central location at specific times and dates to take the exam. This causes considerable administrative work to secure a location, need for access to parking /public transportation, and also rescheduling if applicants are unable to report at the assigned location at the date and time indicated.

- **Computer-based**—Many former pencil and paper exams have been automated, allowing applicants to take the examination electronically rather than on paper. Some of the negatives of pencil and paper exams are ameliorated, such as the need to report to specific locations on the assigned date and time, the need for test proctors, and the administrative efforts required to set up test locations, notify applicants, etc., which may increase the cost-effectiveness of this selection method. Other advantages are that organizations can give applicants a window to access and complete the examination at their convenience, and the applicant may be informed at the conclusion as to whether he/she achieved a passing score.

The disadvantages include the assumption that all applicants will have access to a PC and are sufficiently able to access and complete the examination. In this regard, if applicants encounter a glitch in using the computer system, they will need access to a help desk to immediately resolve the problem and reset the examination?

Finally, if applicants are taking the examination from home, there is no way to ensure that he/she is not receiving assistance from a friend or family member while taking the examination. One way to avoid these potential problems is to utilize licensed test centers to administer examinations, many of which have access to parking and public transportation. In effect, these centers proctor your organization’s online exam and ensure that time limits, if required, are adhered to.

- **Assessment centers**—Mathis and Jackson describe an assessment center as “a series of evaluative tests during which candidates are assessed by multiple raters,” and that this methodology is most often used in the selection process when filling managerial openings. This methodology can be very effective in evaluating many of the softer skills needed for managerial effectiveness, such as decision-making, judgment, time management, customer service, and communication skills. The results can also be used to provide unsuccessful applicants with information on strengths and weaknesses. So if you are using this method to test only internal candidates, it can be used to drive future career development initiatives for these employees.

Disadvantages include cost, as they are more expensive to administer and may require more than a day to complete. Also, there are limits on the number of applicants that can be effectively processed at one time. So if you have several hundred applicants, completion of the assessment center may require several weeks or perhaps more than a month to complete.

Finally, the raters must be thoroughly trained in evaluating the results, which also increases the time and, potentially, the reliability of the process. Mathis and

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Jackson also point out that “the tests and exercises in an assessment center must reflect the content of the job for which individuals are being screened, and the types of problems faced on that job.”

- **Training and Experience (T&E) Ratings**—As the name implies, this selection method involves an evaluation of the applicant’s relevant education, work experience, and professional licensure. Typically, the applicant is asked to describe his/her past work experience in some detail, document educational credentials, and/or achievement of licensure. The evaluation of the applicant’s information typically results in a pass/fail, although it is possible to assign predetermined scores based upon the evaluator’s assessment of the applicant’s background. This methodology is most effective when recruiting applicants for:
 - professional jobs such as engineers, physicians, etc.;
 - applicants with very specialized education/experience, such as nuclear plant operators, forensic specialists, etc; or
 - positions which require professional licensure, such as engineers with a Professional Engineer’s (PE) certificate.

Because of difficulties in attracting people with these skill sets to public sector employment, having them take a written examination, for example, would be a major turnoff. T&Es can be processed relatively quickly, so the organization should be in position to extend an employment offer relatively quickly.

Some of the disadvantages of this selection method include:

- If the applicant is terse in his/her description of their work experience, the evaluator may not be able to accurately determine if the applicant does in fact qualify for the position. This could result in lengthy delays, waiting for the applicant to provide additional supporting documentation.
 - The T&E needs to be carefully crafted to elicit the proper information, based upon the job analysis and the duties and responsibilities routinely assigned to the positions.
 - Evaluators need to receive intensive training to assure they are assessing the factors included on the T&E in the same manner.
 - This methodology is best if used for relatively small groups of applicants (less than a hundred at a time). Having to evaluate several hundred T&Es could be time consuming and delay the appointment process.
- **Interviews**—Mathis and Jackson discuss a number of different types of interviews in terms of the validity and the structured nature of the process that is applied to the interview process:

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- Biographical, focusing “on a chronological assessment of the candidate’s past experiences.” This type of interview is “widely used and is often combined with other interview techniques.”
- Behavioral, in which “applicants are asked to describe how they behaved or performed a certain task or handled a problem in the past, which may predict future actions and show how well applicants are suited for current jobs.”
- Competency, which typically uses “A competency profile ... which includes a list of competencies necessary to do that particular job.” This type of interview process “takes time and sometimes benefits articulate or impression management-oriented people.” The value of this method lies in the ability to assess organizational values such as a customer service orientation, or consultative skills.
- Stress, which is designed to “create anxiety and put pressure on applicants to see how they respond.” Typically used for high stress jobs, this type of interview can turn off an applicant to further consideration of the employer.
- Situational, in which applicants are asked questions “about how applicants might handle specific job situations.” Done properly, the situational interview approach may provide insight into how a candidate might function in actual work-related situations.

Interviews are probably one of the most common selection methods used by employers nationally and internationally. It is typically combined with one or more of the other selection methods we either have or will discuss in this portion of the module. If there are large numbers of applicants to be screened, using interviews in any of the formats described by Mathis and Jackson may be cumbersome. This selection methodology is probably best used in combination with one or more other selection methods, probably as the final step in the selection process, when the applicant pool has been reduced to a manageable number. There can be many problems associated with the use of interviews, most of which pertain to the training and skill of the interviewer. Mathis and Jackson list a number of these problems, explaining that they are often the result of a lack of training or infrequent interviewing opportunities:

- Snap judgments
- Negative emphasis
- Halo effect
- Biases and stereotyping
- Cultural noise

It is absolutely essential that managers who will be required to conduct interviews are properly trained and, perhaps, receive refresher training if a significant period of time has passed since they last conducted interviews.

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- **Performance tests**—These types of selection methods are most effective when certain skills are so essential to successful job performance that it is considered necessary to assess the individual’s level of skill in performing the task. Some examples include:

- Keyboarding capability for positions which require extended periods of time using a PC, calculator, or similar office equipment;
- Driving exam for positions which require extensive operation of motorized equipment;
- Transcription capability for positions which require accurate and complete note-taking of legal or official minutes from business meetings, etc.;
- Physical agility, for positions such as police officers and firemen because of the need to assure that applicants will be able to successfully perform all of the physical activities typically associated with these types of positions; and
- Use of a video for law enforcement applicants to judge their ability to accurately recall a series of events as they transpired.

The most important consideration in determining whether to use a performance test is the relevance to the job (refer to Part Five: Job Analysis Techniques and Procedures). If the performance of this task is a daily or hourly event, then a performance test may be appropriate. It is essential, however, that the performance test be administered to all applicants in the same manner and that the evaluators received extensive training in evaluating the performance test in the same manner. Applicants should be informed in advance that they will have to complete the performance test as part of the selection process, the reasons for the test, and what constitutes a passing grade. This type of selection process is best used in conjunction with one or more of the other selection processes, such as a paper and pencil test, interview, etc., as the performance of this single task, despite its overall importance to job success, is probably not the sole indicator of success on the job. For example, police officers need good communication, writing, and people skills in addition to physical agility. To base the selection of police officers solely on the basis of their ability to perform physical tasks would not be in the best interests of the organization or the public they are intended to serve.

- **Assessment Process**—This can best be described as “assessment center light,” as this selection method normally consists of a portion or piece of a typical assessment center. By reducing the scope of the areas included in the assessment, the time and costs associated with this methodology is reduced and more candidates can be processed in a shorter period of time. Also fewer evaluators are needed, and the overall complexity of the process is reduced. These positive effects are offset, however, by reducing the overall scope of the selection process. Since we are reducing the number of “evaluative exercises,” as described by Mathis and Jackson, we are also reducing the evaluative capabilities—choosing to hone in on only a few of the traits considered to be essential for successful performance. Unless this is done

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carefully, the net effect may be that the selection method is less predictive of successful job performance.

- **Supplemental Application**—In an effort to gain more information regarding applicants' past experience and training, organizations will sometimes use a supplemental application form. This form will ask more direct questions regarding an applicant's experience in certain specified areas, and it is typically used for technical and professional jobs where the depth of experience and knowledge in specific areas is needed for successful job performance. In some respects, it may be similar to the T&E's discussed earlier, although it may not be scored or graded as is usually done with a T&E, and the breadth of experience is less important than the specific experience/knowledge in predetermined areas. As with T&Es, this methodology can be effective for hard-to-fill positions, where there are a limited number of applicants, or time constraints. Processing time is reduced, although with large numbers of applicants, the process could become unwieldy.
- **Other selection methodologies**—Some organizations may use psychological or behavioral tests. These may have application in specific types of positions such as law enforcement or correctional facilities, as employees in these occupations are subjected to stresses and mental fatigue not typically experienced in other types of positions. The predictive value of these tests varies greatly, and they should probably only be used as part of a more extensive battery of selection processes.

Finally, we want to briefly touch on the use of videos and conference calls as part of the selection process. In order to reduce costs and the time required to conduct interviews, or to accommodate applicants for whom travel to the organization would constitute a hardship, organizations may resort to either telephone or video conferencing. In some instances the use of either of these methods might also be considered an ADA accommodation to the applicant. Telephone interviews can be effective but may not be appropriate for managerial jobs which involve the exercise of judgment and decision-making capabilities. Sometimes the applicant's facial or physical reaction to questions may be misleading or may indicate his/her lack of understanding for the issue(s) embodied in the question. Not being able to see the applicant may also eliminate the potential for bias which would result from their mode of dress or physical appearance. Video interviews conform more closely to the concept of in-person interviews in that the applicant is visible and it is possible to judge more precisely his/her reactions to the questions as they are posed.

Exercise

1. Briefly describe which of the above selection methods are used predominately by your organization.
2. Are there any of the above methods your organization has never used? If so, please identify them and explain why.

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Part Four: Application Methods

There are a multitude of ways in which organizations allow applicants to apply for their jobs:

- **Mail**—This is perhaps one of the most common application methods. Applications mailed in country typically arrive within two or three business days. It is perhaps the slowest method. In a large organization, which receives copious amounts of mail, the applications typically are processed through a mail room and then routed to HR for review and processing. Because of the multiple handlers involved, chances for the applications being lost or misplaced are higher than for the other application methods we will discuss. Also, if the application has not been completed properly, or portions are missing, additional time and effort is required to notify the applicant and for the applicant to return the updated application. The applicant has little assurance that his/her application has been received unless a timely notification, either by telephone or mail, is sent to acknowledge receipt. This creates additional work and costs for the organization.
- **In person**—Many job search texts advise applicants to apply in person—either show up with their completed application in hand, or complete it at the employer’s location. The advantage of this method for the applicant is that by appearing in person, they may perhaps be interviewed or receive additional information regarding job prospects that might not be generally available. According to job search experts, it also demonstrates the applicant’s interest in the organization. The disadvantage for the organization is that these unplanned visits may disrupt operations—in fact taking time away from processing applications received through the mail or online (refer to the next bullet point). To counteract the drop-in effect, some organizations will accept the application, perhaps provide general information about the organization and the jobs that are available, but refrain from conducting an actual interview. The organization may also have not wanted to conduct a preemployment interview in order to avoid the appearance to other applicants that drop-in applicants received preferential treatment. Also, if all applicants will eventually have to participate in a selection process (refer to Part Three above), interviewing them may be a waste of time, if they do not perform well in the selection process. There is also an inherent danger in not interviewing the applicant at the time of their visit. The applicant may be turned off by the apparent lack of interest shown by the organization and may lose interest in further consideration in employment with them. Most organizations that accept applications in person, usually advise the applicant that their policy is not to grant interviews or provide any additional information until after the closing date for receipt of applications.
- **Online**—This is becoming a more common application process, and it presents a number of positive features:
 - It is fast, and the organization can quickly acknowledge receipt and provide additional information regarding employment, testing, or other preemployment requirements to the applicant;

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- Less processing time and effort is needed by the HR staff, and copies of the applications/resumes can be forwarded electronically to line staff for review;
- If the organization is using applicant tracking software, the application/resume can be quickly transferred to an electronic file for ease of storage and retrieval;
- Future communications with the applicant can be done electronically, eliminating mailing costs and the time and effort needed to prepare the mailings.

There are really few downsides to online applications unless your email and/or applicant tracking systems crash, thereby losing all of the stored data. Modern back-up systems are available which make this possibility less likely. There are people who may not have access to PCs and would not be able to apply online or who do not feel comfortable using this method of applying for jobs. We discussed the generational differences among workers earlier (refer to Part Two of the recruitment module). Older workers might be less inclined to use an online application process, whereas younger workers, who tend to be more tech savvy, would probably prefer the online application process.

All of the above application processes can be effective, and organizations should continue to use all three, recognizing that each has some limitations associated with it.

The remaining issue for discussion in this portion of the course is in regard to applications versus resumes. Some organizations discourage submission of resumes, preferring instead that all applicants complete the organization's official application form. Some organizations will accept resumes if they are attached to the application form, and a few organizations will accept resumes in lieu of the official application form. Which method is best? The answer is all of the above; each method has pros and cons associated with it:

- **Application forms**—Mathis and Jackson list the five main purposes for using application forms:
 - It is a record of the applicant's desire to obtain a position.
 - It provides the interviewer with an applicant profile that can be addressed during the interview.
 - It is a basic employee record for applicants who are hired.
 - It can be used for research on the effectiveness of the selection process.
 - It is a formal document on which the applicant attests to the truthfulness of all information provided.

Mathis and Jackson also list a number of notices and disclaimers that should routinely be included to protect the organization:

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- **Reference contacts**—including permission to contact previous employers listed on the application form or resume.
- **Employment testing**—notifying the applicant of required pre-employment examinations, such as a paper and pencil test, drug test, physical exam, etc.
- **Application time limit**—notifying the applicant as to how long the organization will maintain the application in their active files.
- **Information on falsification**—explains that falsification of information on the application may result in discipline, up to and including termination.
- **At will employment**—this may be important for some positions, however for public sector jobs covered by a merit system, inclusion of an at will employment statement may not be appropriate since the employee’s employment privileges may be based on a law or regulation governing the operation of the merit system.

Finally, Mathis and Jackson list a number of items that organizations should ensure never appear on their application forms:

- Marital status
- Height/weight
- Number and ages of dependents
- Information on spouse
- Date of high school graduation
- Emergency contact person
- Social Security number

Application forms do provide an efficient and uniform means of gathering specific data about a group of applicants that the organization deems to be critical in making employment decisions. Ensuring that the form is in compliance with applicable federal and state laws and regulations is the major hurdle that needs to be overcome.

- **Resumes**—Some organizations like to have resumes, as they typically provide a little more background information regarding applicants’ past work experiences. The downside of resumes is they may also provide some information that employers are legally prohibited from obtaining, such as marital status, date of high school graduation, or membership in fraternal or religious organizations. Even though this information has been voluntarily disclosed by the applicant, employers should **not** use that information during the selection process.

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Screening resumes has been made somewhat easier through software products that can be programmed to review resumes, looking for selected key words that would indicate the applicants have work experiences that are specific to the job for which they are applying. These products reduce the processing time and effort.

Regardless of whether your organization requires applications and/or resumes, the most important requirement is that you conduct a reference check to verify the information that the applicant has provided. As Mathis and Jackson point out: “Various accounts suggest that a noteworthy percentage of applicants knowingly distort their past work experiences.” Refer to Part Six of Module Two on recruitment for more information on conducting background and reference checks.

Exercise

Briefly describe which application methods are predominately used in your organization.

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Part Five: Job Analysis Techniques and Principles

We began Part Three of this module on selection methods with the following statement: “Determining the best selection method to be used to screen the candidates gathered through a recruitment program may be the biggest single contributor to organizational success or failure.” Well, the way we get to the best selection method is by conducting a thorough and complete job analysis. We discussed the importance of job analysis in Module Two in regard to planning the recruitment strategy. Because of the legal requirements outlined in the EEO’s Uniform Selection Guidelines (refer to Part Two above), creating a selection program that is job-based is absolutely essential. There are a number of steps that need to be taken in order to develop a selection methodology:

- **Subject matter experts**—The organization needs to identify a group of individuals who are intimately familiar with all aspects of the jobs for which the selection methodology is to be developed. Subject matter experts (SMEs) may be:
 - Current employees who are knowledgeable and proficient in performing the work activities. New staff (typically less than two or three years of experience) should not be used.
 - Supervisors who oversee the work activities and are relied on by workers or managers for their expertise.
 - Trainers who spend at least a substantial portion of their time training employees to perform the work activities.
 - Recognized experts who have written articles or are members of a professional association. These folks may be external to the organization but who add value because of their considerable knowledge regarding the work activities.

Selecting SMEs should be based upon:

- The currency of their experience with the way work activities are accomplished.
- Representing different work functions included with the jobs for which the selection method is being developed and geographical differences. The SMEs should also be representative of the organizational diversity, including minorities, females, and older workers.
- Ability of the SMEs to maintain confidentiality.

It is best to select several SMEs rather than relying on one individual, regardless of his/her qualifications. Typically a group of three to six is sufficient.

- **Research**—If a selection methodology was developed previously for the positions within the past two years, it is advisable to review it to determine if any portion of it is still useable. There is no need to reinvent the wheel if we

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already have a workable design and the main spokes to support it. The SMEs should be able to provide advice as to the efficacy of the old material. You may also be able to contact other public organizations and merit systems to review their selection methodologies to determine their applicability to your organization's jobs. Through a literature review, you may determine that other, more appropriate selection methodologies may have been developed that might have applicability to your organization. Other sources of information that should be explored during the research portion include:

- **Organization charts:** The organizational charts can show how the jobs relate to other jobs in the organization, including reporting relationships and supervisory and managerial structure.
- **Job descriptions:** The job description will provide an orientation point in understanding the major tasks and responsibilities. There are some caveats on the reliability of job descriptions in that they may be outdated, may not accurately or adequately portray the nature of the job, and changes resulting from technology or work processes may not have been incorporated into them.
- **The Occupational Information Network (O*NET):** The O*NET system, which replaced the Dictionary of Occupational Titles, is maintained by the federal government. It is a database of occupational requirements and worker attributes that describes occupations in terms of the knowledge required, how the work is performed, and typical work settings. Since it is web-based and free, organizations can access and download information on jobs that appear similar to those used in their specific organization. This may provide useful information for gathering selection data on similar types of jobs from other organizations. O*NET can be accessed at www.onetcenter.org.
- **Essential functions**—We need to determine what are the essential functions for these positions. The list of essential functions developed for the ADA might be a good starting point, but that list may be out of date or not reflective of all important aspects involved in the work.
- **Critical KSAs**—We need to develop a list of the critical knowledge, skills, and abilities needed for successful job performance. We discussed the need for a current list of KSAs and competencies in Module Two when developing a recruitment profile for the position (refer to Part Two of Module Two). As with the other portions of this process, the SMEs should be able to assist in this process.

The selection methodology will ultimately be based upon a combination of the essential functions and KSAs, as required by the EEOC's Uniform Selection Guideline. Organizations need to establish a clear trail from functions to KSAs to the type of selection methods to the type of examination to the interview questions asked of applicants. Without that type and level of detail, organizations are at risk of having their selection processes challenged and possibly determined to be discriminatory.

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Part Six: Selection Plan

Just like the recruitment function, selection activities require careful and complete advance thought, preparation, and planning and can serve to manage expectations regarding the ultimate results. Having completed the job analysis, the organization now needs to focus on what selection method(s) would be best and the relative importance of each portion of the selection process. Some issues to consider include:

- **Type and weights of the selection process**—Assume that we are developing a selection process for a mid-level management position and have decided to use an oral interview coupled with an assessment center. This decision was made based upon the nature of this position, which the job analysis revealed has considerable contact with the general public on a daily basis, coupled with the need to make multiple decisions in a short timeframe that requires management acumen. The organization would need to make a decision as to whether the two portions of the selection process should be weighted equally, or one should carry more weight than the other. This is largely a judgment call based upon the input of the SMEs and the data gathered during the job analysis. If the nature of the public contact is potentially troublesome (i.e., saying the wrong thing could create serious public relations problems), then the oral portion might be weighted more heavily than the assessment center results. Conversely, if poor time management, decision-making, and judgment will create serious operational problems for the organization, then weighting the assessment center results more heavily may be appropriate.
- **Weighted versus qualifying**—Assume that we are developing a selection process for a nonsupervisory professional engineer for the organization's highway department. The decision was made to use a T&E coupled with an oral interview. This was based upon the job analysis that revealed the need for a person with solid engineering credentials coupled with the ability to make public presentations and discuss issues and concerns with outside vendors and consultants. The T&E was used because of the difficulty that has been experienced in the past recruiting engineers, and so it is to be used solely to establish the applicants' engineering credentials—for "qualifying" purposes only. The oral interview, however, will carry considerable weight because of the public contact work involved in the position.

Determining the type of selection processes to use involves much science and some art. The science is the solid, factual data gathered through the job analysis and the input of the SMEs. The art is taking the data, determining the type of selection methodology that would best predict successful job performance, and weighting the selection methods appropriately. This requires skill, an understanding of selection theory and practice, and an understanding of the legal requirements that selection methodologies must meet.

The final piece of the selection planning process involves the development of any special instructions for the examination proctors. Depending upon the type of selection methods that are employed (e.g., assessment center, oral interview, paper and pencil test, etc.), different sets of instructions will need to be developed for the examination proctors. There may be particular portions of the selection

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process that need to be administered in a particular way, time limits may need to be established, and information provided on reasonable accommodations (refer to Part Eight of Module Three) for people with a disability.

The planning process needs to be carried out in a deliberate, thoughtful manner and should not be skipped over as an unnecessary and time-consuming step. Done properly, planning will actually save time later and avoid potential legal problems.

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Part Seven: Test Development and Design

The organization to date has invested time and effort in recruiting a group of SMEs, conducting a comprehensive job analysis, planning some of the details of the selection effort in regards to the determining the type of selection methodologies to be used, and also the need for weighting portions of the selection process. It is now time to develop the selection process itself, and this is where the proverbial rubber meets the road.

Before proceeding further it is important to also recognize the limitations of selection methodologies. Selection is not an exact science; it is an attempt at forecasting which individuals from a large pool of applicants have the highest possibility of performing effectively on the job. Much like predicting the weather, there is a level of uncertainty that the sun may not shine tomorrow as predicted by the meteorologist despite his/her thorough analysis of the wind and weather patterns and the endless computer simulations. Using the available job data, conducting a thorough job analysis, and gathering input from the SMEs and other people actually performing the work, provides as much information as possible and points the organization in the direction of what appears to be the best possible selection methodologies.

There are a number of activities that need to occur as part of the actual examination development process:

- **Review of job analysis results**—This information may have been gathered in a number of ways—observation of actual work activities, survey questionnaires, interviews with all or a portion of the employees performing the work, interviews with supervisors or managers, and a review of job descriptions. All of this information needs to be analyzed and an initial decision made regarding the KSAs, skill sets, and competencies determined to be essential for satisfactory job performance.
- **Meeting with SMEs**—Having completed the first step, meetings with the SMEs are typically arranged to review the job data with them and to gather any additional input regarding critical KSAs, skill sets, and competencies.
- **Item writing**—If developing a paper and pencil examination, test items would be developed that are intended to elicit the presence or absence of specific knowledge or factual information that has been deemed to be important in predicting job success. If developing an assessment center, work would center on the development of exercises that mirror actual work issues and situations. If developing a T&E, the focus would be on developing factors based on work experience and educational requirements that would need to be incorporated into the final form. For oral interviews, the questions will focus on eliciting information on communication skills, judgment, etc.
- **Test standards and rating procedures**—This is typically an outline of the methods by which the selection method should be administered, as well as the procedures to be followed in the testing of all applicants. It is important to

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ensure that the selection methods are uniformly administered and applied to **all** applicants in the same manner. Should the selection process be challenged at a later date, this information will be essential to the organization's defense of their actions.

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Part Eight: Test Administration Considerations

The goal of all selection systems is to be unbiased and fair to all groups. We have discussed the basis for developing selection processes based upon the work performed, required KSAs, and skills sets and competencies. Assuring fairness and lack of bias must also carry over to the administration of the selection process. Administering a selection process is fraught with potential problems and concerns that need to be considered and addressed. The first and most important of these is ensuring compliance with the *Americans' with Disabilities Act*, as many of the issues to be discussed in this portion of the module are impacted by the ADA.

The ADA requires that all qualified individuals with disabilities must be given equal opportunity in all aspects of the employment process, and this would of course extend to the manner in which the selection process is administered. It is the responsibility of the individual with the disability to inform the organization that he/she needs an accommodation. Typical forms of accommodation may include one or more of the following:

- **Extended time**—For a paper and pencil exam, the time limits may be expanded to afford the individual with the disability to read and answer all of the questions. This might extend to other forms of selection such as an assessment center or an oral interview where the individual must read material in order to formulate a response.
- **Reader**—The individual with the disability may need a reader to read the questions to them and mark his/her responses on the answer sheet.
- **Special equipment**—This might include a magnifying lens, a special PC fitted with a magnifying screen, or a raised desk or table to accommodate a wheel chair.
- **Modification of exam materials**—This might entail printing a copy of the examination materials in very large print.
- **Interpreter**—An applicant with dyslexia or a learning disability may need an interpreter to explain what he/she is expected to do.

In addition to the ADA, there are a number of other details that need to be addressed as part of administering the selection process:

- **Scheduling**—When will you hold the selection process, evenings or Saturdays in order to accommodate applicants with other employment or family responsibilities or Monday to Friday for several weeks during normal business hours to accommodate walk-ins and those who are unemployed? If you are using online testing, applicants could possibly be allowed to access and take the examination from home or a local test center. If you are using an oral interview or an assessment center, defined appointment times will probably need to be established, as only a limited number of applicants can be tested using these selection methods within a day or a week.

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- **Location**—As in real estate, so it is with the determination of testing sites: location is very important. First and foremost, the organization needs to ensure that the location(s) comply with the ADA requirements on accessibility. The locations also need to meet some other requirements as well:
 - **Access to public transportation and availability of parking**—Some applicants may only have access to public transportation, and using remote sites will disadvantage them. Also, if the site has little or no on or off-street parking, applicants who drive may spend extra time parking several blocks away and arrive late or skip the examination.
 - **Space**—Space must be adequate for the type of examination. For example, oral interviews will require several small rooms in which to conduct the interviews, larger areas for reception/waiting, and a large conference room for debriefing after the interviews have been conducted. Assessment centers will need larger areas and, perhaps, some smaller rooms for small group or individual sessions. Paper and pencil tests will need large areas with tables and chairs and good sight lines for proctors to observe the exam. If a portion of the selection process involves the use of a PC, then access to a computer facility or lab will be needed.
- **Staffing**—The organization will need sufficient staff to administer the selection process, and the number of staff is dependent on the type of examination. For example, paper and pencil tests can be administered to as many as a hundred people at a time but require relatively few staff to check in the applicants and proctor the examination. Oral interviews will require more staff, as typically one oral panel consists of three individuals, and there may be as many as five or more panels in addition to staff to greet and process the applicants. Assessment centers typically require multiple evaluators in addition to the administrative staff needed to greet and coordinate activities. The staff assigned to these activities need to be thoroughly trained in their assignments, and how to handle any problems that may occur. It is important to remember that selection processes, regardless of the type, are stressful for the applicants. It is important that the staff have good people skills to put the applicants somewhat at ease.
- **Proctors**—The staff assigned to actually administer and oversee the selection process need to be thoroughly trained on their job duties, how to handle instances of suspected cheating, and oriented to typical problems that could arise and how to deal with them. In many respects, these individuals are the organization's quality control experts who ensure that the selection process is administered fairly and without bias.
- **Security**—This is an essential requirement of any selection process. If the selection process is to be used repeatedly for additional groups of applicants, it is essential that the materials be protected. Proctors and staff need to ensure that applicants do not leave the test site with any papers. Exam materials should be maintained in a locked, secure area until needed, and exam materials must be counted before and after the examination. Also transporting the materials to and from the exam site should be done carefully to assure security

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at all times. It is important to remember that considerable time and effort has been invested in developing these materials. If they are compromised, new materials will need to be developed. This will delay the ultimate capability to hire new employees, which may have major impact on the organization's goals and objectives.

- **Materials and supplies**—It is important that all testing materials and supporting information are available at the examination sites. This would include not only the actual exams, but information needed by the exam proctors, administrative staff, oral interview panelists, and assessment center evaluators, as well as informational literature for the applicants. This is an opportunity for the organization to make a favorable impression on the applicants, to demonstrate that the organization has its collective act together, and is a serious, conscientious employer.
- **Timing**—Decisions need to be made about the length of time that applicants will be allowed to complete various portions of the selection process. If the organization has used the selection methods before, that information should be readily available and meaningful for applying to the current process. Clearly some portions may require more time. We previously noted that assessment centers can be very time-consuming, whereas oral interviews or paper and pencil exam can probably be completed in one or two hours unless ADA accommodations need to be made. The best resources for determining the appropriate amount of time would be past practice and polling other selection experts and your SMEs.

The administrative details as outlined above seem simple, but as any experienced selection expert can attest, the devil is in the details, which include not just the details of examination development and ranking, but also in properly administering the selection process. **All** portions of the selection process need to work seamlessly.

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Part Nine: Scoring Methodologies and Resources

There is a tendency to view the score assigned to an applicant's examination results as an absolute, as a fixed determination of his/her level of competence. Before we discuss the various methods for scoring exams, we need to be clear about the utility of selection procedures. Despite the organization's best efforts to standardize and objectify the selection process, there will always be some errors made in employment decisions that are based on examination results. All selection methods, regardless of how carefully crafted, are subject to some level of measurement error. The chosen selection method(s) will neither measure specific capabilities with absolute accuracy for all applicants nor fully reflect their potential job performance. That is one of the reasons why the probationary period is extremely important. It is in one sense the final portion of the selection process—the on-the-job test to see if the applicant can actually perform effectively.

If selection methods are used to infer applicants' likely future performance on the job, we need to determine what the score actually means and whether the applicants are qualified. There are two essential methods for interpreting the results of selection processes:

- **Norm-referenced**—This method relies upon a comparison of the scores an applicant receives with the performance of a particular reference (or norm) group. There may be several norm groups composed of a large population of representative applicants, (e.g., educational, cultural, occupational backgrounds, years of experience, etc). It is their performance and the distribution of their scores that set the standard and becomes the exam norms for the group. For example, assume that you are seeking to hire one or more experienced accountant with at least five years of experience and have prepared a paper and pencil exam to test the applicants' knowledge of accounting practices. That exam would be appropriate for this norm group, but to use this same paper and pencil exam for applicants for accounting assistant positions, which require only two years of experience, would be inappropriate.
- **Criterion-referenced**—While the norm-referenced method was intended to indicate how well each applicant does compared to others, criterion-referenced is intended to assess each applicant's degree of total competence in the specific area of expertise. This type of interpretation is generally used with assessments of educational and achievement testing, certification, or licensing. This method relies on determining a minimum acceptable level of competence that is typically based upon past experience with the exam related to observed job performance. For example, in evaluating keyboarding skills, the organization may determine that 35 words per minute with 2 errors is the minimum level of proficiency that is acceptable for an employee performing word processing activities.

Examination results are usually expressed as a numerical score, and there are three main types of scores:

- **Raw**—The raw score represents the number of exam items that were answered correctly. Raw scores typically are of little value because knowing that an

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applicant correctly answered 50 of 100 items does not tell you much unless it can be compared to the results of all the other applicants. For example, you may discover that only 6 of 80 applicants answered more than 50 items correctly, which would indicate that the applicant performed rather well.

- **Standard**—Standard scores are converted raw scores that indicate the applicant's score in relation to a reference group. For example, if the average score for all applicants is 50, then an individual applicant with a raw score of 60 is above average. We will discuss standard scores, in regard to standard deviation later.
- **Percentile**—A percentile score is a form of a converted score where an applicant's raw score is converted to a number indicating the percent of people in the reference group who scored below the applicant. For example, a score at the 80th percentile indicates that the applicant's raw score of 50 is the same or higher than 80% of all applicants who took the exam.

Obviously scores are important, but we need to be able to place them within a frame of reference that permits the organization to determine ultimately who will be in the top group for employment consideration. For this reason, it is useful to review the distribution of scores in total. There are a number of different perspectives for reviewing the distribution:

- **Normal curve**—This is the ubiquitous bell-shaped curve, that statisticians will tell you typically describes all human activities, assuming the sample population is large enough. If you were examining the height of all humans, for example, most humans would cluster in the middle of the curve, and statistically speaking, progressively fewer humans who were either taller or shorter would spread out to either the right (taller) or left (shorter) directions from the cluster in the middle. In evaluating selection methodologies, it is useful for organizations to examine the extent to which the distribution of scores mirrors a normal, or bell-shaped, curve.
- **Standard score distribution**—When reviewing the score distribution, there are several characteristics that deserve mention:
 - **Mean**—This is simply the average of all scores. The mean is used as a measure of central tendency.
 - **Standard deviation**—The standard deviation is a measure of variability, and it is used to describe the distribution of scores around the mean. This is usually expressed as one or two deviations from the mean. One deviation on either side of the mean should encompass 68% of all scores, and two deviations should encompass 96% of all the scores.
 - **Median**—This reflects the midpoint of all scores—between the highest and the lowest scores.
 - **Mode**—This is the most frequently occurring score—the score that was achieved by the largest number of applicants.

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- **Coefficient of correlation**—This is the degree to which the exam is an effective predictor of future performance.

Reviewing examination results is a multilayered effort that involves looking at the overall results, as well as the performance of all applicants on individual exam items. Item analysis is important because it assists in determining whether individual items in the examination process were effective. This review is largely a statistical analysis to determine the level of difficulty, (i.e., did a substantial number of applicants fail or do poorly on a specific item or aspect of the examination process). In performing an item analysis, an experienced assessment specialist would determine the standard deviation, median, central tendency and coefficient of correlation for each item or portion of the examination process. The extent to which the above statistical tools align indicates whether specific items or portions of the examination process are useable as part of the total selection process.

The most vexing portion of the scoring methodology is setting the pass point, and there are a number of factors that need to be taken into consideration:

- **Exam reliability**—This really is a measure of the degree to which the examination consistently and dependably indicates that an applicant will be successful on the job.
- **Error of measurement**—Selection methodologies that are intended to measure job-related criteria, such as competencies, knowledges, skills, and abilities, are not perfect and need to be accounted for when setting a passing point for the selection program. Generally speaking, error of measurement is linked to reliability; the higher the level of measurement error, the lower the reliability will be of the selection process.
- **Skewness**—This is the extent to which scores deviate from the central tendency; the less bell shape to the curve, the greater the skewness. This would indicate that applicants either did extremely well or poorly on the examination.
- **Kurtosis**—This is the degree to which the scores concentrate around the mean, or central tendency. In this case, the bell shape to the curve is more peaked in the center, around the mean.

An experienced assessment specialist will take all of these factors into consideration in determining an appropriate pass point for the examination. While this process involves a good deal of science (and knowledge of statistics), there is also much art involved in the process. If this examination process has been used before, what was previously used as a pass point, and did scores seem to translate into successful performance on the job?

There is one remaining factor the assessment specialist must take into consideration —adverse impact. In Parts One and Two of Module Three, we discussed the EEOC’s Uniform Guidelines on Employee Selection. The federal government has provided some guidance in this area in “Testing and Assessment: An Employer’s Guide to Good Practices”:

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A well designed assessment program will improve your ability to make effective employment decisions. However, some of the best predictors of job performance may exhibit adverse impact. As a test user, there are several good testing practices to follow to minimize adverse impact in conducting personnel assessment to ensure that, if adverse impact does occur, it is not a result of deficiencies in your assessment tools.

- Be clear about what needs to be measured, and for what purpose. Use only assessment tools that are job-related and valid, and only use them in the way they were designed to be used.
- Use assessment tools that are appropriate for the target population.
- Do not use assessment tools that are biased or unfair to any group of people.
- Consider whether there are alternative assessment methods that have less adverse impact.
- Consider whether there is another way to use the test that either reduces or is free of adverse impact.
- Consider whether the use of a test with adverse impact is necessary. Does the test improve the quality of selections to such an extent that the magnitude of adverse impact is justified by business necessity?
- If you determine that it is necessary to use a test that may result in adverse impact, it is recommended that it be used as only one part of a comprehensive assessment process. That is, apply the whole-person approach to your personnel assessment program. This approach will allow you to improve your assessment of the individual and reduce the effect of differences in average scores between groups on a single test.

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Part Ten: Role of Preference Points

The granting of employment preference to particular groups of people, such as veterans, is a unique feature of public sector organizations. There may be private sector organizations that have policies or practices that profess to provide special consideration to veterans and others, but public sector organizations throughout the U.S. are obligated by law to grant employment preference to veterans or others. The granting of preference to veterans and others is embodied in state and local laws and ordinances, and the methods and procedures differ markedly from state to state:

- **Pennsylvania**—This state grants ten (10) points to all veterans and spouses of deceased or disabled veterans.
- **Kansas**—This state does not grant points but identifies state jobs that are “veterans preference eligible” and for which veterans are guaranteed an interview if they meet all of the eligibility requirements for the position. A veteran’s spouse can receive preference under the following conditions:
 - The veteran is 100% disabled, or
 - Is the unmarried spouse of a veteran who died in or as a result of military service, or
 - Is the spouse of a prisoner of war.
- **Federal Government**—The federal government has basically three types of preference eligibles, disabled (10 point preference eligible), nondisabled (5 point preference eligible) and sole survivorship preference (0 point preference eligible)

0 point preference eligible is the only surviving child in a family in which the father or mother or one or more siblings:

- a. Served in the armed forces, and
- b. Was killed or died as a result of wounds, accident, or disease, is in a captured or missing in action status, or is permanently 100 percent disabled or hospitalized on a continuing basis (and is not employed gainfully because of the disability or hospitalization), where
- c. The death, status, or disability did not result from the intentional misconduct or willful neglect of the parent or sibling and was not incurred during a period of unauthorized absence.

5 point Preference eligible if active duty service meets any of the following:

- a. For more than 180 consecutive days, other than for training, any part of which occurred during the period beginning September 11, 2001, and ending on August 31, 2010, the last day of Operation Iraqi Freedom, or

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- b. Between August 2, 1990 and January 2, 1992, or
- c. For more than 180 consecutive days, other than for training, any part of which occurred after January 31, 1955 and before October 15, 1976
- d. In a war, campaign, or expedition for which a campaign badge has been authorized or between April 28, 1952 and July 1, 1955.

10 point Preference eligible if you served at any time, and you:

- a. Have a service connected disability, or
- b. Received a Purple Heart.

As you can see, there is considerable variation in how public jurisdictions have chosen to afford preference to veterans. The underlying public policy goals of all of these preference policies is summed up in succinctly in the statement on the State of Kansas job site (www.jobs.ks.gov): “In recognition of the sacrifices made by those serving in the Armed Forces, the State of Kansas enacted laws to prevent veterans seeking State employment from being penalized because of time spent in military service. Veterans’ preference recognizes the economic loss suffered by citizens who have served their country in uniform, restores veterans to a favorable competitive position for Government employment and acknowledges the obligation owed to disabled veterans. Veterans’ preference is not so much as a reward for being in uniform as it is a way to help make up for the economic loss suffered by those who answered the nation’s call to arms.”

While veterans’ preference is perhaps the best known and most universally accepted preference program in public jurisdictions nationwide, there are other forms of preference programs in operation. One example is elder preference granted to job applicants 60+ years of age who apply for employment with the Pennsylvania Department of Aging, and any of the 50+ area agencies on aging that operate in the commonwealth. Applicants who meet the age requirement are granted preference in employment over younger workers when they rank within the top 3 candidates on the eligible list. The purpose in this case was to provide a means for more senior applicants to obtain employment with the organizations that provide services to older adults throughout the commonwealth. Other preference systems that may be found include:

- **Seniority**—Typically preference may be granted to current employees who have achieved a particular level of service over less senior or external applicants. This may be present in unionized work environments with civil service or merit system requirements.
- **Training programs**—Graduates of apprenticeship programs may be granted employment preference over nongraduates. These are sometimes internal training programs, designed to grow your own staff to fill critical needs. One example would be internal programs to train lower level care staff as registered nurses in hospitals.

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Regardless of the nature of the preference program, there are a few universal requirements that all applicants who are eligible for some form of preference must meet:

- In the case of points added to scores on eligible lists, as in the case of veterans' preference, the applicant **must** achieve a passing score before the preference points are added to his/her score.
- The applicant **must** meet all of the stated experience and educational requirements of the position.

All of the preference programs in operation in public organizations are intended for the public good and are considered to be not a hand out, but a hand up.

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Part Eleven: Eligible Lists

The establishment and use of eligible lists is a public sector phenomenon that is not replicated in the private sector counterparts. It is a centerpiece of merit system/civil service operations and also serves as another example of the transparency requirement in public sector organizations in that **all** applicants who successfully complete the selection process will be placed on the eligible list in some manner. There are typically two types of lists that result from a selection process:

- **Open competitive**—This type of list is frequently referred to as the employment list and is typically comprised of all applicants who have successfully completed the selection process. This list usually includes external and internal applicants arranged in score order from highest to lowest.
- **Promotional**—This type of list is comprised of only those internal applicants who have successfully completed the selection process. Typically, in order for a current employee to be included on the promotion list, he/she must complete his/her probationary period or served in another position within the organization for a specified period of time.

Depending upon the nature of the organization's recruitment program, all applicants will either be tested at one time or periodically over several months. Applicants tested at one time who successfully complete the selection process will be placed on the eligible list at one time, and this is usually referred to as a standard eligible list. If the organization's recruitment efforts continue for an extended period of time, applicants are tested periodically, and their names are inserted on the list based upon their score. This type of list is usually referred to as a register or open list because names will continue to be added over time.

Standard lists are more practical in situations where the number of jobs to be filled is relatively small, turnover is limited, and additional vacancies are not forecast to occur in the foreseeable future. Open lists are more practical when there are a large number of current or anticipated vacancies over an extended period of time and turnover is perhaps higher. Many organizations include information on the applicants' notice of selection results in addition to their score, such as their relative rank on the list. This information is usually provided in order to give them an understanding of their actual chances for employment in the immediate future. On standard lists where all names are added at one time, this ranking information is reasonably accurate.

On open lists where names are added periodically, an individual included in the first or second selection programs may find their ranking changed as the additional names from subsequent selection programs are added. This sometimes causes applicants included in the early selection phases to question the validity of the organization's selection processes and list management practices. It is advisable to inform applicants when selection will continue for an extended period of time that the ranking data included on their notice is only valid for the date their names were placed on the list and may change as additional applicants complete the selection process.

Depending upon the organization's rules and regulations, the number of applicants that may be considered for employment off the eligible list may be circumscribed.

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There are a number of different methods that have been developed by civil service/merit systems over the years:

- **Rank score**—Applicants are considered based upon their rank on the list, starting with the highest score and working down the eligible list in score order. In order to give the some flexibility, organizations are typically allowed to consider a limited number of applicants who are considered to be coequal. The rules under which such a system operates may allow 3, 5, 7, or even 9 applicants to be considered in this group. This is typically referred to as the Rule of Three (or Five, Seven, or Nine, depending upon the civil service/merit system).
- **Bands**—In this type of system, applicants' raw scores (refer to Part Nine above) are grouped in some manner so that all raw scores within a range are assigned the same score on the eligible list. For example, applicants whose raw scores are between 80 and 100 would receive a "score" of 95.00, and applicants with raw scores between 60 and 79 would receive a "score" of 85.00. The organization must then consider all applicants within the highest band score before being able to consider anyone from a lower band score. Banding typically allows the organization a larger pool of applicants from which to choose than the Rule of Three (or however many) described above.
- **Whole list**—This is sometimes referred to as the Rule of the List. As the name implies, the organization is free to consider any applicant on the list regardless of score or rank. Obviously this method provides the greatest freedom to the organization to select the candidate of their choice.

All of the above methods have their supporters and detractors. The Rule of Three, is viewed by some as too restrictive of the organization's freedom to select the best applicant. Conversely the Rule of the List is viewed by some as too easy to manipulate to select an applicant for other than meritorious reasons. Some do not like the score bands because while it allows more choice than the Rule of Three, if the quantity of applicants within a given band has been somewhat depleted and the quality of the remaining applicants is somewhat suspect, the organization is unable to consider applicants from the next lowest score band.

Also it is important to keep in mind that regardless of which of the above systems are used, preference requirements for veterans and others may require their consideration ahead of any other nonveteran applicants. It is absolutely essential that the HR professional be knowledgeable and cognizant of the effect that preference requirements will have on the use and management of an eligible list.

Exercise

Describe the type(s) of selection procedures used in your organization in regard to Rule of Three, bands, or whole list methodologies. Is any consideration currently being given to altering the system currently in place? If so, what do you think would be a more effective system?

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Part Twelve: Management of Eligible Lists

In Part Eleven, we discussed the different types of eligible lists that are typically used in most public organizations. We also need to review the manner in which these lists are used and managed.

Typically the eligible list is dated, indicating the date it was issued, and the list is considered usable for some stated period of time from that date. Depending upon the organization's rules and regulations, that time period may be 30 or 60 calendar days. The organization is expected to contact, interview, and make an employment offer within that timeframe. This can be problematic, as applicants contacted by mail or telephone for interview may not be available on the projected interview date(s) as determined by the organization, thus necessitating a delay in finalizing all the interviews, conducting background checks, and determining to whom an offer of employment should be made.

Because of difficulties in scheduling interviews with applicants, and the time required to complete other administrative tasks related to the employment process, it may be necessary to request an extension on the termination date of the list. Extensions typically are granted for an additional 30 to 60 calendar days, although extensions beyond this period of time may be granted because of special considerations, such as the completion of medical or drug exams, or the need for applicants to obtain and provide official copies of licensure or certifications. Each organization has differing requirements in terms of the time the eligible list is considered useable.

Many organizations utilize different types of eligible lists, in addition to, or as a substitute for, the normal employment and promotion lists discussed in Part Eleven. Some of the more typical types of lists include:

- **Substitute list**—This might be used to locate applicants who are interested in part-time or temporary employment, usually as a substitute for an employee who is on an extended absence, or perhaps to assist during peak workload periods. The term of this substitute employment is usually for less than 12 months. When applicants first apply for employment, they may be asked to indicate their availability for part-time or substitute employment. When a need arises, an eligible list composed of just those who answered affirmatively is prepared and used to fill the temporary need.
- **Selective list**—This type of list is typically used to fill the need for an employee with special or unique skills or attributes. Examples would be a need for employees who speak a certain language or someone who could sign for deaf clients or patients. This type of list has also been used in some public organizations as a means to consider and employ minority or female applicants where the organization is able to establish a bona fide occupation qualification for employees with specific race or gender requirements. An example might be female guards in personal care areas in detention or prison facilities.

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- **Reemployment list**—This type of list is typically comprised of former employees who have lost their jobs through a reduction in force (RIF), the elimination of funding for their operation, or privatization. The list is usually issued for the specific job classification in which the employee was previously employed, although some organizations may also permit the employee to be placed on eligible lists for other, lower level job titles for which they also qualify (see Alternate List below). Depending upon the organization's rules and regulations, these types of lists are usually only active for a defined period of time, such as 12 months from the employment termination date, and the employee may have preference in employment over other applicants whose names are included on the employment list. If an organization has a unionized workforce, the use of reemployment lists may be superseded by reemployment lists contractually agreed to as part of the collective bargaining agreement.
- **Alternate list**—This type of list is comprised of employees whose employment was terminated because of a RIF, program or funding termination or reductions, or privatization, and who qualify for the specific job title based upon prior work experience or qualifications. It is not the job title held at the time of their termination. Depending upon the organization's rules and regulations, these types of lists may remain active for 12 months or longer, and the employee does not typically have preference over other applicants for employment consideration, such as that enjoyed by employees on reemployment lists. The main advantage of this type of eligible lists is that it affords the organization an expanded pool of candidates from which to select staff.

As noted earlier, the use of eligible lists is a public sector practice that is largely unknown and not present in virtually any private sector organizations.

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Part Thirteen: Other Employment Considerations

Having recruited, tested, and probably interviewed a number of potential applicants, the assumption would probably be that the organization knows the applicants under consideration extremely well and is in a position to make a job offer. Most likely, the answer is: not yet. There is still one very important hurdle that all applicants need to overcome, and that is the background/reference check. Most public organizations have written policies on conducting background/reference checks for a very simple reason—the transparency issue we have discussed previously. The old motto “Public Employment is a Public Trust” still holds true today, and if the organization is going to hire someone to transact the public’s business in some manner, there is an expectation that the individual has been truthful in presenting his/her qualifications. Unlike our private sector counterparts, there are additional checks required for certain types of public sector jobs. For example, most public organizations, such as school districts and social service agencies, are required to perform a criminal check on any applicant for a job that involves contact with children or the elderly.

There are also legal ramifications for both public and private employers who fail to properly screen their employees prior to employment. Mathis and Jackson point out that “lawyers say that an employer’s liability hinges on how well it investigates an applicant’s background. Consequently, details provided on the application form should be investigated extensively, and these efforts should be documented.” You may want to refer to Part Six of Module Two on recruitment, where we discussed background and reference checks procedures in some detail.

At a minimum, the organization should verify certain aspects of each applicant’s background:

- Educational attainment if this is part of the stated qualifications for the job, such as possession of a bachelor’s or master’s degree in a particular area of study such as accounting, social work, etc.
- Professional licenses, certifications, or designations if the possession is part of the stated qualifications for the job, such as a professional engineer or registered nurse license, or a current certification to operate certain types of equipment such as nuclear scanners.
- Driver’s license if there is a clear, stated expectation that the employee will be expected to operate a motor vehicle. This would also include possession of a commercial driver’s license (CDL) if the employee is expected to operate heavy equipment or large vehicles. It is also advisable to determine if the applicant’s license privileges had ever been revoked for DUI or repeated traffic violations.
- Criminal convictions to determine their potential relatedness to the type of position for which the applicant is being considered. If there is a criminal conviction and it is unclear as to its relatedness to the position for which the applicant is being considered, it is strongly recommended that this issue be discussed with the organization’s legal counsel. As Mathis and Jackson point out: “Decision-makers should be aware that, if used incorrectly, criminal

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background investigations could contradict federal law indicating that checks should not be an ‘absolute bar to hiring.’ Furthermore, background checks have some candidates and employees concerned because the information reported might be inaccurate or outdated.”

The last issues to be discussed involve medical inquiries and drug testing. Mathis and Jackson sum up the strictures placed on these activities: “The *Americans with Disabilities Act* (ADA) prohibits the use of pre-employment physical exams, except for drug tests, until a job has been conditionally offered. Also, the ADA prohibits a company from rejecting an individual because of a disability and asking job applicants any question related to current or past medical history until a conditional offer has been made. ... It should be made clear that the applicant who has been offered the job is not ‘hired’ until successful completion of the physical inquiry.”

In regard to drug testing, Mathis and Jackson share some practical advice: “If drug tests are used, employers should remember that their accuracy varies according to the type of test used, the item tested, and the quality of the laboratory where the test samples are sent. Because of the potential impact of prescription drugs on test results, applicants should complete a detailed questionnaire on this matter before testing. If an individual tests positive for drug use, then an independent medical laboratory should administer a second, more detailed analysis. Whether urine, blood, saliva, or hair samples are used, the process of obtaining, labeling, and transferring the sample to the testing lab should be outlined clearly and definite policies and procedures should be established.”

Exercise

1. Does your organization use drug testing as part of its preemployment process? If yes, please describe the types of positions for which drug testing is required, as well as the organization’s experience with this process over the past two years.
2. Does your organization require medical exams following extension of a conditional job offer? If yes, what has been the organization’s experience with this process over the past two years?

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Part Fourteen: Development Strategies

Selection strategies are central to all of the activities that occur within public organizations. All of the following will be discussed in greater detail in the appropriate module of this course, so what follows is a thumbnail sketch of some of the interrelationships between selection and other organizational concerns:

- **Recruitment**—Selection is, in many respects, an extension of the recruitment process. Having recruited a group of applicants from a variety of sources, the selection process provides a way to separate the wheat from the chaff and determine those who are able to best perform the job for the organization.
- **Retention**—Typically, in most public organizations with merit systems, participating in a promotional selection process is considered one of the principal ways of advancing one's career. As we noted earlier some selection methods, such as assessment centers, can be used for career development purposes by providing feedback to the employees on aspects where they need to improve their performance.
- **Succession planning**—Just as succession planning is an integral part of the recruitment function, it is also an integral part of selection. Sufficient time needs to be set aside to develop and implement the selection methodologies. Additionally, the selection process must be able to distinguish between those workers who could merely do the job and those who could perform the job at a high level. A key part of the succession planning process is determining who among those who are currently within the organization would be best able to assume the duties of the new position.
- **Diversity**—Selection systems need to be able to accommodate the organization's diversity needs. Selection specialists need to ensure that, to the extent possible, the organization's selection methodologies are fair and unbiased.

Information technology is beginning to have a positive impact on the selection function. We previously discussed applicant tracking software, online application procedures, and online testing. Additional areas in which technology will have an impact are:

- **Test validation**—Statistical analyses of selection results can be accomplished more quickly and with less manual effort.
- **Item analysis**—Analyzing the responses to individual exam questions can be accomplished more quickly and accurately.
- **Passing point**—Reviewing a statistical model showing all results will enhance the ability to make rational decisions regarding passing points.
- **Exam weighting**—Being able to review the results from portions of the selection process will facilitate the decision-making process in regard to weighting specific portions of the selection process.

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Part Fifteen: Records Retention

There are a number of records that have to be maintained:

- **Selection process**—Accurate and complete records need to be maintained on all of the data gained through the:
 - Job analysis,
 - Discussions with SMEs and the information gathered from them,
 - Actual observations of work activities,
 - Development of skill sets and competencies lists,
 - Methods for determining the type and scope of the selection method(s) to be employed, and
 - Development and use of the scoring methodology
- **Applicant tracking**—As Mathis and Jackson point out: “It (applicant tracking) is increasingly important for employers to carefully define exactly who is an applicant and who is not, because many employers are required to track and report applicant information as part of equal employment opportunity and affirmative action plans.” We discussed the value and utility of applicant tracking systems earlier in this Module (refer to Module Three, Part Four: Application Methods).
- **Examination results**—As part of determining whether the selection process had a disparate impact on any protected group, analyses should be conducted; specifically in regard to racial or sexual biases.

The above information may be needed in responding to any complaints of bias regarding either the actual selection process or the manner in which it was administered. Further, if successful, the above information may be useful in developing future selection methodologies. Finally, many organizations have records retention policies that may specify how long selection records need to be maintained.

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Part Sixteen: Review and Appeals

In Module One we outlined a number of similarities and differences between public and private sector organizations. Two of the areas of difference were transparency and merit system requirements. Transparency requires that public business be transacted in public, and selection processes for public jobs falls into that category. Additionally, merit systems typically allow applicants for public jobs the right to appeal their nonselection or that the selection process was unfair in some manner. In either case, the burden to prove that the selection process was valid falls to the organization. That is why the records outlined in Part Fifteen above are so potentially valuable.

The appeal process in most public organizations is not open-ended, and applicants who were unsuccessful, feel they should have received higher scores, or believe that the selection process in some way disadvantaged their chances for employment have a specified number of days in which to file an appeal following receipt of their results. Typically, failure to file during this period negates their access to the appeal process.

Many public HR specialists decry the time and effort needed to defend the selection processes—sometimes several months after the eligible list(s) have been developed—and people may have been hired. Like it or not, it is part of our obligation as public HR professionals to assure that all applicants are treated fairly, in an unbiased manner, and that each applicant is afforded an opportunity to be heard. Hearings are typically open to the public, although most citizens remain unaware of this fact. Granting an applicant a hearing is part of the transparency of government; so while we may dislike the time and effort that must be expended, we should embrace the concept that is central to our entire system of governance.

Exercise

Describe how appeals related to selection methodologies are handled in your organization.

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Module Four: Classification and Compensation

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Reading Assignment for Classification and Compensation Module

Chapters Four, Eleven and Twelve, *Human Resource Management*, Fifteenth Edition, by Robert L. Mathis, John H. Jackson, Sean R. Valentine, and Patricia A. Meglich

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Section One: Classification

Part One: Applicable Laws

To begin, what is job classification or job analysis, and why do we need it?

The *Encyclopedia of Business and Finance* defines job analysis as “the term used to describe the process of analyzing a job or occupation into its various components, that is, *organizational structure, work activities, and informational content.*” The process results in a relevant, timely, and tailored database of job-related information that can be used in a variety of ways: to create and classify job titles; to develop conventional, individualized, computer-based, and/or critical incident education and training programs and materials; to write job descriptions; to prepare organization charts; to determine quality assurance standards; and to write both knowledge- and performance-related employee evaluation measures.

Terms used interchangeably with job analysis are job classification, occupational analysis, and task analysis. In the literature, job and occupational analysis most often are viewed as the same. The process focuses on the categorizing of a job into its occupational structure, work activities, and informational content. The data provided by the analysis guides the writing of job descriptions, the creation and development of job titles, the orderly arrangement of these titles into job families, the preparation of organization charts, and the underpinning of the organization’s test development, recruitment and selection, employee development, succession planning, and performance appraisal programs.

Job classification is used to group occupations by function, level of responsibility, or ability. To classify jobs by function means to categorize them by similarity of function or activity. For example, titles such as “accounting,” “human resources,” and “chemist” imply that all people working in one of these defined areas are performing a similar type of activity. Job classification is regularly used to categorize listings of duties and responsibilities, assign a formal or working job title, place the job within the organizational framework, and identify the essential functions required for successful job performance.

Classifying occupations by ability involves segregating jobs based upon their experience, skill level, or education and training. Terms such as apprentice, journeyman, entry-level, technician, and specialist all reflect a classification of jobs by ability level. The classification of employees by ability also distinguishes professional jobs such as nurse, physician, engineer, or architect, and at the same time guides management in establishing the wage and salary levels of the various job titles.

Task analysis is an integral part of job analysis. Task analysis addresses the process of analyzing a particular task into its various elements of performance steps; standards of performance; frequency, importance, and complexity of tasks; and tools, equipment, materials, supplies, and technical or professional skill requirements.

Job analysis should describe all important work behaviors, their relative importance, and their difficulty level. A job analysis should include an analysis of the important

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work behaviors required for successful performance, as well as their relative importance and, if the behavior results in work products, an analysis of the work products. The job analysis should focus on the work behaviors and the tasks associated with them. If work behaviors are not observable, the job analysis should identify and analyze those aspects of the behaviors that can be observed and the observed work products. The work behaviors selected for measurement should be critical work behaviors or important work behaviors constituting most of the job.

The above information provides a general understanding of classification and job analysis. With this, we can now begin discussing the classification of jobs.

As we indicated in Module One, as an HR professional, there are a number of legal issues you need to be aware of. In developing and administering a job classification program, you will need to become familiar with both the provisions and intent of the five laws described below. A more complete description of these laws can be found in Module One.

The **Equal Pay Act of 1963** is a federal law amending the [Fair Labor Standards Act](#), which abolished wage differentials based on sex. In passing this law, Congress denounced sex discrimination because it:

- Depresses wages and living standards for employees necessary for their health and efficiency;
- Prevents the maximum utilization of the available labor resources;
- Tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;
- Burdens commerce and the free flow of goods in commerce; and
- Constitutes an unfair method of competition.

The law provides, in part, that:

No employer having employees subject to any provisions of this section [section 206 of title 29 of the United States Code] 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.

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The ***Fair Labor Standards Act's*** (FLSA) basic requirements are:

- Payment of the minimum wage;
- Overtime pay for time worked over 40 hours in a workweek;
- Restrictions on the employment of children; and
- Record keeping.

The FLSA has been amended on many occasions since its passage in 1938. Currently, workers covered by the FLSA are entitled to the minimum wage and overtime pay at a rate of not less than one and one-half times their regular rate of pay after 40 hours of work in a workweek. Various minimum wage exceptions apply under specific circumstances to workers with disabilities, full-time students, youth under age 20 in their first 90 days of employment, employees whose income is derived in full or in part from tips, and student learners. Special rules apply to state and local government employment involving fire protection and law enforcement activities, volunteer services, correctional facilities, and compensatory time off in lieu of cash payment. Employers are required to keep records on wages, hours, and other items which are generally maintained as an ordinary business practice.

The FLSA child labor provisions are designed to protect the educational opportunities of youth and prohibit their employment in jobs and under conditions detrimental to their health or safety. The child labor provisions include some restrictions on hours of work for youth under 16 years of age and lists of hazardous occupations too dangerous for young workers to perform.

In order for the FLSA to apply, there must be an employment relationship between an “employer” and an “employee.” The FLSA also contains some exemptions from these basic rules. Some apply to specific types of businesses and others to specific kinds of work.

The ***Americans with Disabilities Act*** (ADA) was passed in 1990 and amended in 2008. Title I of the ADA covers employment and requires that employers of more than 15 people must make reasonable accommodations that allow a qualified job applicant with a disability to complete the application process or a disabled employee to carry out the duties of his or her job. According to the ADA, “an individual is considered to have a disability if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.”

While one may have reasons for keeping a disability a secret from an employer, revealing it may require the employer to provide certain accommodations that will allow a worker to perform his or her job. The ADA mentions that an employer may refuse to grant an accommodation if accommodation being sought by the job applicant is not reasonable.

With the passage of the *Americans with Disabilities Act*, job analysis has taken on increasing importance. A job analysis can be used to define the essential

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elements or the essential functions of the job, including the physical demands that the work requires.

The ADA specifically states that no covered entity shall discriminate against a qualified individual with a disability and defines qualified individual with a disability as someone with a disability who “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”

An essential function is determined by “the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job” (see [ADA Section 101. Definitions \(8\)](#)).

The ADA requires that handicapped individuals be given reasonable accommodation in the workplace so that they will not be unreasonably excluded from employment. Job analysis is the process used to identify the tasks and duties performed on the job, as well as any equipment used. This information may be helpful in determining what reasonable accommodations could be made for an individual to perform the job.

Job analysis can be used in defense of actions taken by the employer who is sued under ADA. A thorough job analysis will play a crucial role in identifying the essential functions of a job and also assisting in identifying what reasonable accommodations may be made.

The **Age Discrimination in Employment Act** (ADEA) prohibits an employer from refusing to hire, discharge, or otherwise discriminate against any individual because of age. The Act covers compensation, terms, conditions, and other privileges of employment, including health care benefits. This Act specifically prohibits age-based discrimination against employees who are at least 40 years of age. The purpose of the Act is to promote the employment of older persons and to prohibit any arbitrary age discrimination in employment.

The ADEA covers individuals, partnerships, labor organizations, employment agencies, and corporations that: 1) engage in an industry affecting interstate commerce and 2) employ at least 20 individuals. The ADEA also covers state and local governments. Referrals by an employment agency to a covered employer are within the ADEA’s scope regardless of the agency’s size. In addition, the ADEA covers labor union practices affecting union members; usually, unions with 25 or more members are covered. The ADEA protects against age discrimination in many employment contexts, including hiring, firing, pay, job assignment, and fringe benefits.

Under the Act, employers are forbidden to refuse to hire, to discharge, or to discriminate against anyone with respect to the terms, conditions, or privileges of employment because of a person’s age. The Act also forbids employees from limiting, segregating, or classifying an individual in a way that adversely affects their employment because of age. The Act states that all job requirements must

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be truly job-related and forbids employers to reduce the wage rate of an employee to comply with the ADEA. It forbids seniority systems or benefits plans that call for involuntary requirements due to age and also makes it illegal for employees to indicate any issue related to age in advertisements for job opportunities.

As we indicated in Module One, before the **Civil Rights Act of 1964**, an employer could reject a job applicant because of his or her race, religion, sex, or national origin. With the passage of this Act, employment discrimination based upon one's race, religion, sex, national origin, and color became illegal. This law protects employees and job applicants of all private and public employers. All companies and organizations with 15 or more employees are required to adhere to the rules set forth in Title VII. The law also established the Equal Employment Opportunity Commission (EEOC) which continues to enforce this and other laws that protect against employment discrimination.

Fair and equitable tests and other candidate screening methods are covered in detail in Module Three. As noted, testing and selection practices pose concerns in assuring equal employment opportunity. Selection tests include ability tests, assessment centers, personality tests, honesty/integrity tests, and other types of tests.

As part of the effort to level the playing field, in 1978 the EEOC issued Uniform Guidelines on Employee Selection Procedures. The guidelines provided guidance to employers to help them comply with federal laws which prohibit discrimination in employment based on race, color, religion, sex, and national origin. The guidelines apply to employers who are subject to Title VII of the *Civil Rights Act of 1964* or Executive Order 11246.

An employment selection process is considered discriminatory if it has an adverse impact on the hiring, promotion, or other employment opportunities of individuals because of race, sex, or ethnicity; that is, if the selection rate for any race, sex, or ethnic group is less than 80 percent for the group having the highest selection rate. A selection procedure that results in an adverse impact is allowed to stand if the employer can demonstrate that the test measures a trait necessary for successful performance of the job; or if the employer can eliminate the factor that has caused the adverse impact from the selection process.

In effect, the Uniform Guidelines require that selection processes need to be job-related. The best available, and perhaps most appropriate, way to assure compliance is through a properly maintained job classification program that accurately and completely portrays the actual work tasks, duties, and responsibilities. Without this foundation, the organization's selection methods may be suspect and subject to legal challenge.

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Part Two: Concepts and Principles of Classification

Job classification, as with many of the other functional areas in a typical HR operation, requires practice, analytical capabilities, communication skills, and patience. A working definition of job classification is the orderly arrangement of categories of positions on the basis of the kind and level of work performed. This definition is somewhat different than that provided by Mathis and Jackson, who define a job evaluation as “a formal, systematic means to determine the relative worth of jobs within an organization.” The difference between the two terms is largely due to how the process is viewed within public and private organizations. In public organizations job classification is more directed toward identifying and categorizing jobs within the context of the existing organization. Job evaluation, however, is geared more toward determining the value and worth of the job compared to all the other jobs within the organization. While the distinction is admittedly small, the end result is much different. Job evaluation is part of an integrated approach to also determine the market value of the job for compensation purposes. In public organizations, job classification is viewed as from but related to compensation. This is, in large measure, due to the more restrictive nature of compensation in public organizations as we discussed in Module One.

Job classification is the foundation upon which many of the organizational, HR, and employee needs are satisfied. This includes:

- **Organizational needs**—The job classification system provides a repository of information about the organization’s operations and programs that is unavailable from any other single source. This information can be used for advance planning for reorganizations, making or revising long-term plans linked to the organization’s mission, and understanding how the various jobs and work units within the larger organization fit together.
- **HR needs**—There are a number of uses for the job classification system within the HR function itself:
 - **Examination and selection processes**—As discussed previously in Module Three on selection, the EEOC’s Uniform Guidelines on selection require that all selection methodologies be job-related. The easiest and most effective way to accomplish this is through extensive review and analysis of an organization’s actual job descriptions and job standards/specifications.
 - **Performance appraisal**—The ultimate purpose of performance appraisal is to build and improve employee performance. By focusing on meaningful, job-based performance standards, employees are able to more easily identify with and accept the basis of their evaluation.
 - **Training**—The knowledge, skills, and abilities typically developed as part of the job classification system can be used to identify training needs and as the basis for ongoing staff development programs.
 - **Compensation**—A properly structured job classification system, where the kind and level of work have been clearly established and delineated, can

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be the basis for determining pay relationships between various types and classification of jobs within the organization.

- **Unionization**—Typically, similar types of jobs are grouped together to form bargaining units as part of the initial steps in the creation of a collective bargaining system. The job classification information provides the necessary data to aid in the determination of the collective bargaining units.
- **Regulatory compliance**—A properly maintained job classification system can assure compliance with a number of federal laws that we outlined in Part One of this module. Perhaps of most importance is the need to determine the exemption status of all positions within the organization under the FLSA. Other areas of potential use involve the ADA, which is discussed in Part One of this module, and also the identification of employees who perform hazardous work or come into contact on a recurring basis with hazardous materials. Both federal and state laws require that employees whose jobs involve contact with hazardous materials must be tracked, monitored, and regularly tested for harmful exposures.
- **Employee needs**—Employees need to be assured that differences in job classification and levels within a job classification family (e.g. Clerk 1, 2 and 3) are in fact reflective of significant differences in the level or type of work. Further, those differences are also reflective of differences in compensation, with the ultimate objective of equal pay for equal work. Being able to provide some level of assurance of these issues should be a positive factor in influencing employee morale.

One of the major misconceptions regarding job classification systems is that they are overly restrictive and impinge upon the individual manager's ability to assign tasks and accomplish work. We have all heard about the employee whose reason for nonperformance of a task is, "It isn't in my job description." While the tendency is to blame the job classification system, it is more than likely that the job description was poorly prepared and does not address major aspects of an employee's work tasks. It may also be true that the manager failed to properly address or ignores the employee's nonperformance. Job classification systems are descriptive but not restrictive in that the system does not proscribe the duties of any given job, but merely describes the job as it exists at a point in time.

Jobs have an inherent dynamism in that they change and evolve as the work performed changes and evolves. Rules, regulations, work processes, and technology induce changes in the manner in which work tasks are performed and in the knowledge, skills, and abilities needed to perform them. Without periodic updating, the job classification system will no longer reflect or describe the way work is performed. It is at this point that the job classification system begins to lose organizational value and relevance.

At its base, job classification as performed in most public and private organizations, is intended to group similar types of jobs into the same category, or, "class" of job. There are three criteria that are generally applied to determine the grouping of similar, individual jobs into the same class:

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- Kind of work performed;
- Level of difficulty and complexity inherent in the work; and
- Knowledges, skills, and abilities (KSAs) required to perform the work.

Kind of work is usually relatively easy to discern: for example, the work performed by a file clerk looks and is much different from that performed by a nuclear plant operator.

Determining the level of difficulty/complexity involved in performing different tasks is more difficult and complex. Generally speaking, work ranges from routine tasks, such as filing materials in an alphabetical or subject filing system, to complex, such as maintaining a nuclear power plant within its proper operating range to generate sufficient power for the regional power grid. It is easy in that example to distinguish the differences in the levels of difficulty, complexity, and responsibility.

In regard to KSAs, it is also easily apparent that our nuclear plant operator will require significantly different and more advanced KSAs than the file clerk. This is not to denigrate the work of file clerks, but merely recognition of the differences in the nature and scope of their respective work tasks when compared to the nuclear plant operator.

The factors that are typically used to determine the level of difficulty/complexity include:

- **Interpersonal communication**—This factor is intended to evaluate the purpose and complexity of the employee’s communication with others, both internally and externally. Is he/she merely sharing factual information with others in his/her work unit, or responding to requests from other organizations or the general public for information? Is the purpose of this communication merely to share information or data, or to persuade or convince others to take or accept a given course of action?
- **Decision-making**—Evaluates the employee’s level of autonomy in deciding how to resolve job or organizational issues he/she is confronted with and the types of decisions that are solely within the purview of the employee to make without recourse to oversight or modification by a superior.
- **Consequence of error**—Evaluates the extent of the fallout from a bad decision in terms of monetary loss, risks experienced by the organization, and resulting public notice and/or ridicule.
- **Supervision/guidance received or exercised over others**—Evaluates the number and types of subordinates supervised.
- **Originality**—Evaluates the extent to which the employee is able to control the manner and methods used to accomplish the work tasks, absent direct or continuing supervision, or the requirement to follow detailed written policies/procedures in accomplishing work tasks.

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- **Variety of work assignments/tasks**—Evaluates the extent to which the employee performs a variety of different tasks or is allowed to accomplish all aspects of the unit’s work activities from receipt to completion of the work activity/project.
- **Required KSAs**—Determines the nature and scope of the knowledge, skills, and abilities routinely used by the employee in accomplishing his/her work tasks.

The above factors will enable a classification specialist to more precisely discern differences in the level of difficulty and complexity of the work activities under review.

Effective job classification systems focus on the work to be done—the kind of work, the responsibilities assigned to the position, and the KSAs needed to perform the work. There are, however, a number of factors that are typically mentioned by managers or supervisors in support of requests to reallocate an employee’s job to a higher level. Many of these may relate to the employee’s performance but are not factors that are relevant to determining the proper job classification. These nonallocation factors include:

- **Length of service**—How long the employee has worked for the organization and/or performed their current work assignments is not relevant to determining the proper classification of their position.
- **Unusual personal qualifications**—Employees with advanced, post-high school education that is not required to perform their current job, or who obtain a bachelor’s or masters’ degree while employed by the organization, may feel that they should be rewarded in some manner for their educational achievement.
- **Volume of work**—Supervisors will occasionally seek to upgrade an employee’s job classification because he/she is able to accomplish more work than other employees. Productivity can be the basis for compensation decisions in an assembly line situation where the amount of work produced is rewarded with a higher rate of pay for the number of widgets produced. It is not the basis for determining an employee’s proper job classification.
- **Personality**—The fact that an employee has a pleasant personality is not the basis for determining the proper job classification that is to be based on the kind and level of work that the organization needs to be performed.
- **Friendship**—Determining the proper job classification based upon the presence or absence of social relationships is a recipe for organizational anarchy.
- **Efficiency**—This is a performance issue, and we hope that all employees perform their work in an efficient manner, but it is not a factor that should be used in determining the proper assignment of a job within an organization’s job classification system.

All of the above-listed factors are person-centered, and it is important to understand that job classification systems are organization-centered. That is they have as their focus the needs, mission, and objectives of the organization.

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Having delineated both the factors that are relevant and irrelevant to job classification, it is necessary to also examine the most common evaluation methods used as the basis for designing job classification systems. These are:

- **Whole job ranking, also known as job-to-job comparison**—Using this method, the classification specialist compares the whole job to be classified against another job that is commonly recognized as being properly allocated, or that in most respects typifies most of the important elements of this specific classification. This properly classified standard or measurement, or whole job comparison, is commonly referred to as benchmarking or using a benchmark position.

For example, if a recent survey revealed a number of existing jobs as being representative of the types of positions properly classified as an Administrative Assistant 2, these benchmark jobs can be used as part of the methodology to allocate other jobs in the organization’s administrative assistant occupational area. If a subsequent administrative assistant position under review is compared to the appropriate benchmark descriptions and the two descriptions are essentially identical, then the job being reviewed would be classified at the same level as the benchmark. In the event that the benchmark position is similar to, but not identical with, the position under review and differences are substantive, it may be advisable to use one of the other job evaluation methodologies.

- **Job standards/specification, also known as job-to-category comparison**— This is probably the most common method for allocating positions in public organizations. This method relies on the comparison of the job under review with a written job standard or specification that in general describes the types of tasks, level of difficulty, complexity, etc. encompassed in a specific job classification. Generally, the classification specialist will compare the job as a whole with the classification standard which best describes or delineates the duties and responsibilities contained in the job under review. As with the benchmark method, if the job fits the factors or characteristics of the classification standard, the position is allocable to that specific classification. When the similarity is not readily identifiable, but the job seems to fit the class concept, the specialist must analyze the individual factors contained in both the classification standard and the position under review.
- **Job component analysis, also known as job components/point systems**— This methodology relies upon the development of criteria which are weighted to place the emphasis on the overall importance of the specific criteria to organizational success. Each of the specific criteria is typically divided into degrees of value, with each degree assigned a point value—the higher the degree, the more points awarded. The points for each criteria are added together to arrive at a total, and the totals are arranged from most points to least points to produce a hierarchy of job value. Typical examples of criteria include:

- **Knowledge**—This factor accounts for the kind and level of information that the employee must apply to satisfactorily perform the work tasks. The information could be acquired from a variety of sources—prior

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work experience, formal education, apprenticeships, OJT, self-learning, organization-sponsored training, or some combination of these.

- **Information processing**—This factor describes the mental processes used by the employee in applying the knowledge.
- **Decision-making**—This factor is intended to evaluate the employee's autonomy in deciding how to resolve job issues and the types of decisions that are solely within the purview of the employee.
- **Interpersonal communication**—This factor evaluates the purpose and complexity of the employee's communication with others, both internally and externally.
- **Impact on organizational results**—This factor evaluates the overall impact of the employee's activities on the organization, including any risk resulting from action taken or failing to act.
- **Environment**—This factor assesses the physical demands of the employee's work and the working conditions in which work is typically performed.

The above factors are what are typically used to determine the proper allocation of jobs. Depending upon the nature of the organization, there are a number of other factors that might be used either in addition to the above factors, or as a substitute. These include:

- **Severity of error**—measures the extent to which an error or omission causes major expense, injury, public ridicule, or embarrassment to the organization.
- **Access and use of confidential or sensitive information**—measures the extent to which the release of confidential or sensitive information will affect the organization's operations.
- **Authority**—measures the level of the employee's authority to conduct work independently or with some level of oversight.
- **Financial impact/accountability**—measures the amount of money the employee controls in some manner.
- **Number of employees supervised**—measures the number of employees supervised directly and those supervised by subordinate supervisors.
- **Project management**—measures the employee's planning, organizing, leading, and controlling skills in managing projects/work assignments.

This method of job allocation relies heavily on the ability of the classification specialist to accurately assess the job and to appropriately apply rating scales to the tasks, activities, and responsibilities assigned to the position under review.

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All of the above systems can be found in public organizations and can be used effectively in designing job classification systems and maintaining the integrity of the classification system.

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Part Three: Job Analysis for Classification

Gathering and analyzing the job information needed to make an informed and rational classification decision is a time-consuming and, at times, tedious effort. It requires good communication, analytical, and planning skills. The classification specialist needs to gather sufficient data regarding the following aspects of the position:

- **Duties**—A listing of regular duties performed repeatedly and special duties performed less frequently which may include special, one-of-a-kind work assignments. If possible, the employee should be asked to define the percentage of time spent on each of the duties or tasks.
- **Supervision**—This should include a description of the supervision given to others and/or the supervision received from others.
- **Decisions made**—This should include a listing of records and reports routinely prepared, types and nature of materials and equipment utilized, and any financial or budgetary responsibilities.
- **Contact with others**—This should include a listing of internal and external contacts that the employee routinely makes in the course of accomplishing work tasks.
- **Physical requirements/environment**—This should include a description of the physical efforts (e.g., lifting, carrying, squatting, bending, etc.) that are routinely required to perform work tasks. Included with this should be a description of the work environment (e.g., dusty, hot, air-conditioned) in which the employee is typically required to perform his/her work.
- **Worker requirements**—Specifically, what knowledge, skills, and abilities are needed for the average employee to satisfactorily perform the work? This should also include any special training, certification, or licensure required as part of the position requirements.

Many organizations will use a number of different methodologies to gather the above information:

- **Questionnaires**—This is an excellent method to use if the classification review is intended to be organizationwide, a large subunit of the organization, a specific job classification that encompasses a large number of jobs, or a number of jobs in geographically isolated areas. Use of a questionnaire assumes that information should be gathered from either a statistically significant cross-section of all the jobs or, if possible, from all positions included in the survey. Use of an online questionnaire that employees can access and complete should increase participation rates.
- **Position descriptions**—This can be used in conjunction with a questionnaire and typically involves gathering and reviewing individual job descriptions from all the employees in the affected work units/job classifications. This can be a time-consuming process, but assuming the descriptions are reasonably current,

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it will provide information on the complete range duties and responsibilities assigned to positions in a specific job classification/work unit.

- **Functional statements**—Functional statements/descriptions that outline the major organizational responsibilities assigned to specific work units can be useful in providing an overview of organizational activities and interfaces with other operations within the organization. This assumes, of course, that they are reasonably current in terms of describing the actual work activities and operations and/or have been updated to reflect recent organizational changes.
- **Organizational charts**—As with functional statements, the organizational charts will provide useful information, assuming they are current. The organizational charts are useful in gaining an understanding of the size and scope of the work unit, along with reporting relationships.
- **Focus groups**—This method can be effective in gathering more detailed job information, perhaps as a follow-up to a questionnaire, or confirming the validity of the questionnaire data. The danger is a herd mentality, where everyone concurs in the comments uttered by a few and important nuances regarding job duties and responsibilities are missed or overlooked.
- **Individual interview/audit**—This is probably the most effective way of either confirming job data gained through one or more of the other methods or in gathering job data. This method also affords the classification specialist the opportunity to possibly observe actual work functions and gather work samples for later use and analysis. The main drawbacks are the time required for individual interviews and whether the classification specialist is sufficiently skilled or prepared to gather the relevant data. We will discuss this methodology later in more detail, as it is perhaps the best method for obtaining good job data.
- **Research**—It may be possible to obtain information and job data from other public organizations in the area who have job classifications similar to those in your organization. Copies of job descriptions and job standards from other organizations may provide useful background information in analyzing the jobs in your organization. Additionally, the classification specialist should check the Occupational Information Network (O*NET). The O*NET system, which replaced the Dictionary of Occupational Titles, is maintained by the federal government. It is a database of occupational requirements and worker attributes that describes occupations in terms of the knowledge required, how the work is performed, and typical work settings. Since it is web-based and free, organizations can access and download information on jobs that appear similar to those used in their specific organization. This may provide useful information for gathering data on similar types of jobs from other organizations. O*NET can be accessed at www.onetcenter.org.

There has been a continuing debate for many years regarding the efficacy of on-site versus paper audits in documenting work activities as part of a job classification study. Both methods have advantages, some of which we have already touched upon. Paper audits tend to be far less labor-intensive and time-consuming, but rely

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heavily on the accuracy and completeness of the job data that is gathered, such as job descriptions, organization charts, functional statements, etc. On-site audits/interviews require more time, and there are limits on how many jobs can actually be audited in a day/week/month. The on-site audit does permit the classification specialist to talk directly with employees performing the work and supervisors who are overseeing the work while actually observing the work activities as they are being performed. Some organizations with geographically dispersed work units have used telephone or teleconferencing as a substitute for in-person interviews, which saves time and travel costs but still provides the direct contact with the employees performing the work. In large organizations with literally hundreds of employees in the same work unit, job classification, or job family that is to be surveyed, a combination of paper audits with selected on-site audits would probably provide the best use of staff time and resources.

Regardless of the methods of data collection, the ability to communicate effectively is absolutely paramount to the success of the job classification program. As was noted earlier in Part Two, many managers' and employees' understanding of the job classification function is ambiguous and colored by ties to the compensation systems. In instances of occupational or organizationwide surveys, there may be lingering suspicion as to why and how they were selected for audit. If the employee requested a review or his/her position in expectation of receiving a higher classification and increase in pay, he/she may be apprehensive as to why the classifier is seeking additional information. For all of the above reasons, the classification specialist needs to carefully prepare for his/her interview with the employees whose jobs are to be audited. Some simple guidelines for this preparation include:

- Try to place the employee at ease;
- The tone of the interview should be conversational and informal;
- Unless privacy is an issue, the interview should be conducted at the employee's worksite;
- Explain the purpose for the audit;
- Take notes unobtrusively, so as not to distract the flow of the discussion.

Gathering relevant data and conducting insightful interviews is essential to developing and maintaining accurate job descriptions, job standards, and an effective job classification program. This data is important for other reasons, as well. In Module Three, we discussed the importance of good job information to the development of effective selection processes, but it is also important for use as part of the organization's ADA compliance program; more specifically, the identification of essential functions. As Mathis and Jackson point out, "HR managers and their organizations must identify job activities and then document the steps taken to identify job responsibilities. The one result of the ADA is increased emphasis by employers on conducting job analyses, as well as developing and maintaining current and accurate job descriptions and job specifications." Mathis and Jackson also provide a chart in the twelfth edition of their textbook to explain

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the differences between essential and marginal job functions, which we have recreated below.

CONSIDERATIONS	ESSENTIAL FUNCTIONS	MARGINAL FUNCTIONS
Percentage of time spent on task	Significant percentage of time, often 20% or more, is spent on task.	Generally less than 10% of time is spent on task.
Frequency of task	Task is performed regularly: daily, weekly, or monthly.	Task is performed infrequently or when substituting in part of another job.
Importance of task	Task affects other parts of job and other jobs.	Task is unrelated to job, and there are few consequences if not performed.

The classification specialist will need to evaluate all of the information gathered to determine whether specific duties need to be considered essential for ADA purposes. In some organizations, job descriptions may be annotated by the employee or manager with the approximate percentages of time that employees, on average, devote to performing the tasks. If that information is not routinely gathered or expressed as part of each employees' job description, then it will need to be determined by the classification specialist. Even where it is routinely included as part of an employee's job description, it is advisable to assure that the information is current and reflects the manner in which work is presently performed.

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Part Four: Classification Processes

In Parts Two and Three, we discussed the importance of a properly maintained job classification program, its value to the organization, different means typically used to evaluate jobs, and classification factors that are relevant and irrelevant to determining where a job might fit within the organization's hierarchy of jobs and job families. That is the nuts and bolts of the classification system, but there is much more that is involved in the process.

For example, there are some types of jobs that are difficult to classify because of the nature of the work involved. One example is positions that involve pure research, where the employee's work activities will vary greatly and the day-to-day activities may be dissimilar. While most of these types of jobs exist in private sector organizations, there are publicly funded and operated research facilities at the federal, state, and local level, and these jobs will need to be categorized and classified. For these difficult to classify positions, it may be advisable to search O*NET to determine if similar jobs exist elsewhere or to contact other similar facilities/organizations to determine how they have structured their classification program. If these two courses of action are not available, it may be necessary to use a different approach in preparing the job descriptions for these positions. Rather than listing the actual work tasks that are performed, since they may be indeterminate, describe the work processes and research steps that need to be accomplished in order to conduct the research. There may be other types of positions in your organization that may be difficult to classify using traditional methods that may require more creative approaches.

One of the questions that is heard most frequently from employees and managers alike is where do all the job titles come from? This is both an easy and difficult question to answer. The job title should describe the nature of the work, and many job titles do just that: Accountants do some form of accounting work, Equipment operators typically operate some form of heavy equipment such as a bulldozer, and an electrical engineer typically designs and supervises the installation of electrical systems. Those titles are fairly descriptive of the type of work performed. Other titles may be less descriptive of the work performed. If you reviewed a cross-section of jobs titled as office assistant from a number of organizations, you would probably find considerable differences in the work tasks. Some job titles are more generic, and encompass considerable variety in work activities and assignments. Other titles are intended to denote the location of a job in the organizational hierarchy: Executive assistant is typically used to denote a job that reports to a high-level executive. Exactly what tasks the executive assistant performs is usually left to the senior executive to determine, so the job duties for this generic title may also vary somewhat from one organization to another. There is no law that governs the titling of jobs, so determining and assigning titles is done solely at the discretion, and creativity, of the organization. Tools such as O*NET may provide some guidance to organizations that are seeking input for titles, along with contact with other organizations with similar types of jobs.

Once titles have been determined at the worker level, they usually are carried forward throughout the hierarchy of jobs. For example, an accountant does some form of accounting work, and an accounting supervisor supervises the work

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performed by a group of accountants. An accounting manager oversees and directs a substantial portion of the accounting function, while the director of accounting directs and is responsible for the organization's entire accounting operation. Also, depending upon the size of the operation, the number of staff, and the manner in which work has been organized, there may be several levels of work. In Part Two we discussed the need to discern and determine the levels of work, which may result in multiple levels of workers. For example, the organization may have three levels of accountant: 1, 2, and 3, each of which performs more advanced accounting work than the level below it. It is possible that there may be two or more levels of accounting supervisor, again depending upon the manner in which work activities have been structured and organized.

We discussed earlier the importance of job descriptions as a substantial portion of the foundation of a job classification program. Another piece of that foundation is the job documentation that is routinely maintained. This typically consists of the creation of job standards/specifications. A job standard/specification is a generalized description of a group of jobs that, for classification purposes, have the same title. Job standards/specifications are derived from a cross-section of job descriptions and need to be updated periodically to reflect changes in the job tasks, uses of technology, and the manner in which work is accomplished. Properly prepared and maintained, the job standard/specification can be used to measure major components of the organization's HR system:

- Forms the basis for measuring, titling, and, ultimately, compensating the work performed.
- Defines the nature and type of employees to be hired to perform the work. In this regard, it provides the standards to be used to evaluate, assess, and rank employees for employment or promotion.

We also need to be clear about what a classification standard is not:

- It is not the standard against which the employee's performance is measured.
- It is not an individual employee's job description.
- It is not the basis for recruitment for an individual position, but the basis for recruitment for broad, generic job classifications.

There are numerous formats for job standards/specifications that have been developed by private and public organizations to reflect their individual needs and style. Most job standard/specifications typically include the following parts:

- Class title and numeric code
- Class definition
- Examples of work
- Required knowledge, skills, and abilities

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- Experience and training requirements
- Necessary special requirements

The following is a brief description of each of these six parts:

- **Class title and numeric code**—The class title should be expressive of the generic occupation of work and, if needed, the specific specialty within that occupation. For example, if an organization had a class series for clerical staff, it might look something like this: Clerical Technician 1, Clerical Technician 2, Clerical Technician 3, Clerical Supervisor 1, and Clerical Supervisor 2. From the titles alone, we are able to determine that there are three levels of workers and two levels of supervision. The five classes, taken together, form the clerical job family. The numeric code would distinguish each class in this job family from the other, as well as from other classification titles and class families.
- **Class definition**—This is perhaps the most critical part of the standard, and also the most difficult to write. The definition should contain all the critical factors that separate this specific class title from all other class titles in terms of the kind and level of work. The definition should include:
 - The factors that differentiate jobs within a class series; and
 - For each factor, the job components that reflect measurable differences.

In preparing the definition, the classification specialist should assure that the following conditions are met:

- Do not utilize classification factors that are not relevant to the classification of this position;
- Define factors in terms of the specific work done at a specific level;
- Do not use exclusionary phrases; and
- Make all statements as concise as possible.
- **Examples of work**—This portion of the class standard is perhaps the least understood, most misinterpreted, and most misused section of the standard. The examples of work are illustrative of the work activities, and they should be:
 - Work actually performed by at least one or more of the positions allocated to that class;
 - Representative statements of work normally performed at that level;
 - Examples which further clarify factors used in the definition; and
 - Action statements that depict the work.

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These examples are **not** designed to be all inclusive of the work performed in jobs allocated at that level. If they were required to meet this objective, you could imagine the length of the listing that would be needed for a classification with 50 or more positions assigned to it.

- **Required KSAs**—To begin we need to clarify what is intended, for our purposes, by each of these terms:
 - **Knowledge**—Information concerning facts, principles, procedures, rules, laws, or processes that is possessed in a manner that can be evaluated or tested. An example would be “Knowledge of generally accepted accounting practices.” In developing knowledge statements, the classification specialist needs to avoid the use of adjectival modifiers such as some, considerable, extensive, etc., as these adjectives have no standardized application when used for assessment purposes.
 - **Ability**—Abilities fall into two major types:
 - ♦ *The capability of using knowledge with competency.* An example of this type of ability statement would be “Ability to prepare reports of interviews and develop factual reports of potential problems.” Abilities of this type are used either in lieu of or as an extension of, knowledge expressed in the standard.
 - ♦ *The capacity to acquire either knowledge or skill.* An example of these types of ability statement would be “Ability to operate a personal computer and use Microsoft software products, such as Word, Access, and Excel.” These types of abilities are used to outline either work standards which the employees are required to meet or information the employee will be required to learn for successful job performance.
 - **Skill**—This involves the proficient use of knowledge or proficiency in a motor or physical work requirement. Examples would be “Skill in establishing and maintaining effective working relationships and communication with co-workers, visitors, government officials, the media, and the general public,” and “Skill in solving engineering problems involving structural stress, and utilizing differential calculus.” Skills are typically job factors that can be assessed through testing processes.
- **Experience and training requirements**—This is often the last section on most job standards, and it can be viewed as the first assessment of an applicant. Typically, organizations state the minimum experience, education, and/or training which a candidate must possess. As this section is normally condensed and expresses two or three possible combinations of experience and training, there will normally be an equivalency clause. This clause allows the organization flexibility to consider applicants with unusual or unique backgrounds and ensures that potentially acceptable applicants receive fair treatment.
- **Necessary special requirements**—This is typically the last section on the standard, and it is used only in instances where licenses, registration,

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certifications, or permits are legally required to perform work. If a necessary special requirement is identified, either the work performed requires a license, or a legal citation of the requirement must be obtained and maintained as part of the reference file. An example might be if an equipment operator is routinely expected to drive a tractor-trailer or other heavy motorized equipment and a CDL is required. This might be expressed as “Applicants must possess a current Commercial Drivers’ License (CDL) issued by the State of _____.”

KSAs and experience and training requirements need to be job-related in accordance with the requirements of the EEOC’s Uniform Guidelines. KSAs need to be reasonable related to the work performed, so “Knowledge of generally accepted accounting principles” would be appropriate for an accountant, but not for an office assistant; whereas “Ability to operate a personal computer and use Microsoft software products, such as Word, Access, and Excel” might be appropriate for both types of jobs.

Establishing training and experience requirements may be more difficult and problematic, as there is tendency in some organizations to rely on the qualifications of the incumbent as the basis for these requirements. This is a bad idea that could result in a patchwork of requirements with no rhyme or reason, placing the organization in some legal jeopardy. There needs to be some consistency in the establishment of these requirements that is reasonably related to the work performed. Using our accountant example, it would be reasonable to require a bachelor’s degree with perhaps some accounting course. For the office assistant, however, the organization may not require any post-high school education.

In regard to experience, the organization might want a year or two of accounting experience for our accountant classification and perhaps a year or two of experience working in an office setting for the office assistant. As was mentioned earlier, there typically is some type of equivalency statement that allows the substitution of experience in lieu of education, and vice versa. For example, the office assistant requirements might be “High school graduation and two years of experience in an office setting; or one year of experience in an office setting and an associate’s degree in business/secretarial science; or any equivalent combination of experience and training.” The equivalency clause will allow for applicants who may not fully possess either level of experience and training to qualify, and it provides some assurance to the organization that the person ultimately selected will be able to perform the work.

One of the HR uses for job classification relates to the regulatory function needed to assure compliance with federal and state laws. Earlier we discussed the use of job classification data to identify ADA essential functions. The other major regulatory requirement for which job classification data is absolutely essential is the determination of positions in the organization that are exempt or nonexempt from the overtime provisions of the *Federal Fair Labor Standards Act*. Exempt status under FLSA means that the position occupied by the employee is not eligible for overtime pay. Nonexempt status means that the position occupied by the employee is eligible for overtime pay and that the organization is required to compensate the employee in accordance with the provisions of the FLSA.

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There is actually a two-tiered test for determining the proper exemption status:

- **Salary level and basis test**—If an employee is compensated less than \$23,600 per year, or \$455 per week, he/she is nonexempt and eligible for overtime payments. Salary basis is the manner in which the compensation is received. If the employee is paid on a salaried basis, with the expectation of a “guaranteed minimum” amount of pay that he/she will receive, the job may be exempt.
- **Duties test**—This test is far more complicated than the salary test, and it involves determining whether the job falls into one of three categories of exempt job duties, which are:
 - Executive
 - Professional
 - Administrative

We will discuss each of these, as their requirements are different, and also rather specific.

Exempt executive job duties include the following types of activities:

- Regularly supervises two or more other employees; and also
- Has management as the primary duty of the position; and also
- Has genuine input into the job status of other employees, which includes activities such as hiring, terminating, promotions, or assignments/reassignments.

In dealing with the first requirement, supervision, this must be a regular part of the job and involve supervision of employees of the organization, as supervision of volunteers and other nonemployees does not qualify. In addition to the supervision, the employee must also be involved in management as part his/her primary duty. The FLSA provides a listing of typical management duties:

- Interviewing, selecting, and training employees;
- Setting rates of pay and hours of work;
- Maintaining production or sales records (does not include clerical activities);
- Appraising productivity, handling employee grievances or complaints, or disciplining employees;
- Determining work techniques;
- Planning the work;
- Apportioning work among employees;

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- Determining the types of equipment to be used in performing work, or materials needed;
- Planning budgets for work;
- Monitoring work for legal or regulatory compliance; and
- Providing for safety and security of the workplace.

This listing is fairly exhaustive, so determining whether an employee meets the statutory definition of executive requires a case-by-case examination; and the data for that kind of analysis can only come from the organization's properly maintained classification program.

Exempt professional job duties are somewhat easier to discern. First of all, the traditional professionals like physicians, dentists, architects, registered nurses, accountants, and engineers are typically exempt. Professionally exempt workers must have education beyond high school, and usually beyond college, in fields that are distinguished from the mechanical arts or skilled trades. Advanced degrees are the most common measure of this, but they are not absolutely necessary if an employee has attained a similar level of advanced education through other means and if the employee performs essentially the same kind of work as similar employees who do have advanced degrees.

Exempt administrative job duties are less well defined and subject to wide interpretation. The FLSA definition of administrative duties includes:

- Office or nonmanual work, which is
- Directly related to management or general business operations of the employer or the employer's customers, and
- A primary component of which involves the exercise of independent judgment and discretion about
- Matters of significance.

This type of exemption is normally designed for relatively high-level employees whose main job is to keep the business running or who are staff rather than line employees. Some example of the types of jobs typically covered by the administrative exemption include those in human resources, payroll and finance, accounting, legal and regulatory compliance, and marketing and advertising. Administratively exempt work typically involves the exercise of discretion and judgment, with authority to make independent decisions on matter which affects the business as a whole or a significant part of it.

Determining whether a job meets one of the exemption criteria outlined above relies on the classification program's effectiveness in gathering appropriate job data, documenting work activities completely, and the careful analysis of all of the available job information. Once an initial exemption determination has been made,

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it is unlikely that the exemption status would change; however, it is advisable to periodically reassess the exemption status of all jobs, especially those exempted on the basis of the administrative criteria.

In April 2018, the United States Supreme Court, in a 5-4 decision (*Encino Motorcars, LLC v. Navarro*) that service advisors for a car dealership are exempt from the overtime pay requirement of the *Fair Labor Standards Act* (FLSA) because they are salesmen primarily engaged in servicing automobiles. The FLSA contains an exemption for “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements.”

What makes this case relevant and important for employers is that the majority opinion written by Justice Thomas rejects the long-held principle that FLSA exemptions should be construed narrowly. According to Justice Thomas, “because the FLSA gives no textual indication that its exemptions should be construed narrowly, there is no reason to give them anything other than a fair (rather than a narrow) interpretation.” It will be up to the federal courts to apply this ruling to future cases. As cases evolve, they may provide guidance that will assist employers in determining whether employees should be classified as exempt or non-exempt from the FLSA.

There is an assumption that having created a classification program, and established an appropriate job classification structure for all positions in the organization, the work has been completed. Unfortunately, just the opposite is true. The classification plan now has to be maintained and updated as jobs change and the organization evolves. As was mentioned earlier, jobs are dynamic entities that change as work tasks are modified, added, and deleted, and also as the organization assumes new activities, grows, contracts, and/or is restructured. The maintenance of the classification plan needs to be a proactive effort, where the classification specialists conduct periodic surveys and audits to monitor the organization’s classification plan to revise the existing job classifications and to develop new classifications to reflect significant changes in work tasks.

The easiest way to maintain the classification plan is through a planned review effort spread over several years. For example, the HR department could establish a goal to review at least 20% of all positions in the organization each year. This would assure that all jobs are reviewed within a five-year period.

There are two possible means to select jobs for review:

- By organizational unit, selecting work units within the organization that approximates the target goal of 20; or
- By job title/job family that approximates the target goal.

Both methods have advantages. The former allows the classification staff to concentrate on specific work units, perhaps selecting units with similar activities or interests. The latter method allows for a broader view of jobs across all organizational units by job classification and may highlight systemwide concerns. The method for accomplishing the review could be done using one or more of

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the survey methods described earlier: questionnaires, position descriptions, focus groups, or individual interview/audit.

While the annual survey assures some measure of updating the class standards/specifications, it may miss changes to individual jobs. To correct this shortfall, some organizations use a position accuracy certification (PAC) to maintain the currency of employee job descriptions and assigned job classifications. The PAC is usually an addendum to the annual performance appraisal form that requires the supervisor to list any work tasks that have been added or deleted from the employee's job. The form is signed by both the employee and the supervisor and becomes an addendum to the employee's job description to formally document the changes that have occurred. A copy of the PAC form is typically provided to the HR staff for review to determine if the changes have in any way impacted the classification of the employee's job. In large organizations, use of a PAC system could create a huge paper chase for both the supervisors and the HR staff. If the organization has the capability to automate the PAC form, the completion and review could potentially be accomplished online.

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Part Five: Establishing Class Relationships

How do we value one job over another? We know that we must provide equal pay for equal work, but how do we decide what the actual job values are, and how do we price our jobs to assure internal and external pay equity? In this portion of the course, we will explore different methods used to evaluate and, in effect, value jobs. We need to understand that the second question, valuing and pricing jobs, is a compensation issue, which we will discuss in Section Two of this module. One of the problems with job evaluation is the tendency to lump it in with compensation, which is unfortunate but understandable. Employees believe one of the means to greater income is having their job reallocated/reassigned to a higher classification in the organization's hierarchy of jobs. In effect, the job evaluation/classification system is linked to increased income. Job evaluation and compensation are inextricably linked, but they need to be dealt with and performed separately.

Mathis and Jackson define job evaluation as “a formal, systematic means to determine the relative worth of jobs within an organization.”

The first step in the job evaluation process is to analyze each job being performed. In doing so, it is important to determine and document:

- Why the position exists;
- The major duties performed;
- The educational and experience requirements for successful job performance; and
- The physical and mental requirements for performing the job.

The primary tool in documenting a job evaluation is a job description. It is not necessary that the job description contain every duty performed in the job; however, it is important that it contain a listing of the major job duties and responsibilities. The job description should also include the job title, office or unit in which it is located, geographical location, the person or position to which it reports, and the job's pay rate if one has been set.

A critical component in conducting an objective job evaluation is the need to analyze the required job duties rather than not the person performing the job at the time the analysis is conducted. Job classification is an organization-centered, not employee-centered, process.

Mathis and Jackson discuss the major job evaluation methods currently in use in most organizations. These include:

- **Point method**—As Mathis and Jackson state, “The most widely used job evaluation method, the point method, breaks jobs down into various compensable factors and places weights, or points, on them. A compensable factor identifies a job value commonly present throughout a group of jobs. Compensable factors are derived from the job analysis and reflect the nature of different types of jobs.”

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Mathis and Jackson believe “the point method is most popular because it is relatively simple to use and it considers the components of a job rather than the total job. However, point systems have been criticized for reinforcing traditional organizational structures and job rigidity. Although not perfect, the point method of job evaluation is generally better than the ranking and classification methods because it quantifies job elements.”

The point method is used in many private organizations and its use is less widespread in public organizations.

- **Job ranking**—This method is sometimes referred to as whole job ranking. As Mathis and Jackson state, “The ranking method is a simple system that places jobs in order, from highest to lowest, by their value to the organization. The entire job is considered rather than the individual components. The ranking method generally is more appropriate in a small organization having relatively few jobs.”

In this method, jobs are compared to each other based on the overall worth of the job to the organization. The worth of a job is usually based on skill, mental or physical effort, fiscal or supervisory responsibility, and working conditions. As Mathis and Jackson point out, the advantages are that it is fairly simple to accomplish, and it can be very effective where relatively few jobs are involved. The disadvantages are that ranking jobs can be subjective, it is difficult to administer as the number of jobs increases, and, since there is no standard used for comparison, new jobs would have to be compared with existing jobs to determine their proper rank. The ranking process would need to be repeated every time a new job is added.

The ranking methods typically used are:

- Ordering—Simply place job titles on 3x5 inch index cards, then arrange the titles by relative importance to the organization.
- Weighting
- Paired comparison

After ranking, the jobs should be grouped to determine the appropriate salary levels. This method is also not common to public organizations, although, as stated earlier, it may work well in smaller organizations.

- **Factor comparison**—Mathis and Jackson define this method as “a quantitative complex combination of the ranking and point methods. Each organization must develop its own key jobs and its own factors.” In the factor comparison method, a set of compensable factors is identified as determining the worth of jobs. Typically the number of compensable factors is four or five. Examples of compensable factors are:

- Skill
- Responsibilities

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- Effort
- Working conditions

This method is also not typically found in public organizations.

- **Classification method**—This is the method utilized in many public organizations, but is not found in many private organizations. As Mathis and Jackson indicate, in this method “job descriptions of each class are written and then each job in the organization is put into a grade according to the class description that best matches it.” Mathis and Jackson point out that the difficulty associated with this method “is that subjective judgments are needed to develop the class descriptions and to place jobs accurately within them.”

Regardless of the system employed, all rely on properly prepared job descriptions, which form the foundation upon which all job evaluation systems rest. A completed job description permits comparison of the job duties and requirements to established, objective factors such as:

- Education and experience requirements;
- Initiative and ingenuity required;
- Physical, visual, and mental ability requirements;
- Responsibility for equipment, material, product, and process;
- Work and safety of others;
- Working conditions, including hazards;
- Complexity of duties;
- Supervision received;
- Potential impact of errors;
- Contact with others, internal and external to the organization;
- Responsibility for confidential data; and
- Scope and nature of any supervisory responsibility.

Exercise

Describe the job evaluation system that is used in your organization. What major problems or difficulties are encountered in using this system? Has the organization considered using another system in place of the current system?

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Part Six: Classification Strategies

As Mathis and Jackson point out: “Using job analysis to document HR activities is important because the legal defensibility of an employer’s recruitment and selection procedures, performance appraisal system, employee disciplinary actions, and pay practices rests in part on the foundation of job analysis.”

Job analysis is called the cornerstone of human resource management because the information it collects serves so many HR management functions. It is important that we examine how classification strategies relate to and impact the following HR functions:

- Recruitment
- Retention
- Compensation
- Succession Planning

Recruitment

As was discussed in the recruitment module, any successful recruitment effort starts with the conduct of a job analysis and the development of a recruitment profile. Staffing would be haphazard if the recruiter did not know the job duties and qualifications needed for the job. Mathis and Jackson reinforce this concept: “Job analysis is a systematic way of gathering and analyzing information about the content, context, and human requirements of jobs.” The information generated by job analysis may be useful in redesigning jobs, but its primary purpose is to capture a clear understanding of what is done on a job and what capabilities are needed to do it as designed.

As Chris Jarvis notes in his [Business Open Learning Archive](#):

Recruiters obviously need to comprehend job requirements fully. Information from a job analysis, and sources such as exit interviews, can help to restructure the job and resolve potential difficulties, such as:

- Scope and authority;
- Job demands, choices, and constraints;
- Ambiguities and uncertainty;
- Complexity and technical challenges;
- Incompatibility (i.e., person-job-organization);
- Conflict and stress.

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A job description can be prepared—what needs to be done in the job—a definition of the main responsibilities and tasks/priorities. This is useful for recruiters and applicants.

Once we understand the job we can specify the attributes (education, skills, experience, competencies) required of a person who is likely to do the job successfully—a person profile—modeling those candidates most likely to be successful in the job.

Job analysis generates:

- Job prospectus information needed by applicants.
- A recruitment campaign that will attract suitable candidates (inclusive of job advertising).
- Better understanding of how applications received must be handled/processed to evaluate candidates (candidate-to-candidate and candidate-to-job) and produce an initial short-list to invite for interview.
- Better information so that selection decisions can be made as objectively as possible. The soundness of decisions can be readily undermined by perceptions, attitudes, and values, arrogance, and ignorance of selectors.
- A better understanding of what selection methods—interviews, written tests, etc. might serve as valid, reliable, and useful tests for different types of jobs/staff.
- Clear decision-making criteria for selectors to use. Such criteria must be relevant/valid for performance of the job in question—otherwise forms of discrimination may creep in running counter to equal opportunities statutes.

Without proper definition of job requirements, performance criteria, and competences required, recruiters may fall into the trap of selecting on the basis of false assumptions. Managers involved in recruitment may think they understand the job and its requirements but too frequently apply stereotypical views about “the ideal candidate.”

The outcome may be a poor fit between the job and the capacity of a new starter. They may be too good for the job, not capable of doing it, or simply the job is ill-suited to their needs and interests. It is not uncommon for someone to start work and leave within the first week saying “This is not the job I expected.”

We must not forget that recruitment and selection involves differentiating between people (applicants). But the process must be fair—ethically and in accordance with the law.

Retention

Retention of trained staff is a serious concern in many organizations, and Mathis and Jackson point out that “some people contend that turnover and absenteeism

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are different reactions to the same problems. That may be true—both can be classified as organizational withdrawal. Absenteeism is temporary withdrawal and turnover is permanent withdrawal. Like absenteeism, turnover is related to job satisfaction and organizational commitment.”

In his article *Seven Steps to Increase Employee Retention*, Mike Poskey discusses the importance of “no surprises” by placing managers and job candidates on the same page through the conduct of a thorough job analysis. The resulting job preview was discussed at length in the recruitment module. As Poskey states:

Many organizations are now realizing the bottom-line effect on retaining quality employees. Retaining quality performers quite simply adds to increased productivity and morale, while reducing the associated costs of turnover. Why is employee retention critical to business success? Turnover analysis reports continue to show that the cost of unwanted turnover can be 1.5 times the employee’s annual salary. Employee turnover’s greatest cost is lost business and productivity.

The following outlines a seven step strategy to increase employee retention, one that helped one Fortune 500 Company realize a 67 percent increase in retention in the first year of implementing all seven steps:

- Conduct job analysis audits to provide realistic job previews. Conduct job analysis audits with behavioral assessments, cognitive reasoning assessments, job simulations, and hard skills assessments (e.g., computer skills, etc.) to objectively define the core competencies required for success in each role (competency modeling). This helps in providing a realistic job preview for candidates and managers. Oftentimes what managers think they need for a certain role is different from what they actually need.
- Implement a well-designed assessment and selection process. Include behavioral assessments and structured behavioral interviewing techniques to increase the likelihood of hiring people that can, and will, do the job at a high level in your environment and for your managers (job fit assessment).
- Provide good employee orientation. The people you hire today are potentially your greatest resource for corporate success in the years ahead. As a senior leader, your participation in new employee orientation sends a vital cultural and leadership message: ‘We’re all involved here in the drive toward what we want to be in the future.’ Everyone—even the newest employee—has value.
- Implement programs for employee training and development. Provide ongoing professional development to show your willingness as an organization to develop your greatest asset—your people.
- Improve manager and employee relationships. Concentrate on the people that stay with you to learn what makes them happy... then give them more of it! ‘People leave managers, not companies. If you have a turnover problem, look first at your managers,’ Marcus Buckingham and Curt Coffman write in *First, Break All the Rules*.

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- Provide an equitable or fair pay system. Be competitive!
- Encourage succession planning. Identify roles for which employees may be suited in the future and work with them on designing their succession plan within the organization. Invest in cross-training, job shadowing, coaching, mentoring, and cross-experience.

In summary, many organizations are already using several of the aforementioned steps, but may be lacking or deficient in the other steps. Each step is critical to the overall success of a comprehensive employee retention plan.

Several other keys to employee retention are offered by Mathis and Jackson. They indicate, for example, “the determinants of retention can be divided into five general categories, with key organizational components being characteristics of the employer, job design and work, career opportunities, rewards, employee relationships.”

Job analysis can be helpful with job design and work, as well as with career opportunities. To further emphasize this point, the authors also expanded on this in the following bullet points in this same summary:

- The jobs and work done by employees affect retention, particularly if individuals are properly selected, work schedules are flexible, and work/life balancing programs are offered.
- Organizational career opportunities are frequently cited as crucial to employee retention.

Compensation

The importance of compensation cannot be understated, as Mathis and Jackson point out: “Most people in organizations work in order to gain rewards for their efforts. Whether employees are considering base pay or variable pay, the extent to which they perceive their compensation to be fair often affects their performance, how they view their jobs, and their employers. This factor may lead to lower or higher turnover rates.”

As Don Straits points out in his article *How Much Am I Worth, Why Isn't My Salary Higher?*

I wish I had a dollar for every time people complained to me that they are not paid what they are worth. I could retire rich. Almost everyone, regardless of income, education or position, believes that he or she should be earning more money. People at minimum wage obviously want to make more, but people at the highest levels also want more.

Professional athletes are a prime example. National Hockey League players make about \$1.8 million annually, on average. They recently could not reach agreement with owners on an annual contract, despite the fact that the league is in extreme financial difficulty. As a result, the entire hockey season was cancelled. Hey, it's tough to feed a family on \$1.8 million these days.

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In terms of internal pay equity, job analysis information is essential for estimating the value of and appropriate compensation for each job. It allows the classification specialist to judge the relative worth of jobs in the organization, and to set fair compensation rates. Job analysis can be used in compensation to identify and determine:

- Skill levels;
- Compensation job factors;
- Work environment (e.g. hazards, hazardous materials, attention required, physical effort, etc.);
- Responsibilities (fiscal, supervisory, managerial);
- Required level of education;
- Certification or registration requirements.

Job analysis depicts the job worth, which is the measurable effectiveness of the job to the organization. By fixing the job's level of accountability and freedom to act without supervisory or management controls, the specialist can make internal comparisons of jobs based upon decision-making responsibility.

In the thirteenth edition of their textbook, Mathis and Jackson spell out what they view as the

typical division of HR responsibilities in relation to compensation:

- **HR Unit**
 - Develops and administers the compensation system
 - Evaluate jobs and analyzes pay surveys
 - Develops wage/salary structures and policies
- **Managers**
 - Identify job descriptions and compensation concerns
 - Recommend pay rates and increases according to HR guidelines
 - Evaluate employee performance for compensation purposes

Mathis and Jackson also note that “because of the technical complexity involved, HR specialists typically assume responsibility for developing base pay programs and salary structures and policies.”

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In terms of external pay equity, classification specialists track pay information by using pay surveys and analyzing compensation policies of competing employers. Here is where market pricing analysis is done. Organizations formulate their compensation strategies by assessing their competitors' or industry standards. Organizations attempt to set the compensation packages of their employees so they are aligned with prevailing compensation packages in the market. At times, organizations may need to offer higher compensation packages in certain occupational areas like licensed medical personnel such as nurses or physicians to attract and retain this talent in their organizations.

Once again, if employees do not perceive their compensation as fair and competitive based upon what other employers are paying, the organization may be faced with high turnover in these specific occupational areas.

Succession Planning

Succession planning is becoming an increasingly important HR function as Mathis and Jackson note:

One important outcome of HR planning is succession planning, which is a process of identifying a long term plan for the orderly replacement of key employees. In larger organizations, such as the U.S. federal government, the aging of the workforce has significant implications for HR planning and succession planning. For instance, U.S. government agencies as varied as the National Park Service, Army Corps of Engineers, Department of Veterans Affairs, and Department of Agriculture are just some of the ones facing significant losses of experienced workers. Veterans Affairs is already facing competitive challenges in recruiting nurses due to the high demand in health care generally. Other agencies are concerned about finding a significant number of specialized and experienced engineers, technical workers, and scientists. One common flaw in succession planning is that too often it is limited to key executives. It may be just as critical to replace several experienced mechanical engineers or specialized nurses as to plan for replacing the CEO.

Mathis Jackson continue by outlining the steps needed to complete the succession planning process:

Two coordinated activities begin the actual process of succession planning. First, the development of preliminary replacement charts ensures that the right individuals with sufficient capabilities and experience to perform the targeted jobs are available at the right time. Replacement charts (similar to depth charts used by football teams) both show the back-up players at each position and identify positions without current qualified back-up players. The charts identify who could take over key jobs if someone leaves, retires, dies unexpectedly, or otherwise creates a vacancy. Second, assessment of the capabilities and interests of current employees provides information that can be placed into the preliminary replacement charts. With that information, a formal succession plan is prepared as a guide for future use.

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Often HR has the primary responsibility for succession planning organization-wide. However, for CEO and senior management succession efforts, top executives and board members often have major involvement. Because of this, HR often performs the following actions:

- Identifying development needs of the workforce
- Assisting executives/managers in identifying needed future job skills
- Participating in noting employees who might fill future positions
- Communicating succession planning process to employees
- Aiding in tracing and regularly updating succession plan efforts

As indicated above, succession planning and job analysis go hand in hand. Many private and public employers have had position management programs in place for many years. The impact of the aging workforce has heightened the importance and the priority accorded to succession planning. The identification of talent and skills required to meet future needs is also changing, and this aspect was pointed out by Mathis and Jackson: “Note that when developing succession plans for jobs and identifying candidates, focusing only on management skills may be too narrow. For example, assume that succession planning for a Vice President of Operations at a hospital is being done. That position must have candidates who have industry contacts, community involvement, leadership and management capabilities, and other competencies. These items are especially important if the current VP has extensive experience and numerous internal and external capabilities.”

The basic premise of organizational success in succession planning is the organization’s ability to operate smoothly, efficiently, and effectively despite the loss of experienced performers who retire or leave for a variety of reasons. Previous success often resulted from the identification and training of a designated backup for targeted jobs from within the organization. This is a good plan, unless circumstances change. Sometimes this change occurs as a result of the introduction of new technology, new work processes, or work simplification, and sometimes it happens because the business plan has changed. So it appears that we may need a backup plan for our backup plan.

In her article *High-Impact Succession Management: Best Practices, Models, and Case Studies in Organizational Talent Mobility*, Kim Lamoureux states: “Today, talent mobility—the ability to quickly and effectively reorganize and move talent into new roles and vacancies—is critical to business success. Without an integrated, top-to-bottom succession management program, your organization can’t make informed talent-related decisions.”

As stated by Josh Bersin on his blog, *The Business of Talent*: “Today many successful private sector organizations are heavily focused on defining their core business strategy, understanding the competencies and behaviors of high performers, and using talent management tools to make sure they attract, develop, and manage people to optimize their fit and skills in the organization. Several major

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companies provide specific measures to help monitor the health of their workforce in key areas. They include measures like leadership capability, job fit, retention, as well as traditional measures like work performance and documented employee potential. HR can be useful in this process particularly if the organization has adopted and utilizes a performance management program. This would allow them to monitor, identify, and track highly successful work performers.”

The final strategy we need to employ is the use of expanding use information to the classification function. In regard to the use of IT, Sandra E. Black and Lisa M. Lynch noted in their article *The Impact of Workplace Practices and Information Technology on Productivity*, noted: “We find that it is not whether an employer adopts a particular work practice but rather how that work practice is actually implemented within the establishment that is associated with higher productivity.”

Such trends as rapid job change, organizational decentralization, the need for increased productivity, legal challenges, changing work force needs, and the evolving job analysis technology all have imposed a potential impact of this technology on human resources professionals.

There are a number of consulting firms who offer automated systems, methods, and processes for conducting a job analysis. Most offer online job description formats that are easy to complete, with several offering standardized job description tasks for nurses, pharmacists, engineers, clerical workers, accountants, etc.

Obviously, employing a consultant may not be feasible for many public jurisdictions. HR specialists can still utilize the automated technology at their disposal to make their job analysis process more efficient and cost-effective. Online job descriptions, job description formats, job standards, organizational information, organizational pay structures, all can be useful tools for the job analyst.

Another source of information for job classification purposes is the O*NET system we have mentioned previously.

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Section Two: Compensation

Part One: Translating Classification into Compensation

Having established a classification structure that meets the organization's needs, we need to move on to the task of setting salary rates for all of the classifications in the organization. There are really two considerations that need to be accounted for in accomplishing this:

- Internal equity among and between the various types of positions; and
- External equity as it relates to labor market competitiveness.

All of this assumes, of course, that the organization has the financial capability to support the compensation structure.

In terms of internal pay equity, job analysis information is essential for estimating the value of and appropriate compensation for each job. It allows the organization to judge the relative worth of jobs and set fair compensation rates. Job analysis can be used in compensation to identify and determine:

- Skill levels;
- Compensation job factors;
- Work environment (e.g., hazards, hazardous materials, attention required, physical effort, etc.);
- Responsibilities (fiscal, supervisory, managerial);
- Required level of education; and
- Certification or registration requirements;

Job analysis depicts the job worth, which is the measurable effectiveness of the job to the organization. By fixing the job's level of accountability and freedom to act without supervisory or management controls, the organization can make internal comparisons of jobs based upon decision-making responsibility.

But focusing on internal salary relationships and internal pay equity without looking at the labor market and your competition can be problematic. This internal harmony will quickly dissipate if your rates of pay are not in sync with external competitors. The organization also needs to gather and analyze external pay data, which will require surveying the competition.

The basic idea is rather straightforward. Mathis and Jackson define a pay survey as a "collection of data on compensation rates for workers performing similar jobs in other organizations." Sounds like it would be easy to accomplish, but there are actually a number of issues that need to be addressed as part of planning the survey:

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- What type of pay data are you seeking?
- Is the organization facing hiring problems due to low salaries?
- Is the organization facing retention problems?
- Are employees declining promotional opportunities?
- Given an opportunity, are employees migrating to one specific program area within the organization?

The answers to these questions will narrow the focus of the salary survey and frame the pay data the organization is planning to gather. Traditional salary surveys typically show data that represents a snapshot in time and these surveys are usually collected through a once-a-year client survey or a review of published salaries in a database provided by a trade association or professional organization. As a result, people are often skeptical regarding the accuracy and thoroughness of the methodology used.

Most published salary data found online was published 12+ months ago and, at best, is only remotely representative of a given employee's full employment situation. Employees realize that the factors that influence one's salary are far greater than a person's job title and location; however most salary surveys only report on these two variables.

How can you ensure that the data reported will provide you with current, useful information? According to Mathis and Jackson, the following questions should be answered for each survey:

- **Participants**—Does the survey cover a realistic sample of the employers with whom the organization competes for employees?
- **Broad-based**—Does the survey include data from employers of different sizes, industries, and locales?
- **Timeliness**—How current is the data (determined by the date the survey was conducted)?
- **Methodology**—how established is the survey, and how qualified are those who conducted it?
- **Job matches**—Does the survey contain job summaries so that appropriate matches to job descriptions can be made?

The challenge is to consider the human and material resources needed, the type of survey instrument that will be used, the medium for conducting the survey (mail, internet, telephone, personal interview), the data analysis methodology, and organization of the resultant report.

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The quickest way to complete a survey is through telephone contact, but this is not necessarily the least expensive. If more than one staff member is needed to make the calls, this means providing training for them and monitoring their data gathering. If the information is complex or would necessitate the contacts looking up information, the telephone survey should be preceded by an advance cover letter indicating when telephone contact will be made and providing a copy of the survey questions. This allows the contact to gather information so that the participant is ready when the telephone call is received.

In the vast majority of cases, the internet is used with pay survey questionnaires distributed electronically. It is anticipated that the use of web-based technology will completely overshadow all other survey media in the near future.

Several of the most common compensation elements are:

- **Annual Base Salary**—The annualized base salary of the incumbent;
- **Hourly Wage**—The hourly rate of the incumbent;
- **Noncash Percentage**—The actuarial value of employer-paid benefits, perquisites, and paid timeoff, expressed as a percentage of Annual Base Salary (produced for full-time jobs only);
- **Annual Base Salary + Noncash**—The sum of Annual Base Salary and Noncash compensation value (produced for full-time jobs only).

Often an employer will request median salary data since base salary or actual salary data can be misleading. Following are survey elements to capture this type of data for median salary by:

- Job;
- Certification;
- Years of experience;
- Employer;
- Travel Requirements;
- City/state;
- Organizational size;
- Type of organization (e.g., nonprofit, public, private)

There is also pay survey criteria that compares geographic salary differentials. The organization can request state or city-based data and compare cities or states to each other or to a national average. Another survey method used by many public organizations is to limit their surveys to only public entities or nonprofit organizations.

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Gathering salary data in an organization with significant union representation presents unique issues and problems that need to be addressed. In furthering trust in a labor-management environment, it is best to keep lines of communication open with union officials when surveys of any kind are under consideration and union-covered employees are involved or may be impacted by survey results. To achieve union cooperation, early contact along with supporting information on what management hopes to learn through this survey instrument is recommended.

Avatar Solutions stated in an article *Assessing Employee Engagement in a Unionized Environment: The Challenges, The Rewards, and the Route to a Successful Survey*:

Why is engagement important in a unionized environment? The simple answer is that it is important for the same reason that engagement is crucial in an workplace: numerous studies indicate a strong correlation between employee engagement and overall job performance.

How can you motivate union employees to participate in an employee survey? The key is to make the survey process open and non-threatening. ... unions will be highly distrustful of any survey that seems to threaten the authority and autonomy of the union structure. As a result, we highly recommend that the union be involved in all facets of the survey process. The union will be less likely to oppose the survey if they are included and briefed on the process from day one, and their involvement in the development process will help to prevent them from discouraging survey participation as well.

It is important to note that, while you may initially experience resistance from the union as a whole, the end result is a great opportunity to get them on your side and—more importantly—keep them engaged. A successful Employee Engagement Survey can be implemented in a unionized environment provided that the following three components are in place:

- **Forming A Diverse Survey Committee**—create a survey committee comprised of representatives from both sectors of the workforce. It is essential that both union and non-union employees, as well as managers and supervisors, are actively involved in creating the survey implementation plan so that there are no setbacks due to miscommunication or conflicting interests.
- **Common Ideology**—Once formed, the survey committee must come to a consensus on the survey's purpose and projected outcomes. If the Survey Committee is upfront about the survey's commitment to supporting union concerns, any attempts to discredit the process will be unable to gain momentum.
- **Sensitive Scheduling**—One problem that often surfaces when surveying unionized employees is the fact that these employees often have different schedules than their non-union counterparts. When the Survey Committee is arranging the Survey Administration and Feedback schedules, it is important that the needs of union employees be taken into account.

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When union “group-think” mentality can often seem like a challenge, this can work to your advantage if you manage to convince a majority of the union members that the survey initiative will help them achieve their interests. If you have not yet completed an Employee Engagement Survey at your organization, you may want to consider the rewards that you could reap if all your employees—union and non-union alike—were operating at their highest possible level of engagement.

Understand that salary surveys are not as scientific as one might hope and some providers might say. While the salary survey provides a quality check of survey responses through limited audit activity, you are really relying on another organization’s proper job matches from hundreds of participants, so it is unlikely that any two jobs are really the same. Typically the organization will be matching their benchmark job titles to those used in the surveys. The organization needs to assure as much as possible that the job summary provided with the survey matches the benchmark job description. As a general rule, salary surveys should be used to provide a broad salary range for a job. The skills and experience that an incumbent brings to the role could then be used to assess where and arrange where an individual’s pay level should be set.

According to Mathis and Jackson, the proper use of survey data requires evaluating a number of factors to determine if the data gathered is valid and relevant. They indicate that the following five questions should be answered for each survey:

- Does the survey cover a realistic sample of the employers with whom the organization competes for employees?
- Does the survey include data from employers of different sizes, industries, and locales?
- How current are the data, which is determined by the date the survey was conducted?
- How established is the survey, and how qualified are those who conducted it?
- Does the survey contain job summaries so that appropriate matches to job descriptions can be made?

In some instances, the intended application of the pay data obtained through survey may be to fix organizational pay problems or projected staff turnover. Questions the organization needs to determine include the following:

- Is the organization experiencing difficulty in hiring in a specific geographic area?
- Are select jobs exhibiting high turnover?
- Are certain educational or experience requirements causing turnover or hiring difficulties?

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If organizational concerns have prompted the pay survey, ensure that the survey design will produce the desired results. Following are some suggested coverage areas to provide survey data that is valid and relevant by requesting average salary data by:

- Region;
- Industry;
- Job Responsibility;
- Educational level;
- Size;
- Gender;
- Age;
- Experience;
- Seniority; and
- Staff Size.

According to Mathis and Jackson, it is a common practice to establish a market line that demonstrates the relationship between job value as determined by job evaluation methodology and job value as determined by pay survey rates. This approach to balancing internal equity against market considerations in determining where salary levels should be set uses job evaluation points or other data generated from traditional job evaluation methods. The process ties pay survey information to job evaluation data by plotting a market line that shows the relationship between job value as determined by pay survey rates.

Previously, we indicated that when comparing the organization's jobs to those included in various salary surveys, it is unlikely that any two jobs are really the same. That does not mean that valid comparisons can't be made, but synthesizing your basis for comparison may be required. How is this accomplished?

- **Benchmark specific positions**—Scope the jobs by defining important compensable factors about each position:
 - Special training or education needed
 - Number of employees supervised
 - Size of budget managed
 - Territory covered
 - Amount of travel

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- **Define your organization’s competitive set**—Based on industry, geography, and size:
 - Industry or business focus
 - Large or subtle differences in geographic location
 - Size and type of organization
- **Obtain market data**—Based on compensable factors (listed above) for your job, organization, or project.
- **Match your unique positions**—Based upon:
 - Are you located in a rural area?
 - Do your jobs require special training or certifications?
 - Are you trying to find market data for a new skill?

The organization needs to get very specific with the positions to be surveyed in order to determine market salaries and to establish a market line. By asking in-depth questions as part of the salary survey, the organization will get the job comparison details needed to integrate internal equity and external market considerations in setting the organization’s salary levels.

There are two salary structure designs that are used in most organizations. They are:

- **Step plan variation**—As Mathis and Jackson explain: “Organizations use pay grades to group individual jobs having approximately the same job worth. Although no set rules govern the establishment of pay grades, some overall suggestions can be useful. Generally, 11 to 17 grades are used in small and medium-sized companies, such as companies with 500 to 1000 employees. Two methods are commonly used to establish pay grades: job evaluation data and the use of job market banding.
- **Open range variations**—Market banding is closely linked to the use of market pricing to value jobs. According to Mathis and Jackson, market banding groups jobs into pay grades based on similar market survey amounts. The midpoint of the survey average is used to develop pay range minimums, maximums, and midpoints. This also requires the establishment of pay grades or pay ranges. For example, in a specific pay grade, the maximum salary value would be 20% above the midpoint located on the market line and the minimum value would be 20% below the midpoint. Once pay grades and ranges are established, the current pay of employees must be compared with the draft ranges that fit their specific job.

Broadbanding has become a very popular method of opening up pay ranges. Broadbanding is an alternative approach to defining organizational boundaries and levels. It provides a flatter, broader structure designed to fit a flattened, less

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hierarchical organization. It also provides a more flexible approach for organizing job structures and rewarding employees. This results in much broader ranges than those found in traditional compensation systems and allows the employer to capture more jobs within the organization in that pay range. As Mathis and Jackson note:

The main advantage of broadbanding is that it is more consistent with the flattening of organizational levels and the growing use of jobs that are multi-dimensional. The primary reasons for using broadbanding are:

- To create more flexible organizations;
- To encourage competency development; and,
- To emphasize career development.

In addition to the structured pay system, there may be other forms of compensation, referred to as variable pay, available in the organization for specific reasons. We will explore a number of the more common forms of variable pay, but first we need to understand exactly what constitutes variable pay. As Richard J Greene states in his article “New Strategies and Applications for Public Sector Compensation- Person-focused Pay: Should It Replace Job-based Pay?(IPMA-HR)”

Variable pay is compensation linked directly to individual, team, or organizational performance. One aspect of this is skill-based pay which is linked directly to the individual and delivers base pay increases as a person demonstrates increasing skill depth and/or breadth. Establishing a system requires that the organization:

- Define the skills or “skill clusters” (group of related tasks) that are valuable for an employee to possess;
- Develop a set of criteria that can serve as the basis of a “mastery” test;
- Develop a process that will be used to determine the level of skill mastery, including deciding who will administer the test and what standards they will use;
- Establish relative values for each skill (in pay terms); and,
- Determine administrative policies regulating testing of skill currency, how obsolete and new skills will be factored into the system, and the like.

Skills usually must be learned and demonstrated before becoming certified in skill-based systems. Its primary objective is to:

- Encourage skill development;
- Promote development of a flexible workforce;
- Facilitate workplace redesign in response to changing environment;

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- Enable employee roles to be enriched/enlarged;
- Produce a more knowledgeable workforce;
- Make larger spans of control possible;
- Increase quality; and
- Increase capability to service and satisfy customers.

Bilingual pay is yet another branch of variable pay linked to the individual. “Being able to communicate and conduct business effectively in more than one language is a skill that merits economic rewards. Bilingual pay is when hourly or weekly additions are made to the pay of those that speak a second language, and their job demands the utilization of the language. To be absolutely sure that employees are fluent in their respective second language, proficiency tests should be administered before pay is given. Some individuals may be able to speak a second language fluently but unable to read text or vice versa. Language proficiency tests officially determine a person’s mastery level of a language. For example, the City of Casselberry in Florida requires a proficiency test for anyone who seeks bilingual pay.

Bilingual pay not only benefits employees but can also be a great recruiting tool. Offering a bilingual pay incentive could potentially draw a very diverse group of employees. Equally as important, offering the option of bilingual pay could increase business or enable the agency to reach more people. In diverse urban areas such as Washington, DC, New York City, and Miami, having staff members who can speak different languages is almost a necessity. This also allows an organization to participate in a global market, which could yield unlimited opportunities; in addition to helping grow an organization’s presence in the community, bilingual pay could also help bridge the gap between employees with diverse backgrounds.

Retention of staff is becoming an increasing concern for many organizations. The aging workforce has impacted many public employers and other organizations with concern as baby boomers head into retirement in ever-increasing numbers. In many instances, they possess institutional knowledge, skills, and abilities that are hard to replace in a tight labor market. In the workplace, employers are addressing this challenge by developing strategies to entice skilled, trained staff to stay on.

In her article “How Much Do Most Companies Pay in Retention Bonuses?”, Jackie Lohrey mentioned,

A 2011 World at Work survey show that in general, company participation in retention bonus programs—at least among the businesses responding to the survey—is relatively constant across different industries. Of the 1,023 survey responses received, the healthcare industry led, with 34 percent of businesses reporting a retention bonus program. The finance and computer industries came in next, reporting 33 percent and 32 percent, respectively. Businesses in the retail industry come in the lowest, with 21 percent of all businesses reporting a retention bonus program.

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Most businesses consider retention bonus rates as private and confidential information. However you can use retention bonus information for federal employees, provided by the U.S. Office of Personnel Management, as one reference point. The OPM calculates retention bonuses as a percentage of an employee's base pay. Policy directives state the rate for an individual cannot exceed 25 percent of base pay. If retention bonuses apply to a group of employees, the maximum rate is 10 percent of the base pay. However, in special circumstances, the OPM reserves the right to increase retention rates to up to 50 percent of base pay.

Retention bonuses may not be what it takes in every situation to keep valued staff from leaving, but it is always viewed positively by employees who appreciate knowing that they are valued by the organization.

The specific examples of variable pay cited above by no means cover the gamut of options available when considering variable pay systems. There are pay-for-performance systems that reward individual performance, but they can be redesigned around work groups or teams. There are group incentive plans that involve gainsharing or goalsharing. Gainsharing is a system that measures improvements in performance and then shares the gains from productivity improvements with the employees who have made them. Goalsharing and success sharing are terms used to refer to similar types of pay plans. These plans base payouts on the achievement of specific performance goals. There is also person-focused pay which includes skill-based pay, which we already discussed, but it also includes knowledge-based and credential-based pay systems.

Suffice it to say that the traditional pay systems public organizations have used for decades are being reshaped and redesigned. Why is this happening? According to the introduction of IPMA-HR's *New Strategies and Applications for Public Sector Compensation*, "Critics of government pay programs contend that they are too bureaucratic, inflexible, and costly to maintain. In addition, the critics argue that most current programs are an impediment to new work management ideas, like the importance of teams, rapid and flexible recruitment, and quality service achievement. There is pressure to adapt or adopt compensation programs that are common in the corporate world, to make government run more like a for-profit business. But, the differences between the public and the private sector are real and need to be fully understood and accounted for in developing viable pay program alternatives."

There is one school of thought that believes that the basic elements of a compensation plan are predicated upon sound job description composition, position evaluation, a base and variable pay system, and determining your organization's compensation philosophy and the basics for establishing and administering wages and salaries. However, there are different schools of thought about the basic elements.

A compensation plan or strategy is like a three-legged stool, with three critical components that must be in place, says Jerry Nelson, president and founder of HRN Management Group in Salt Lake City.

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The first is job analysis. “That’s a fancy term for understanding the job,” says Nelson. “What’s required in the position? What are the duties and functions?” The job analysis is usually committed to writing in the form of a job description and job specifications.

The second component is market analysis, which involves finding out what other organizations pay for similar positions. “The credit union industry is a very well-defined industry,” says Nelson, “so the data is really readily available. We usually look at what’s called benchmark positions—positions that are so prevalent that there’s a high level of reliability that the market data is valid.” Examples of these types of positions in credit unions would be tellers, loan officers, and member service representatives. In addition to considering the positions and their functions, market analysis will also take into consideration the size of the organization and its geography.

The third component, says Nelson, is internal equity. A process of job evaluation is used to objectively evaluate jobs to determine their relative worth to the organization. “These three components help establish a sound pay program.”

The Kentucky Personnel Cabinet provides a somewhat different philosophy. According to their *Employee Handbook*, in reference to their compensation plan, the three basic elements are:

- The relationship of the levels of responsibilities and duties of the various classifications;
- What other employers pay for similar work;
- The financial resources (tax dollars) available to pay for the work performed.

Wal-Mart has its own ideas about what elements should be contained in a compensation plan. In developing its approach to its facilities in China, the company indicated that the elements of the plan should include:

- **Objectives** that you recommend for the compensation program.
- **Who should be involved** in overseeing the program’s design and implementation?
- **Compensation philosophy:**
 - Compensation committee—who should be involved? How should it work?
 - What, if any, differences should exist in pay structures for executives, professional employees, sales employees, hourly versus salaried employees, incentive-based versus non-contingent pay (i.e. salary)
 - Should the company set salaries at, above, or below market, and according to which market(s) standards?

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- What types of compensation should be included in the plan, and which are most important? To what extent should non-cash incentives and/or benefits replace or supplement cash compensation? Should Wal-Mart use cash incentives in addition to salaries, and if so how?

As outlined on the *HR Guide to the Internet: Compensation: Outline and Definitions*:

Compensation will be perceived by employees as fair if based on systematic components. Various compensation systems have been developed to determine the value of positions. The components of a compensation system include:

- **Job Descriptions**—A critical component of both compensation and selection systems, job descriptions define in writing the responsibilities, requirements, functions, duties, location, environment, conditions, and other aspects of jobs. Descriptions may be developed for jobs individually or for entire job families.
- **Job Analysis**—The process of analyzing jobs from which job descriptions are developed. Job analysis techniques include the use of interviews, questionnaires, and observation.
- **Job Evaluation**—A system for comparing jobs for the purpose of determining appropriate compensation levels for individual jobs or job elements. There are four main techniques: Ranking, Classification, Factor Comparison, and Point Method.
- **Pay Structures**—Useful for standardizing compensation practices. Most pay structures include several grades with each grade containing a minimum salary/wage and either step increments or grade range. Step increments are common with union positions where the pay for each job is pre-determined through collective bargaining.
- **Salary Surveys**—Collections of salary and market data. May include average salaries, inflation indicators, cost of living indicators, salary budget averages. Companies may purchase results of surveys conducted by survey vendors or may conduct their own salary surveys. When purchasing the results of salary surveys conducted by other vendors, note that surveys may be conducted within a specific industry or across industries as well as within one geographical region or across different geographical regions. Know which industry or geographic location the salary results pertain to before comparing the results to your company.
- **Policies and Regulations**—Written rules, regulations, policies, and procedures that relate to the administration of the Plan.

To begin a review and evaluation of the organization's compensation program, the organization must ensure that employee compensation is externally competitive and internally equitable. This commences by first assessing and determining the organization's specific needs, and then discussing the desired pay philosophy and goal measurements.

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It is important to get the right people involved from the beginning. This includes input from the key players in the organization. These people include anyone who has the potential to derail this project in the future. This step can be accomplished by sending out a questionnaire or by holding meetings with certain groups or individual decision makers.

Once the information has been gathered, prepare a report that clearly articulates the input that you have collected. This valuable feedback will serve as a foundation for the development of the compensation policy and philosophy. Make sure that it is clearly and accurately documented and based on input from key players in the organization.

Stacey Carroll in her article “What Are the Components for a Compensation Plan?” outlines the necessary steps that

will walk you through the significant points in evaluating, developing, or revising a formal compensation plan:

- Create a formal compensation philosophy that will serve as a framework for the development of your policy. It should reflect your company’s or organization’s core values. Document the philosophy so it is available throughout the process as a reference.
- Determine how effective your pay policies have been in regard to hiring, promotion, and merit or market adjustments. Ensure that your pay policies are consistent throughout all levels of employment at your company and embody a system of checks and balances for pay decisions.
- Communicate with your employees about the company’s pay policies and make sure they are informed of the steps the company takes in order to ensure equitable pay practices.
- Understand the numbers and the specific jobs that you’re working with in regard to compensation. Perform an annual external market analysis that helps you set realistic, up-to-date salary ranges for your specific market and location.
- This approach also assumes that the recommended job evaluation criteria that has been developed is based on job content, functions, requirements, and responsibilities. Well-developed job descriptions are an important component of an organization’s compensation plan. You need accurate and current job descriptions to develop an equitable base pay program, as well as to support your recruiting, retention, promotion, and performance efforts. Therefore, for job classification purposes, do not consider the unique qualifications and/or performance of incumbent employees because those are personal—not job-specific—characteristics. At some point in the future this information may be useful, as individual employee performance is typically an indication of where the employee should be paid in relation to his or her job value.

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- Once you're confident in the salary range for a job, you can review individual employee's rates of pay to make sure they are equitable. Include a policy for identifying and red-circling over-paid employees. Consider establishing a pay-for-performance culture to drive compensation decision making. A compensation system that is performance-based encourages employees with rewards and goals that are objective and measurable. Make sure managers are trained on how to properly evaluate performance. In some organizations it may be possible to reward employees with some form of cash compensation that are an alternative to their base salaries—like bonuses and incentives.
- Know how to have hard conversations about pay. If an employee comes to you directly to discuss their salary, request that they speak with their manager initially, rather than you (as the HR professional). If the employee is not comfortable speaking with their manager alone, then you can invite the manager to include you in the discussion. Acknowledge the concerns of the employee and explain the company's goal to ensure pay equity. Next, have the employee confirm that their job description accurately represents the KSA's of the position, and then request an updated resume that includes education, certifications, and skills. Lastly, discuss with the employee the company's policies for pay adjustments and how it may affect their situation.

Above all, be consistent. Once you have your formal compensation plan established and are putting it into practice, consistent compliance to documented pay practices and policies is your best defense against charges of pay inequity from employees and outside agencies. Wherever your company's compensation policy is not followed, document the justifications for the decision with relevant information. And, continue to communicate with employees about how the company is working towards pay equity.

By formalizing your compensation strategy, you elevate your company to one that is working to be the best in every way. That is a great message to send potential employees and your competitors.

Once the compensation plan has been developed that is thought assures internal equity and external competitiveness, it is necessary to gage its effectiveness. Mathis and Jackson point out: "Employers spend huge amounts of money for employee compensation. Just like any other area of expenditures, compensation expenditures should be evaluated to determine their effectiveness. Many measures can be used for this evaluation. Employee turnover/retention is one widely used factor. This usage assumes that how well compensation systems operate affects employees' decisions about staying or leaving the organization. Other more specific measures are used as well, and they are outlined in Figure 12-3, page 363. The numbers for calculating these measures are readily available to most HR professionals and Chief Financial Officers (CFOs), but such calculations are not made in many firms. Often the importance of using these numbers is not a priority for managers or CFO's. Ideally, compensation metrics should be computed each year, and then compared with metrics from past years to show how the rate of compensation changes compares with the rate of changes in the organization overall (revenues, expenses, etc.)."

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Market competitiveness of the organization's compensation plan is also viewed as an equity issue by many employees. Companies must decide how they want to position themselves in relation to the labor market. This policy is called a quartile strategy. Pay survey data indicates that generally the dollar differential between quartiles is 15-20%. Companies can then review the survey data from competitors and adopt a market strategy in which:

- **25% of other companies pay above this level, and 75% pay below**—this is selecting the third quartile and is called leading the market strategy;
- **50% of other firms pay above this level, and 50% pay below**—this is selecting the second quartile and is called a meeting the market strategy; and
- **75% of other companies pay above this level, and 25% pay below**—this is selecting the first quartile and is called a lagging the market strategy.

Not surprisingly, most employers choose the second quartile, or meeting the market, strategy. This allows employers to balance their cost pressures with the need to attract and retain good employees.

Deciding which quartile in which to position pay structures is a function of a number of considerations which include the financial resources available, competitive pressures, and the market availability of employees with different capabilities. For instance, some employers with extensive benefits programs or broad-based incentive programs may choose a first quartile strategy so that their overall compensation costs and levels are competitive.

Pay-for-performance has been an accepted practice in the private sector for decades and is slowly making inroads in public sector organizations. The pay-for-performance usually augments rather than supplants the traditional structured pay system. To obtain a pay increase, an individual must satisfactorily perform his or her assigned job duties. Marginal performers may receive no additional pay. This pay system is based upon providing pay rewards and incentives that are performance based, which requires, identifying performance differences among employees and rewarding the best workers. Employees are not guaranteed a pay increase merely because they completed another year of service with the employer.

As a part of the process of coaching and motivating employees, most organizations have performance appraisal policies and systems in place to assure that supervisors and managers take time to periodically discuss performance with each employee. In addition to talking with the employees about how well they have been doing their jobs, the organization can also use the performance appraisal discussion to set goals for the employees for the coming evaluation period.

There are many pros and cons associated with the use of pay-for-performance systems in public organizations. These are summarized in the article by Widmark Business Solutions, "Linking Pay to Performance":

- **Pros and Cons**—Some experts say that linking pay and performance is not a good idea, and that pay should not be used to motivate employees to do

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a better job because they stop focusing on things like quality of work and how to improve their performance and start focusing on money and how much the raise is.

Others feel that pay-for-performance pits employees against one another in competition for the highest raises. That's why some businesses give the same, across-the-board raises to all employees. It eliminates competition and ensures that the whole workforce is working toward the same goal. But, if everyone gets the same raise, there is no motivation to exceed expectations and go the extra mile in the job. Only you can determine which approach will work best for your employees.

For better or worse, most companies use money to motivate employees in some form or fashion, whether it be bonuses, commissions, cash awards, or bigger raises for good performance.

- **How to link pay and performance**—If you do decide to pay-for-performance, the hard part is making the connection between how well someone has performed and how much of a raise you'll give that employee. There are some basic steps to follow in making that link:
 - Know what your salary budget will be as a percentage of your total budget, considering your overall budget forecast for the coming year.
 - Decide what form the raises will take.
 - If you use actual dollars, you can make sure that the person who performs the best gets the most money. The problem becomes figuring out how to divide the money.
 - Do performance appraisals on all employees.
 - Rank employees based on their performance and the criteria that you set for them.
 - Divide the money up according to that ranking.

If you use percentage points, it becomes easier to rank employees in terms of who gets what percentage. For example, your best performer could get 5 percent, while your average performer could get 3 percent, and your poor performer could get 1 percent or no raise at all. Using this method simplifies the process of ranking, but it does not take into account what each employee is currently making. Using the example above, if the best performer makes \$20,000 a year and the average performer make \$35,000 per year, then the best performer's raise will be \$1,000 and the average performer's raise will be \$1,050. Despite a higher percentage, the average performer still gets more money than the best performer.

If you use a percentage method and you have a set dollar amount in your budget for raises, decide how much each person is going to get and then calculate that

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back to a percentage of that individual employee's salary. For example, if you have \$500 set aside for raises and two employees, and you decide that Employee A (who makes \$15,000) will get \$300 and that Employee B (who makes \$17,500) will get \$200, the percentages for Employee A and Employee B will be 3.3 percent ($\$300 \div \$15,000$) and 1.1 percent ($\$200 \div \$17,500$), respectively.

If you don't have a certain amount of money set aside for raises, just use percentages to rank your employees, with the best performers getting higher percentages and the poorer performers getting lower percentages.

If you calculate raises based on actual dollars rather than percentages, how do you divvy up the money? The simplest approach is to rank the employees and use this formula: take the amount of money you have and divide it by the number of employees. That would give you the amount of the average raise. Use that as a baseline and add and subtract from that number depending on where employees fall in your ranking. For example, if you had \$2,500 set aside and five employees, the average raise would be \$500 ($\$2,500 \div 5$). Therefore, the employee in the middle of the ranking would get \$500, while the two employees who were ranked above him or her would get more than \$500, and the two below would get less than \$500.

According to Mathis and Jackson, a survey of Fortune 1000 firms found that over 80% of the firms use some type of performance-based compensation plans. This same study found that recent growth had been greater in individual incentive plans and team/group reward systems than organization-wide gainsharing, profit sharing, and stock option plans. The study also indicated that such plans may also help reduce employee turnover and increase employee commitment and retention. An HR best practices example of a successful program at First Merit Bank is provided in the Mathis and Jackson textbook. The total rewards approach reflects a more performance-oriented philosophy because it tries to place more value on individuals and their performance rather than just paying employees for having a job.

There are a variety of ways that employees' compensation may be increased, and we will discuss those that are used most frequently in public organizations.

Merit pay refers to the process of determining employee compensation on, in part, the basis of how well each employee performs their work. The principle is simple, at least in theory. It makes sense to reward more productive employees for their increased contributions to the organization in the interests of fairness, but also with an eye to trying to retain the best employees in the company. Merit pay can take several basic forms:

- Annual salary increases can be based on an assessment of the employee's productivity however that might be measured. Those judged as excellent will receive greater salary increases which continue over the years.
- Direct compensation for quantified production. In a factory setting, for example, an employee may receive a piecework rate—being paid x dollars for the production of each ten items. In essence, that's supposed to reward those who work faster. Or there's a commission structure such that you'd find

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in automotive sales or the real estate industries. The more you sell, the more you get paid, and the pay-for-performance is actually built into the entire system. Under direct compensation for quantified production, the link between objectively determined production and pay is clearer, better defined, and requires less judgment.

- Movement of the employee to the next step in his/her assigned pay range, typically on an annual basis, can be made with no direct tie to performance. This type of merit pay is fairly common in public organizations and is usually tied to the organization's policies without regard to performance issues.

Market adjustments may be warranted when the job market drives up the average salary on job classifications or skill sets. The market rate for most positions usually goes up consistently with inflation and the cost of living. The company or organization attempts to keep pace with this through periodic across-the-board pay increases to the entire staff. Individual salary increases to address larger market rate issues that affect everyone are not appropriate because they create pockets of inequity. There are situations, however, when the supply and demand on a particular job classification or skill set significantly raises the market rate of pay for that job classification or skill set. A market adjustment may be necessary when these conditions exist, especially to retain quality employees.

Cost of living increases, or COLAs, are a common pay practice. Often, these adjustments are tied to changes in the Consumer Price Index or some other general economic measure. A cost-of-living allowance adjusts salaries based on changes in a cost-of-living index. Salaries are typically adjusted annually. They may also be tied to a cost-of-living index that varies by geographic location if the employee moves.

Annual escalation clauses in employment contracts can specify retroactive or future percentage increases in worker pay which are not tied to any index. These negotiated increases in pay are often referred to as cost-of-living adjustments or cost-of-living increases because of their similarity to increases tied to externally determined indexes. Most compensation specialists would consider the idea of predetermined future cost-of-living increases to be misleading for two reasons:

- For most recent periods in the industrialized world, average wages have actually increased faster than most calculated cost-of-living indexes, reflecting the influence of rising productivity and worker bargaining power rather than simply living costs.
- Most cost-of-living indexes are not forward-looking but, instead, compare current or historical data.

Stipends or extra pay provided to employees who are being temporarily or permanently relocated may also be called cost-of-living adjustments or cost-of-living allowances. Such adjustments are intended to offset changes in family finances predicated upon geographic differences in the cost of living. Such adjustments for temporary relocation of employees might more accurately be described as geographic pay differentials. Employees who are being permanently

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relocated are less likely to receive such allowances, but they may receive an increase in base salary to reflect local market conditions.

Bonuses or lump sum increases are generally a one-time payment to compensate employees for a job well done or extra effort devoted to a project. A pure lump sum increase or bonus approach typically does not increase the employee's base pay. As a consequence, unions generally resist lump sum increase or bonus programs because of their lack of impact on pensions and the employee's hourly rate of pay. According to Mathis and Jackson, a bonus or lump sum increase plan offers advantages and disadvantages. The major advantage is that it heightens employees' awareness of what their performance levels merited. Another advantage for employers is that they can use this approach to slow down the increase of base pay and reduce or avoid the compounding effect on succeeding raises. One disadvantage is that workers may react negatively to a lump sum payment because, as stated earlier, their base salary rate remains unchanged.

Exercise

1. Describe the methods used by your organization to obtain updated salary data.
2. Does your organization use any form of variable pay? If so, please describe them.

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Part Two: Pay-for-Performance

We have previously identified and discussed a number of the major differences between HR functions and operations in public and private sector organizations, and pay-for-performance is clearly one of these areas. Incentive pay, bonuses, etc. which involve the expenditure of funds is not a common practice in public sector organizations. It is a widespread practice in most private organizations, and as Mathis and Jackson point out, these incentives take many forms: bonuses, incentive pay, free trips and gifts, and the like. Also, where incentive programs that involve compensation do exist in public organizations, the amounts of money are relatively small when compared to their private sector counterparts. There is clearly little public support or sentiment for the use of taxpayer funds for programs that reward employees for superior performance, regardless of the justification. Obviously using public funds for free trips, gifts, etc., once publicized, would most likely create a public outcry.

Many public organizations offer what is often referred to as exceptional pay increases which are granted to a specific employee for exemplary service that has been documented and subject to review and approval at multiple levels within the organization. These types of increases remain relatively rare in most organizations, and they typically involve the employee receiving a one- or two-step increase within the employee's existing pay range/grade. Normally, these types of increases arouse little public notice or ire unless disgruntled employees publicly complain and it is later determined that the grounds for the increase were without merit. Additionally, some organizations offer small monetary rewards for employees who suggest cost-saving efficiencies that are implemented. Usually the amount of the monetary reward is based on a sliding scale—the larger the cost saving, the greater the monetary reward. Even in these instances, the amount of the monetary rewards are relatively small when compared to their private sector counterparts.

Many public organizations typically use recognition and service awards since the amount of money needed to fund them is diminutive. As Mathis and Jackson state: "Recognition awards often work best when given to acknowledge the specific efforts and activities that the organization has targeted as important. The criteria for selecting award winners may be determined subjectively in some situations; however, formally identified criteria provide greater objectivity and are more likely to be seen as rewarding performance rather than as favoritism." Service awards typically are given to employees based upon longevity, and as Mathis and Jackson point out, "have little to do with employees' actual performance."

Many public sector organizations have utilized teams to work on organizational issues and problems with great success, and this is perhaps the area in which monetary rewards are most prevalent in the public sector. Again, the amounts may be relatively small when compared to their private sector counterparts, but they do exist. Mathis and Jackson outline a number of the issues that need to be dealt with when considering team rewards:

- **Timing**—When are the rewards to be distributed? Mathis and Jackson point out that "the most common period used is annually. However, the shorter the time

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period, the greater the likelihood that employees will see a closer link between their efforts and the performance results that trigger the award payouts.”

- **Distribution**—Mathis and Jackson describe the two principle methods for distributing the rewards:
 - **Same-size reward for each member**—Under this methodology, each team member gets the same amount regardless of their contribution or performance.
 - **Different-size reward for each member**—In this approach, each team member’s reward is dependent upon his/her contribution/performance or other factors such as current pay, experience, skill, etc.

Both of these methods have obvious pros and cons, and Mathis and Jackson point out that “most organizations use the first approach in addition to different levels of individual pay.”

- **Decision-making**—As Mathis and Jackson point out: “To reinforce the effectiveness of working together, some group/team incentive programs allow members to make decisions about how to allocate the rewards to individuals. ...However, many companies have found group/team members unwilling to make incentive decisions about co-workers.” Obviously, input from the team members is needed, and outsiders should not be solely responsible for determining how the rewards are to be distributed. Having the distribution decision made by someone external to the team may hinder or destroy the team dynamics. Use of an outside facilitator to assist the group in making the decision may be appropriate.

Many team rewards systems are based upon amount of resultant savings, with some portion devoted to team rewards. Another system described by Mathis and Jackson is gainsharing, which is a “system of sharing greater than expected gains in profits and/or productivity with employees.”

Regardless of the amounts of the monetary rewards devoted to team or individual pay-for-performance initiatives, they all require the presence of several interconnected factors:

- **Credible performance management and appraisal systems**—The performance system used by the organization needs to be compatible with whatever factors the organization deems to be appropriate for recognition. For example, a management by objectives performance (MBO) system needs to be tied to goals/objectives to be rewarded. If other factors, such as acquiring new competencies not part of the appraisal system, are used as the basis for rewards, the value of the MBO evaluations become less meaningful to employees. Simply stated, the rewards and the organization’s performance management systems must be congruent.

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- **Performance management culture**—The performance management system must be an integral part of organizational life that is supported at all levels of the organization and reinforced periodically by top management.
- **Trained supervisors and managers**—Regardless of the type of system that is used, the role of managers and supervisors is absolutely critical to the success of the performance management system. HR's responsibility is to ensure that managers and supervisors have been properly trained and prepared to use the performance management system effectively to delineate superior performance from average, and poor performance in need of correction.
- **Communication**—This needs to occur throughout the organization on at least two levels:
 - **Top management** reinforcement of the importance of the performance management system and the goals, objectives, conduct, etc. that get rewarded.
 - **Supervisor/manager** interaction with employees to guide, direct, and correct employee performance and to quickly address and take correction action on unacceptable employee performance and conduct.
- **Monitoring**—This is a major HR responsibility—to monitor the performance management system, point out inconsistencies and problems to management, and take/recommend corrective action. HR should design monitoring systems and procedures to track the completion of evaluations and deal with employee complaints regarding their evaluations.

Finally, if an organization is looking to establish an incentive system tied to performance, the first step is to critically evaluate the existing performance management system to determine if it is being used properly and is congruent with the goals and objectives of the incentive program. Once the performance management system is operating effectively, consideration can then be given to the development of a incentive/reward program. Without the underlying structure provided by a fully operational and effective performance management system, any reward/incentive program is doomed to failure.

As a summary of the types of pay-for-performance systems that currently exist, we have compiled a listing of fairly typical programs.

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PAY-FOR-PERFORMANCE USE IN THE PUBLIC SECTOR

Public Entity	PFM Elements in Use	PFM Amounts/Caps	PFM Complications/Concerns
USDA	Spot Awards Program: Small to moderate monetary awards designed to grant “immediate” recognition to individuals or groups of employees for day-to-day extra efforts	\$50 - \$750 per individual per occurrence (no ceiling on total amount of any group award, \$500 cap per person) One spot award per employee per year	Concern regarding distribution of award information out to field locations
Utah	Under guidelines and approval requirements, each agency develops its own base pay or lump-sum PFM elements	Cap: \$4,000 per occurrence or \$8,000 annually	None stated
Iowa	Variable merit for nonunion employees (20% of workforce)	Cap: Max of pay grade	Not widely used; most employers give everyone 4.5%
Colorado	Achievement Pay: base salary increases for all successful employees; lump-sum payments for top performers	Varies by FY & state personnel director specifies a percentage for base and non base achievement pay based on available funds.	Budgetary limitations; lack of appropriate performance management training and education
Montana	Competency Pay (attainment of measurable competencies) and Performance Pay (performance criteria linked to actual results) can be base salary increases or lump-sum awards; Results Pay (results of individual efforts and/or team efforts) must be lump-sum	All wage adjustment types are subject to legislative caps; currently legislature sets percent of an agency’s budget to be used for discretionary wage adjustments	Not widely used by agencies
Kentucky	Adjustment for Continuing Excellence awards outstanding performance on an ongoing basis Employee Recognition Award for one-time contributions	Continuing Excellence: base pay adjustment of 10% of base pay midpoint; Employee Recognition: base pay adjustment of 5% of base pay midpoint. Limits per employee in a two-year period; limits on number of employees receiving awards in an FY	Employees sometimes question fairness of the programs
Indiana	Variable Merit: All pay increases are based on performance	Varies by FY: 2006: 0%, 4% and 10% 2007: 0%, 3% and 8% 2008: 0%, 3%, and 8.5% 2016: 3%, 4%, 6% Categories: Meets Requirements, Exceeds Requirements, or Outstanding.	Lack of appropriate performance management training and education; culture change

(table continued on next page)

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Public Entity	PFP Elements in Use	PFP Amounts/Caps	PFP Complications/Concerns
Alabama	<p>Variable step increases tied to performance</p> <p>Special Merit (Exceptional Pay Increase): Additional merits or increased merits can be awarded with justification of exceptional performance and results</p>	<p>Step Increases: 2.5% (meets standards), 5% (exceeds standards), consistently exceeds standards (up to 10%)</p> <p>Special Merit: Varies; all proposals are approved by the state's finance director and the personnel board</p>	<p>Governor has asked agencies to limit possible salary advances to 5% rather than the up to 10% steps which the state's personnel board rules provide</p>
Minnesota	<p>In addition to annual general increases (which all employees receive) each agency may dedicate a percentage of its budget to award additional pay to high performers</p>	<p>This program is not funded by the Minnesota legislature.</p> <p>Agencies may use dedicated funds as desired; an online reporting system to the state's central HR office provides automated auditing.</p>	<p>Minnesota does not face issues of entitlement regarding its PFP elements because all employees receive the general increase. It is accepted that the additional funds are reserved for the highest performers.</p>
Florida	<p>Prudential-Davis Productivity Awards: Presents awards annually to individuals, teams, and work units for innovation and creativity that measurably increases performance and productivity in the delivery of state services and products</p>	<p>Monetary: Cash award of \$250 to \$2,500 per year</p> <p>Nonmonetary: Commemorative plaques or certificates of commendation</p>	<p>Program is not easily customized for agencies; competition for awards across all state agencies may not allow for a great amount of recognition for individual employees</p>
CDC	<p>Special Act or Service Awards: Lump-sum cash award to recognize those who have exceeded normal requirements; Individual, Group, On-the-spot</p> <p>Suggestion/Innovation Awards: Recognize ideas or inventions that improve operations/services</p> <p>Time-off Awards: Time off from work that is granted to employees without loss of pay or charge to leave</p> <p>Travel Savings Incentive: 50% savings on airfare for employees who travel frequently</p>	<p>Special Act or Service Awards: Varies (usually limited in amount); \$ 500 cap for On-the-Spot</p> <p>Suggestion/Innovation Awards: Varies—retirees, contractors and customers can receive only nonmonetary awards</p>	<p>Public Scrutiny: Website information points to several news articles regarding CDC pay practices; transparency was necessary</p>

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Pay For Performance Use in the Public Sector, Louisiana Department of Civil Service, 2007.
Updated by IPMA-HR 2017

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What is more widely used in the public sector are honorary performance awards. An example of these comes from the U. S. Office of Personnel Management’s Honorary Awards and Informal Recognition Awards FAQs: “An honorary award is a gesture of respect given to an employee to recognize his or her performance and value to the organization. Honorary awards are generally symbolic. Many public sector agencies include them as part of their overall incentive awards programs. Often, such honor award programs do not use monetary recognition at all, but emphasize providing formal, highly symbolic recognition of significant contributions and publicly recognizing organizational employees as examples for other employees to follow. They typically involve formal nominations, are granted in limited numbers, and are approved and presented by senior agency officials in formal ceremonies. The items presented, such as engraved plaques or gold medals, may be fairly expensive to obtain. However, they are principally symbolic in nature and are not meant to convey a sense of monetary value.”

Exercise

1. Describe your organization’s performance reward programs. If your organization provides pay-for-performance monetary rewards, please describe the criteria that are used by this program.
2. How would you characterize your organization’s performance management system in terms of the five interconnected factors identified in the module?

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Part Three: Executive Compensation

Mathis and Jackson describe in some detail the various forms of executive compensation that are available in private sector organizations. It is useful information; however, virtually none of it applies to executive-level positions in the public sector. To state that there are extreme differences between the public and private sectors in regard to executive compensation is a clear understatement of reality.

The first significant difference is that many senior executives in the public sector hold positions where they are serving in at-will employment positions. In many of these situations, the executive simply agrees at the time of hire that his/her employment may be terminated by the employer at any time without any right of appeal. In essence, the employer has the right to end the employment contract at any time without reason, notice, or cause. In contrast to the private sector, the at-will employee could be performing exceptionally well and still be terminated. Individuals holding executive or senior management positions really serve at the pleasure of the administrative superior or governing body to whom they report, and this gives pause to many qualified candidates who know that any semblance of job security is nonexistent should they accept one of these appointments.

There are other substantial differences in executive compensation between a public official and his private sector counterpart. Severance pay is one example. In the public sector, an executive or senior manager may be granted a two week or one month notice of termination that assures that some income will be available to this employee as they transition to unemployment. In some public organizations, terminated at-will employees may be paid for unused leave. There are many other public employers who do not pay for unused leave. Contrast this with the private sector where many terminated executives have golden parachutes to ease their separation from employment. A golden parachute is an agreement between a company and an executive specifying that he/she will receive certain significant benefits if employment is terminated. These benefits may include severance pay, cash bonuses, stock options, or other benefits. The use of golden parachutes have caused some stockholders concern since they do not specify that the terminated executive had to perform successfully to any degree while he or she occupied the position from which they are being removed.

Outplacement is yet another area where major differences exist between public and private sector displaced executives. Outplacement is a term used to describe the efforts made by an organization or company to help its displaced employees through the process of locating new employment for executives, placing employees in other positions, or providing training to these executives once they have been designated for separation. Assisting employees or former employees in locating jobs with other employers can range from help with drafting a resumé to extensive job retraining in trades or professions in demand. An outplacement program often involves offering advice and career guidance, providing practice interviews, and placing laid-off employees in transitional jobs for a limited period of time while retraining or job searching is underway. Outplacement in the public sector is much more limited. Displaced executives in the public sector may have their resumes circulated to the various agencies to see if there are openings for which they might

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be considered. Even this limited support is not widely available in many public jurisdictions for political or other reasons.

Benefits provided to public and private sector executives are very similar while they are in active employment. They are typically included in the coverage provided to other staff, which includes retirement, health insurance, life insurance, vacation plans, and, sometimes, deferred compensation. The major difference between the public and private sectors arises upon termination. Private sector employers may extend health care benefits and life insurance coverage to displaced employees for some period of time after their separation from employment to ease their financial concerns. For public sector executives, upon termination, virtually all previous benefits cease. If the employee took advantage of deferred compensation, this money would, of course, be theirs. Also, any retirement contributions made by the employee would be retained. COBRA coverage might be available for terminated employees and their families to continue benefits under the employer's health insurance plan.

Executive performance awards are the final area for discussion, as these awards differ substantially in the private and public sector. Above, we discussed the use of executive performance-based incentives tied to executive compensation as it relates to executives in the private sector. While pay-for-performance programs do exist in the public sector, without stock options and substantial lump-sum payments, the magnitude of the award itself and the amounts of money involved are not nearly as significant as those typically found in private sector organizations.

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Part Four: Compensation Strategies

Show me the money!

For many employees, the compensation they receive is supposedly the main reason they come to work. The amount of compensation they receive is important to them as it determines the lifestyle they and their families may enjoy. It probably also has some psychic value, reflecting their perceived value within the organization where they work.

As we pointed out in the first module, compensation within public organizations tends to grade lower than their private sector counterparts due to caps on top management salaries which are set by statute or ordinance. That is the reality of public service in the United States. It is also the reality within which all of the compensation-related activities within public organizations must operate. These include:

- Recruitment
- Selection
- Classification
- Succession planning

We will briefly discuss each of these issues and the compensation strategies that are related to them.

In regard to recruitment and selection, compensation is a huge issue, and we have previously discussed ways in which public organizations may be able to compete with the private sector. These techniques include:

- Signing bonuses;
- Longevity increases after the first or second year of employment in addition to COLAs;
- Above minimum appointments where the applicant can document he/she is making more than the established minimum;
- Performance bonuses for short-skill areas such as engineers, physicians, RNs, etc.;
- Promoting the range of employer-paid benefits, particularly those that may be more comprehensive than private sector competitors, and access to other perks, such as use of cars, etc.

The strategies in regard to classification are somewhat different. The classification plan established a hierarchy of jobs within the organization, which was then used as the basis for establishing rates of compensation. As the classification plan is modified to reflect changes in the way work is performed, or to reflect restructuring of work units and activities, it is necessary to periodically determine

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if the compensation plan and structure needs to be modified. Conversely, labor market changes, such as shortages of trained staff, may require the organization to reassess and modify the compensation of jobs within the classification structure in order to remain competitive. Both of these systems are dynamic entities and need to remain in sync with each other as the organization grows, shrinks, acquires new missions, and adapts to changing technologies.

In regard to succession planning, maintaining a competitive posture in regard to compensation will assist in retaining employees needed for future advancement and attracting others to build bench strength. We earlier presented information from Mathis and Jackson regarding the importance of developing an organizational strategy in regard to market competitiveness and outlined the three policies used by most public and private organizations:

- **Match the Market**—The organization positions itself in the midpoint of the market so its compensation rates are in the middle of the market—50% pay more, 50% pay less.
- **Lag the Market**—The organization trails most employers so that 75% of employers pay more and 25% pay less.
- **Meet the Market**—The rates of pay in the organization lead most other employers so that 25% of other employers pay more and 75% of employers in the local market pay less.

Mathis and Jackson point out that most employers try to position themselves in the meet the market position, as “choosing this level is an attempt to balance employer cost pressures and the need to attract and retain employees, by providing mid-level compensation levels that ‘meet the market’ for the employer’s jobs.” How an organization chooses to position its compensation strategy will determine in the long term its ability to retain and attract the employees with the proper skills needed for organizational success.

Information technology can play a large role in assisting an organization with its strategic planning function. The internet provides access to a variety of compensation-related data, some of which can be obtained for free from the U.S. Department of Labor’s Bureau of Labor Statistics. Also, many trade associations and local chambers of commerce may offer free salary and compensation data to their membership. Finally, there are a number of internet services, many of which are associated with HR consulting firms, that will provide information for a fee. Mathis and Jackson caution that the internet “provides a large number of pay survey sources and data. However use of these sources requires caution because their accuracy and completeness may not be verifiable or may not be applicable to individual firms and employees.”

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Exercise

Describe your organization's compensation strategy in regard to matching, lagging, or leading the market. How effective is this strategy in attracting and retaining staff?

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Module Five: Benefits

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Reading Assignment for Benefits Module

Chapter Fourteen, *Managing Employee Benefits, Human Resource Management*, Fourteenth Edition, by Robert L. Mathis and John H. Jackson.

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Part One: Basic Benefits Terminology

Benefits administration is a crucial component of HR, and it can be a complex and confusing area for employees and managers alike. A general familiarity with and understanding of benefits terminology will make this aspect of an HR professional's job duties easier to perform.

Let's start with a broad definition of some terms associated with employee benefits:

- **Employee benefits** are noncash compensation offered to employees at their place of work covering such things as medical expenses, disability, retirement, and death. Many of these benefits are insurance coverages and are paid in whole or in part by the employer.
- **Beneficiary** is the person or persons named by the insured to receive health benefits or the proceeds from an insurance policy.
- **Health insurance** is a general term for insurance against loss by sickness or bodily injury. It typically includes coverage for expenses such as doctor visits and hospital stays, and it can cover normal and preventive care such as check-ups, prenatal care, and baby care.
- **Group insurance** is a single policy that covers a group of individuals and their dependents. The group is usually employees of the same company or members of the same association.
- **Insured** is the person or entity that is covered by an agreement whereby an insurer agrees to indemnify for losses, provide benefits, or render services in return for a premium.
- **Life insurance** provides a lump sum payment to a designated beneficiary or beneficiaries of deceased employees.
- **Disability benefits** provide protection against loss of income due to a nonoccupational illness or injury. These may include short-term and/or long-term benefits.
- **Retiree health care** is a health plan that provides coverage to a retiree beyond what is mandated by COBRA or other health insurance continuation laws.
- **Flexible benefits plan** is a program that allows employees to select the benefits they prefer from groups of benefits established by the employer.
- **Adverse selection** is a situation in which only higher-risk employees select and use certain benefits.
- **Co-payment** is a strategy requiring employees to pay a portion of the cost of insurance premiums, medical care, and prescription drugs.

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- **Pension plan** is a retirement program established and funded by the employer and employees. It is typically either a defined benefit plan or a defined contribution plan. It also may be a contributory plan, where money is paid by both the employer and employee, or a noncontributory plan, where all of the funds are paid by the employer.

Health care, vision, dental, prescription drug, and other benefits often employ and utilize their own terminology. For a useful compilation of these terms, go to the National Compensation Survey: Glossary of Employee Benefit Terms on the U.S. Department of Labor's website at <https://www.bls.gov/ncs/ebs/glossary20112012.htm>

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Part Two: Types, General Characteristics, Eligibility Rules, and Funding of Benefits

There are numerous types of benefit options available, as well as many ways to structure and fund them. Some benefits are required by law, such as unemployment, workers' compensation, and FMLA, while others are voluntary, such as certain types of medical benefits, legal benefits, wellness programs, etc. In general, benefits can be funded by the employer, the employee, or a combination of the two. In addition, there are various eligibility rules. Some employers may provide benefits to full-time employees only, while others may include part-time employees. Dependents may or may not be covered. When provided, dependent coverage may be funded by the employer, the employee, or both. There is usually a waiting period for employee coverage and possibly a different waiting period for dependent coverage. The composition of the workforce, as well as your recruitment and retention strategies, may determine the extent and level of benefits provided. In a union environment, the union membership may dictate the union's priorities. See Figure 14-7 in Mathis and Jackson for additional information on benefits by type and whether the benefits are mandated or voluntary.

Following is a summary of various types of benefits:

- **Medical**—This is a type of insurance coverage that protects against expenses resulting from sickness or injury. Medical care coverage can be provided in a doctor's office, a hospital or other inpatient treatment facility such as skilled nursing or rehabilitation facility, and various types of outpatient facilities including diagnostic centers and outpatient laboratory testing facilities. There are three main types of medical care plans. An **indemnity plan**—also called a fee-for-service plan—reimburses the patient or the provider as expenses are incurred. A **preferred provider organization** (PPO) provides coverage to the enrollee through a network of selected health care providers such as hospitals and physicians. Enrollees may go outside the network, but would incur higher costs in the form of higher deductibles and higher co-insurance rates than if they stayed within the network. A **health maintenance organization**, or HMO, also provides benefits through a contracted network but there is no payment made for services obtained outside the network. In addition, in an HMO, care is most often coordinated by the primary care physician and treatment by a specialist generally requires a referral from the primary care doctor to be eligible.
- **Dental**—This type of coverage insures against the expense of oral care, treatment of dental disease, and accidental injury to teeth. Dental insurance may cover such things as routine examinations, x-rays, fillings, crowns, orthodontics, etc.
- **Vision**—This type of coverage is for the services rendered by eye care professionals such as ophthalmologists, optometrists, and opticians. The typical vision insurance plan provides coverage for yearly eye examinations and partial or full coverage for eyeglasses, sunglasses, contact lenses, and Lasix surgery with or without co-payments, depending on the plan chosen.

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- **Employee Assistance Program**—These programs usually provide mental health and substance abuse treatment benefits. They generally provide counseling for depression, alcohol abuse, or marital issues and may include topics such as financial or legal issues that often impact on employees' feelings of well-being.
- **Short- and long-term disability and accidental death & dismemberment**—Short-term and long-term disability insurance provide continuing income protection for employees who become disabled and unable to work. Long-term disability insurance is more common because, as Mathis and Jackson point out, many employers cover short-term disability through sick leave programs. Accidental death and dismemberment is a term used to describe a policy that pays additional benefits to the beneficiary if the cause of death is a nonwork-related accident. Fractional amounts of the policy will be paid out if the covered employee loses a body part or sight because of an accident.
- **Consumer-driven health plans**—These plans provide financial contributions to employees to help them cover their own health-related expenses. An employer places a set amount into each employee's account and identifies a number of health care alternatives that are available. Then individual employees select from those health care alternatives and pay for part of the costs from their accounts.
- **Cafeteria plans**—A cafeteria plan is a type of employee benefit plan offered pursuant to Section 125 of the Internal Revenue Code which allows employees to choose between different types of benefits, similar to a cafeteria's wide choice of foods. Employees may obtain such benefits as health insurance, group term life insurance, and flexible spending accounts through the plan. Though some cafeteria plans offer an explicit choice of cash or benefits, most today are operated through a salary reduction agreement, which is a payroll deduction in all but name. Deductions under such agreements are often called pretax deductions as they are not subject to income tax, or in most cases, FICA.
- **Flexible Spending Accounts**—Under Section 125 of the Internal Revenue Code, employees can divert some pretax income into flexible spending accounts to fund certain additional benefits. The funds in the account can be used to purchase only the following: 1) additional health care (including offsetting deductibles), 2) life insurance, 3) disability insurance, and 4) dependent care benefits.
- **Long-term care**—An insurance product that helps provide for the cost of long-term care beyond a predetermined period. Long-term care insurance covers care generally not covered by health insurance, Medicare, or Medicaid. Individuals who require long-term care are generally not sick in the traditional sense but are unable to perform the basic activities of daily living such as dressing, bathing, eating, toileting, getting in and out of a bed or chair, and walking. Nursing home care that does not rise to the level of skilled nursing care (medical care) often falls into this category.
- **Work/life programs**—As described by Mathis and Jackson, these are benefits designed to assist employees with balancing the demands of work and homelife. These include caring for children and aging parents by providing

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resources and referral services for child care and elder care, discounts at day care centers, on-site child care, telecommuting, and flexible work hours which allow employees to minimize time off and reduce stress. These also may include such things as a wellness center with on-site physicians, fitness centers, massage services, gourmet meals, car wash, and laundry services. They may be paid for by the employee, the employer, or a combination of both.

- **Workers' compensation**—Provides benefits to persons injured on the job. State law requires most employers to supply workers' compensation coverage by purchasing insurance from a private carrier or state insurance fund or by providing self-insurance. Workers' compensation requires employers to give cash benefits, medical care, and rehabilitation services to employees for injuries or illnesses occurring within the scope of their employment.
- **Transportation plans**—Allow employees to save money on their transit expenses for commuting to work by bus, train, subway, or qualified vanpool, and/or qualified parking by permitting them to have pretax deductions taken from their salary to pay for those expenses up to IRS-approved amounts.
- **Voluntary benefits**—These benefits may include such things as long-term care insurance, life insurance, and disability insurance. For these voluntary benefits, employees pay premiums, but often at discounted group rates. Premiums can be paid through payroll deductions.
- **Unemployment insurance**—Unemployment compensation is required by law as part of the *Social Security Act of 1935*. An employee who is out of work and is actively looking for employment normally receives up to 26 weeks of pay. The amount of compensation varies among states and is based on the worker's previous wage rate and period of employment. Most employees are eligible, except for workers fired for misconduct or those not actively seeking employment. Because states operate their own unemployment compensation systems, provisions differ significantly from state to state.
- **Prepaid legal**—In these plans, employees or employers pay a flat fee for a set amount of legal assistance time each month. Employees have the right to use the service of a network of lawyers to handle their legal problems. Most plans cover routine legal matters such as real estate, divorces, or wills.
- **Wellness program**—These programs encourage employees to get healthy or stay healthy through a variety of programs including no smoking policies, incentives to employees who stop smoking, lose weight, or participate in exercise programs, and other activities. Employers also may provide on-site fitness facilities and/or conduct health risk assessments. Wellness programs produce measurable cost savings to employers, especially when they are targeted at specific health risks such as high cholesterol or blood pressure, smoking, or high body fat levels.

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Part Three: Selection and Negotiations with Providers

The selection of health benefit carriers is a complicated and extremely technical process. Except for very large employers, most public sector employers do not have HR benefit professionals who have detailed knowledge of the marketplace or the expertise required to complete the process to select a benefits carrier. For this reason, it is generally worth the money to use outside experts/consultants to assist in the process.

The first step in the selection of a carrier is the competitive bid process. Competitive bidding ensures the integrity of the process, fair competition, and the best rates. A well-developed request for bid proposals should include the desired plan design, the standard contract language to which the organization wants the carrier to agree, and the detailed systems specifications, which ensures compatibility with the employer's computer system. The request for bid proposals should be developed in conjunction with the scoring system to be used to evaluate the bids. The scoring tool is just as important as the request for proposals. Before the request goes out to vendors, the organization should know exactly how they are going to score the bids and the weight to be given to each category. The scoring tool should be parallel to the request for bids and organized by category (e.g., eligibility, information systems, claims processing). The review committee should be selected carefully and should include individuals with technical program knowledge, financial experts, and IT experts who are familiar with the relationships of the internal systems. Over time, the committee approach has proven to be an excellent way to evaluate and select carriers.

Once the bids are received, the committee should identify the finalists by narrowing the field to those few vendors deemed best able to meet the needs of the program. The finalists then should be approached to start negotiating the best and final offers, including technical aspects of the contract and costs. This process enables the organization to get the vendors to lower prices or agree to improved service. It also gives the vendors an opportunity to discuss any proposed contract terms that they may have difficulty meeting, and to negotiate acceptable alternatives. Once the vendors develop their best offers, a final selection is made. Legal advice is critical during the best and final offer negotiations and the final selection process. A benefits consultant is also important to this process to ensure that knowledge of the broad marketplace and the prevailing rates in the area for the same services are considered. If the organization has done a thorough job so far, once a final decision is made, the process should be completed since the contract was already developed in the process of preparing the request for proposal.

Most requests for proposals are public information and can be found on the internet. If your organization is drafting a request, you should check the internet for sample documents that could be used as templates in designing your own request for proposal. This might reduce the consultant fees and is helpful even to professionals who regularly perform this work, since other employers may have unique perspectives.

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Part Four: Benefits, Budgeting, and Controlling Medical Costs

The organization's benefits budget should be determined in conjunction with the budget staff and senior policy makers. If the organization is budgeting for new programs, it is important to determine how much can be spent on them. This will determine program design. When budgeting for existing programs, there are a number of factors to be taken into consideration. First, the reporting requirements on existing programs must provide the essential tools to enable the organization to calculate the costs of programs and prepare financial forecasts. Ideally, there should be separate accounting for each benefit program. This allows for review of individual expenditures and monitoring trends. Costs are typically driven by:

- **Census**—defined here as counts of both covered employees and their dependents. Separate counts are needed for both categories, along with the total covered lives. As census counts increase and decrease, so do your costs.
- **Utilization**—even if your census does not change, overall costs will increase if overall utilization increases. However, you must also understand what drives utilization. For example, if your inpatient hospital days decrease, you may be experiencing an increase in outpatient costs and, in some cases, your overall costs will decrease since treatments are coming in a less expensive setting. Another example may be that you experience an increase in prescription drug costs, but a decrease in hospitalization results from the increased prescription usage.
- **Trend**—overall medical inflation. You may have no change in census or utilization but still experience inflation which increases the overall cost. In addition, the development of new technology impacts trend, generally serving to drive costs higher until such time as the technology can impact on health outcomes.

As pointed out by Mathis and Jackson, you will discover that the most common means of benefits cost control is cost sharing. The organization can also control costs with wellness programs, employee education efforts, and changing prescription drug programs. These controls must be structured in a way that ensures effectiveness. Use of internal benefits experts or consultants can play a key role in plan design. Without a solid plan design, efforts at controlling costs may not be successful. Some issues to consider include requiring cost sharing at a high enough level so that employees will not use benefits unnecessarily. In addition, cost sharing must be done at the appropriate place, which is not for preventive care where it may ultimately increase costs. The bottom line is that the organization wants employees to get appropriate care at the appropriate place and time; for example, annual physicals often catch and treat problems before they get more serious. If an employee has not been examined on a regular basis and unexpected problems occur, it results in emergency room expenses, resulting in wasted dollars.

Another key factor in designing the benefit plan is the level of risk your employer or fund is willing to accept. Medical and other forms of health care such as dental plans may operate on an insured, or prepaid, basis or they may be self-insured. An insured plan places the financial risks associated with providing comprehensive medical services on an insurance carrier or similar arrangement, usually in return

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for a fixed prepaid fee per member. In a self-insured plan, the employer or fund assumes all liability for incurred expenses and pays the actual costs. With self-insured plans, it's important to maintain stop-loss insurance or adequate reserves to protect against high-dollar claims or abnormally bad experiences. Self-insurance arrangements are recommended only for relatively large groups of at least 5,000 members. It is advisable to consult with an actuarial advisor before entering into a self-insured arrangement to ensure that the organization is adequately protected against the inherent risks involved.

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Part Five: State and Federal Laws and Regulations Pertaining to Benefits Plans

In Module One, we discussed the responsibility of HR professionals and managers to become familiar with the provisions and intent of employment and workplace law. In this module we will discuss some of the various laws and regulations governing benefits. These include but are not limited to the following:

- **The Employee Retirement Income Security Act of 1974 (ERISA)** is a federal statute that establishes minimum standards for pension plans in private industry and provides for extensive rules on the federal income tax effects of transactions associated with employee benefit plans. ERISA was enacted to protect the interests of employee benefit plan participants and their beneficiaries by requiring the disclosure to them of financial and other information concerning the plan, by establishing standards of conduct for plan fiduciaries, and by providing for appropriate remedies and access to the federal courts.
- Government plans are not subject to ERISA; therefore, as a general rule ERISA seldom applies to the public sector. However, where public sector employers participate in multi-employer plan arrangements, they likely are subject to ERISA. There may be other exceptions. Always check with your legal counsel on the applicability of regulatory and statutory matters of this nature.
- **The Consolidated Omnibus Budget Reconciliation Act (COBRA)**, which requires most employers with 20 or more employees to offer extended health care coverage to certain groups is detailed in Chapter 14 of Mathis and Jackson's textbook. COBRA generally requires employers to continue group medical insurance coverage for 18-36 months at the same rate the employer would pay. The length of time is determined by the qualifying event, such as employee termination, divorce, or death of the employee and retirees and spouses whose coverage ends. In 2009, **The American Recovery and Reinvestment Act (ARRA)** was passed. The ARRA provides a subsidy of 65% of the cost of COBRA coverage to qualified beneficiaries who lose health care coverage as a result of involuntary termination. The Act also contains specific notice requirements. In addition, ARRA includes a significant expansion of the privacy and security requirements of ARRA. For detailed information on this Act and its requirements, visit the Department of Labor website at https://doleta.gov/business/ARRA_Grants.cfm.
- **The Health Insurance Portability and Accountability Act (HIPAA)** allows employees to switch their health insurance plans when they change employers and to get new health coverage with the new organization regardless of preexisting health conditions. The legislation also prohibits group insurance plans from dropping coverage for a sick employee and requires them to make individual coverage available to people who leave group plans.
- **The Family and Medical Leave Act (FMLA)** requires employers to provide up to 12 weeks, or 480 hours, of unpaid leave annually to any employee for any serious medical condition of the employee or a member of the employee's

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immediate family, or for the birth or adoption of a child. The FMLA covers all public employers and private companies with more than 50 employees. For a more detailed description of FMLA, refer to Module One.

- **The Uniformed Services Employment and Reemployment Rights Act (USERRA)** protects the civilian employment of non-full-time military service members in the United States called to active duty. The law applies to all United States uniformed services and their respective reserve components. The cumulative length of time an individual may be absent from work for military duty and retain reemployment rights is five years. For a more detailed description of USERRA, refer to Module One.
- **The Mental Health Parity Act (MHPA)** is legislation signed into law on September 26, 1996, requiring that annual or lifetime dollar limits on mental health benefits be no lower than any such dollar limits for medical and surgical benefits offered by a group health plan or health insurance issuer offering coverage in connection with a group health plan. MHPA was largely superseded by rider legislation on the **Troubled Asset Relief Program (TARP)**, signed into law by President Bush in October 2008. The MHPA does not apply to benefits for substance abuse or chemical dependency, and it allows employers some discretion regarding the mental health benefits offered. MHPA is not applicable to small employers (fewer than 51 employees) nor does it apply if the application of the parity provisions would result in a cost increase under the plan of at least one percent.

A majority of the states, and the federal employees' health benefit program, require insurance companies to cover certain mental and physical illnesses equally. **The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008** provides that a group health plan cannot impose more restrictive cost sharing requirements or treatment limits for mental health and substance abuse coverage than for medical and surgical benefits. The Act also extends the current parity rules on annual or lifetime dollar limits to include substance abuse benefits. The Act does not require that mental health and substance abuse benefits be provided. For more information visit the Department of Labor website at https://www.cms.gov/ccio/programs-and-initiatives/other-insurance-protections/mhpaea_factsheet.html

- **Old-Age, Survivors, and Disability Insurance (OASDI)** program, which is commonly referred to as Social Security, encompasses several major programs including federal old-age, survivors, and disability insurance, unemployment benefits, Temporary Assistance for Needy Families, health insurance for aged and disabled (Medicare), grants to states for medical assistance programs (Medicaid), State Children's Health Insurance Program (SCHIP), and Supplemental Security Income (SSI). Social Security is a social insurance program funded through dedicated payroll taxes called *Federal Insurance Contributions Act (FICA)*. Social Security provides benefits to retirees and the unemployed, as well as a lump-sum benefit at death. Payments to current retirees were (and continue to be) financed by a payroll tax on current workers' wages, half directly as a payroll tax and half paid by the employer. For more information, visit the Social Security Administration website at <http://www.ssa.gov>

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- **Internal Revenue Service Dependent Definitions**—There are many benefits which employers provide to both employees and dependents. Often the definition of dependent is determined under the IRS regulations. The following are the IRS requirements for claiming a dependent:
 - A dependent child must be a birth child, a legal stepchild, or a foster child in your care.
 - Dependents can be blood siblings, adopted siblings, or stepbrothers or stepsisters in your care. Descendants of any of these also qualify, provided you materially support them.
 - A dependent must be under 19 at the end of the year you are claiming. The IRS also lets you claim a dependent age 24 or under if they are enrolled in school full-time. You also can claim an exemption for materially supporting anyone with a disability.
 - The child must have lived with you for more than half of the year and relied on your financial support for at least 6 months out of the year.
- **The Fair Credit Reporting Act (FCRA)** passed in 1970 to regulate the collection, dissemination, and use of consumer credit information. Prior to making employment decisions, employers often check with consumer reporting agencies to obtain the credit history of prospective applicants for employment to determine if the applicant has paid bills on time, has filed for bankruptcy, or otherwise defaulted on an account. If you obtain this information and use it in any way to make an employment decision, you must notify the applicant when an adverse action is taken on the basis of such information, and you must provide the name, address, and phone number of the company that provided the report so that the accuracy and completeness of the report may be verified or contested by the applicant. Prior to requesting this information, you must obtain the written consent of the applicant. Medical information may not be provided without the applicant's permission. For more information visit <https://www.ftc.gov/tips-advice/business-center/privacy-and-security/credit-reporting>.
- **Regulations concerning domestic partners**—Laws and regulations regarding domestic partner benefits vary significantly among public employers and they are constantly changing. Some public and private sector employers provide health insurance or other spousal benefits to same-sex partners of employees, although the employee receiving benefits for his or her partner may have to pay income tax on the value of the benefit. Partner benefits are more common among large employers, colleges, and universities than at small businesses. The qualifications for and benefits of domestic partnership status vary from employer to employer; some recognize only same-sex or different-sex couples, while others recognize both. Employers do not need to require documentation of domestic partner eligibility. If an employer does require documentation, it can either define its own requirements or rely on existing legal documentation such as domestic partner registrations. As stated above, domestic partner benefits are constantly evolving and changing. It is important to know the laws and regulations of your jurisdiction and to keep current on changes.

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In 2013, the United States Supreme Court, in the case of *United States v. Windsor* decided that the *Defense of Marriage Act* (DOMA) denied same-sex couples the rights that come from federal recognition of marriage. The Court held that the purpose and effect of DOMA is to impose a “disadvantage, a separate status, and so a stigma” on same-sex couples in violation of the Fifth Amendment’s guarantee of equal protection. As a result of this decision, same-sex couples can marry and have access to the same employee benefits that are provided to spouses.

- **State laws as they vary among the states**—HR professionals must be aware that there are a multitude of state laws and regulations in the human resources area, including benefits. State and local laws vary significantly in many areas affecting benefits such as unemployment compensation, workers’ compensation, domestic partners, affirmative action, immigration reform, workplace flexibility, etc. It is crucial to work closely with legal counsel to determine which laws and regulations are applicable to your organization.

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Part Six: Contracts/Plan Documents

In Part Three above, we discussed the selection and negotiation of contracts with health benefits carriers. Of equal importance to that process is the development of the plan document.

The development of plan documents is required by ERISA. Even though most public employers are not covered by ERISA, it is recommended that the organization develop a plan document for your benefits programs. Plan documents are extremely detailed and contain legal descriptions of benefits that are carefully couched in legal terms. They are usually written by legal staff in conjunction with technical specialists and are not distributed to employees.

A summary plan description (SPD) or employee benefits handbook is the layperson's version of the plan document. It should be written in an easy-to-understand format that employees can rely on for basic benefits descriptions and information. It includes "how to" information such as administrative instructions, forms, telephone numbers, etc. The contents of the plan document and the SPD must match, and notification to employees of changes to benefits must be timely. If these documents do not match and there is a legal challenge, the SPD may prevail even though the more-detailed language is contained in the plan document.

Exercise

1. Describe the extent to which your organization's employee benefit handbook/informational literature parallels a plan document.
2. Describe the nature and scope of the benefits briefing provided to new employees during their onboarding.

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Part Seven: Retirement Plans

Public sector pensions are offered by federal, state, and local governments. They are available to most, but not all, public sector employees. Employer contributions to these plans typically vest after some period of time. Some local governments do not offer defined benefit pensions at all but may offer a defined contribution retirement plan. In many states, these plans are known as public employee retirement systems. These plans may be defined contribution or defined benefit, although the former has become more popular. There are 6,300 public sector pensions in the United States, according to the U.S. Bureau of Labor Statistics. Many cities are allowed to participate in the pension plans of their state. Some of the largest cities have their own pension plans.

As discussed by Mathis and Jackson, retirement plans are categorized as defined benefit or defined contribution according to how benefits are determined. A defined benefit (pension) plan calculates benefits using a fixed formula that usually factors in final pay and years of service with an employer, and payments are made from a fund specifically dedicated to the plan. In a defined contribution plan, the payout is dependent upon both the amount of money contributed into an individual account and the performance of the investment vehicles utilized.

Defined contribution plans—According to Section 414 of the Internal Revenue Code, a defined contribution plan is an employer-sponsored plan with an individual account for each participant. The accrued benefit from such a plan is solely attributable to contributions made into an individual account and investment gains on those funds, less any losses and expense charges. The contributions are invested (e.g., in the stock market) and the returns on the investment are credited to or deducted from the fund account. Upon retirement, the participant's account is used to provide retirement benefits.

Examples of defined contribution plans include accounts (IRA), 401(k), and profit sharing plans. In such plans, the participant is responsible for selecting the types of investments toward which the funds in the retirement plan are allocated. This may range from choosing one of a small number of predetermined mutual funds to selecting individual stocks or other securities. Most self-directed retirement plans are characterized by certain tax advantages. The funds in such plans may not be withdrawn without penalty until the investor reaches retirement age, which is typically 59.5 years of age.

Money contributed can be from employee salary deferrals, employer contributions, or employer matching contributions. Defined contribution plans are subject to limits on how much can be contributed. As of 2017, the total deferral amount, including the employee and employer contribution, is the lesser of \$54,000 or 100% of compensation. The employee-only amount is \$18,000 for 2017, but a plan can permit participants who are age 50 or older to make catch-up contributions of up to an additional \$6,000.

Defined benefit plans—Commonly referred to as a pension, a defined benefit plan pays benefits from a fund using a specific formula set forth by the plan sponsor. The plan defines a benefit that will be paid upon retirement. The statutory definition of defined benefit encompasses all pension plans that are not defined contribution and, therefore, do not have individual accounts.

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Most pension plans offered by government agencies are final average pay plans under which the monthly benefit is equal to the number of years worked times the member's salary at retirement times a predetermined multiplier; for example, a typical calculation may be (30 years of service X \$50,000) X (2%) for a pension value of \$30,000 per year. Normally, benefits are paid at normal retirement age or upon achievement of a specified number of years of service, with a reduction factor applied if an employee retires before the specified limit. Other optional forms of payment, such as lump sum distributions, may be available but are not required.

Retirement Planning—As an HR professional, your role in retirement planning is to assist employees in understanding their retirement benefits and in realizing the importance of planning for retirement sooner rather than later. The earlier employees begin planning, the easier it will be to meet financial goals. Therefore, upon hiring, it is essential for you to provide new employees with detailed information on retirement benefits available to them.

Financial professionals estimate that employees will need at least 70 to 80 percent of preretirement income in order to maintain their current standard of living in retirement. There are multiple components of sound financial planning for retirement. These may include retirement benefits, Social Security benefits, and personal savings and investments, including investments in deferred compensation programs.

Each year, workers covered by Social Security receive free estimates of their projected Social Security benefits. For more information, contact the Social Security Administration website at www.ssa.gov. As with retirement benefits, employees can positively impact the amount of Social Security benefits. An employee's career earnings and the age at retirement impact the amount of Social Security benefits he/she is eligible to receive.

Deferred Compensation—Deferred compensation plans established under Section 457 of the Internal Revenue Code of 1986 allow participants to voluntarily build retirement savings by deferring a portion of salary to selected investment options. Many states have established deferred compensation plans which are governed by legislation. While some aspects of these plans will vary from state to state, the basic concept is the same in which the compensation which is deferred and the income generated from this compensation are taxable in the year in which amounts are paid to the participant or beneficiary.

Since money generated from deferred compensation plans can be a significant component of retirement benefits, detailed information on these plans should be communicated to employees as soon as they are eligible to participate so that contributions have the maximum amount of time to grow over the employee's career.

Exercise

Describe the type(s) of retirement plans offered by your organization.

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Part Eight: Benefits Trends

With respect to health care benefits, the employer acts as a consumer who selects benefits and pays for all or most of the cost. The choices have changed significantly over the years to include conventional fee-for-service arrangements and a selection of managed care plans for health coverage (HMO, PPO, POS, etc.).

The Society for Human Resource Management (SHRM) asserts that as health care costs have increased, the federal government has found ways to transfer some of its costs to health care providers. That has put the hospitals and other providers under cost pressure. They have transferred their costs to employers through higher premiums for health insurance plans. The employers have shifted some of that cost to the employees through deductibles, co-payments, co-insurance, and reducing dependent and retiree coverage.

There is a national debate in progress on what to do about health care. Everyone agrees that there is a problem; however, not everyone agrees on the nature of the problem. To some, it is the escalating cost. To others, it is the percent of the nonelderly population that does not have access to health insurance and are, therefore, denied access to quality health care services. To others, it is the quality of health care available.

According to SHRM, two-thirds of private industry and state and local government workers had access to retirement benefits and nearly three-quarters to medical care in March 2008 (Bureau of Labor Statistics of the U.S. Department of Labor). Access and participation in retirement and medical care benefits were greater in State and local government than in private industry. Data from the National Compensation Survey (NCS), which provides comprehensive measures of occupational earnings, compensation cost trends, and incidence and provisions of employee benefit plans found that:

- Sixty-one percent of private industry employees had access to paid retirement benefits, compared with 89 percent of state and local government employees. Eighty-six percent of government employees participated in a retirement plan, significantly greater than the approximately half of private industry workers.
- Medical care benefits were available to 71 percent of private industry workers, compared with 87 percent among government workers. About half of private industry workers participated in a plan, less than the nearly three-quarters of government workers.
- Virtually all full-time employees in state and local government had access to retirement and medical benefits: 99 and 98 percent, respectively. In private industry, only 71 percent of full-time workers had access to retirement benefits and 85 percent to medical care.
- Employers paid 83 percent of the cost of premiums for single coverage and 71 percent of the cost for family coverage for workers participating in employer sponsored medical plans. Employer share for single coverage was greater in state and local government (90 percent) than in private industry (81 percent).

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For family coverage, the employer share of premiums was similar for private industry and government, 71 and 73 percent, respectively.

As can be seen from the above statistics, access to and the comprehensive nature of benefits are areas in which public sector organizations typically outstrip their private sector counterparts.

Mathis and Jackson note that during the past five years, there has been a 75% growth in health benefits costs for employers. Therefore, the costs of health care benefits have become the number one issue of concern for employers. To deal with this increase, employers are reducing or eliminating benefits, including instituting and/or increasing deductibles and co-payments, and implementing prescription drug management programs.

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Part Nine: Benefits Strategies

There are a number of areas in which the organization's benefits program may impact other operational functions. Some of these include:

- **Recruitment and Retention**—As pointed out by Mathis and Jackson, a challenge for employers is how to best manage the balancing act between the growing costs of benefits and the use of those benefits in accomplishing organizational goals. They go on to say that the approach to benefits depends on many factors. In the public sector, especially where employees are unionized, the approach may differ from the private sector. The give and take of collective bargaining often dictates benefits and makes it more challenging to make distinctions among job classifications. An employer may find it more difficult to recruit for certain classes, but the union may argue for uniformity. Thus, the employer may have to be more creative in solving this problem. This may require meetings with the union to determine if different benefits can be offered.

Mathis and Jackson further indicate that it is well established that benefits influence employees' decisions about which employer to work for, whether to stay with or leave an employer, and when to retire. The benefits package affects how the employer is viewed, which affects recruitment and retention efforts. The composition of the workforce is another consideration. Employees who are approaching retirement age are more concerned about retirement and health care, while younger employees are interested in flexibility and portability. A benefits package that appeals to different groups is essential to attracting and retaining employees. The package also must be based on the organization's needs assessment, which should include reviewing the organization's strategy, the employees' needs, current benefits, and the total compensation package. According to SHRM, the value to the organization of being able to offer competitive benefits to employees is documented and undisputed.

An organization's strategy with respect to retirement eligibility should be determined based on its personnel needs and overall budget. While retirement eligibility in the public sector is usually based in law, there may be times when changes to the legislation are needed to induce turnover, encouraging employees who are close to retirement to leave and either to be replaced by less senior employees or not to be replaced at all. Some early retirement incentives may include reducing the required service or age, or adding a financial incentive. This is not an option that is used often but it may serve a specific need of the organization.

- **Succession planning**—Succession planning must be reviewed in conjunction with recruitment. Again, analyzing the organization and its needs is essential to determine what percentage of the workforce is close to retirement, the ease with which these individuals can be replaced, what type of benefit package appeals to the target recruitment group, and what budgetary concerns the organization has in developing a package. With these issues in mind, the organization can develop a benefits package that will assist in recruiting replacements for the employees who will retire.

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- **Information technology**—Perhaps one of the most dramatic opportunities to change the benefits paradigm is applying information technology as a strategic part of employee information and access. Many organizations are exploring the use of automated systems to improve and enhance their benefits programs. These efforts include:

- **Employee self service**—Many public and private organizations have installed automated systems that allow employees to access their benefit information to:
 - ♦ Print benefits forms;
 - ♦ Access information and explanation of coverages;
 - ♦ Change personal information, to include adding/subtracting beneficiaries or changing coverages.

These systems, which are accessible through the internet, allow employees to review and obtain information 24/7 from home, work, or other remote locations. The accessibility to making changes and obtaining information provides employees with more control over their benefits, assists in making them more effective consumers of their benefits, and reduces administrative work for the HR staff.

- **Cost information**—Many employees simply do not fully understand or appreciate the cost associated with their employer-provided benefits. Through the use of automated systems, sometimes as part of a self-service system, organizations have been providing benefit cost data. This may be done periodically throughout the year or as part of the employees' weekly or biweekly earnings statement. This information is useful in assisting employees in understanding the financial commitment that their employer continues to make on their behalf.

The opportunities to apply information technology to explain, enhance, and control the skyrocketing cost of employee benefits will be an important aspect of an organization's employee benefit program in the future. In addition, as Mathis and Jackson point out, the use of information technology has significantly changed the benefits administration time and activities for HR staff members.

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Part Ten: Benefits in a Union Environment

Under the *National Labor Relations Act* (NLRA) and legislation in many states, employers must negotiate over wages, benefits, and other terms and conditions of employment. This means that collective bargaining must occur before changes to benefits can be made for union-covered employees. Recognizing the continuing increase in health benefits costs, many employers are attempting to decrease benefits, increase employee co-payments, or both. Since the issue of employee benefits is among the top issues of importance to employees and unions, it is extremely difficult to obtain concessions in this area at the bargaining table. For this reason, combined with the continuation of double-digit increases in health benefits costs, it is critical to ensure that you and your bargaining team are fully prepared for negotiations.

Well in advance of the expiration of the contract, you should:

- Assemble your bargaining team, keeping the size to a minimum while ensuring you have the expertise necessary to discuss key issues at the bargaining table.
- Establish your goals and objectives.
- Research and compare various benefits options and costs. Prepare as much information as possible on current benefits costs and usage.
- Look for creative options and alternatives that may create a win-win situation, such as incentives for wellness.
- Prepare recommendations on the direction the employer should pursue.
- Prepare cost estimates on benefit proposals management will be making.

After commencement of negotiations:

- Make sure the union understands the priority you will be placing on this issue.
- Prepare presentations to be made at the bargaining table by subject matter experts, including data on costs, usage, etc.
- Prepare cost estimates of the union's demands.
- Understand that benefits are an integral part of the compensation package and not something to be dealt with in isolation.
- Keep the management staff informed of the progress in negotiations and obtain any essential information needed by the bargaining team.
- Assist with the preparation of proposals and counterproposals.
- Serve as or assist the subject matter expert at the bargaining table.

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Once agreement is reached:

- Carefully draft the contract language. Make certain it says exactly what you intend. Very often, attorneys will review the language to ensure the intent is clear.
- Conduct contract briefings with management to explain the agreement and the intent.
- Communicate changes to employees.
- Assist staff in contract implementation and administration.
- Assist labor relations staff during the grievance procedure by answering grievances and testifying at arbitration if necessary.

The following are some websites for organizations and for other benefits issues:

- National Committee for Quality Assurance—<http://www.ncqa.org>
- Agency for Healthcare Research and Quality—<http://www.ahrq.gov>
- National Alliance for Healthcare Purchaser Coalitions—<http://www.nbch.org>
- International Foundation of Employee Benefit Plans—<http://www.ifebp.org>

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Module Six: Labor and Employee Relations

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Reading Assignment for Selection Module

Chapters Fifteen and Sixteen, *Human Resource Management*, Fifteenth Edition, by Robert L. Mathis, John H. Jackson, Sean R. Valentine, and Patricia A. Meglich

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Part One: Labor/Management Relations

Employees join together in groups to enable them to stand on a more equal footing with their employers when they seek to improve their wages or working conditions and protect their self-interest with regard to continued employment. Some of the goals and objectives of employees include:

- Steady employment providing an adequate income;
- The ability to influence HR policies to ensure fairness and economic security (e.g., the method of the selection of employees for layoffs, retirement policies and criteria, job assignments, transfers, the discipline of employees);
- To have a voice in the decisions affecting employees' welfare (e.g., the scale and schedule of production, the process of contracting out work, the introduction and use of new technology and its effect on employees);
- Protection from economic hazards beyond one's control such as an accident or health problem, illness in the immediate family, postemployment benefits, etc.;
- Recognition and participation. This is an issue of equality at the bargaining table and of recognition of labor's equal position in the success of the organizational enterprise.

That is not to say that union membership is purely based on some well-thought out theory of the workforce. Often, employees first seek out unions in reaction to personal experiences at the workplace, such as discipline for minor offenses, the feeling that workers are being pushed around, inequitable treatment with respect to employer supervision and management decisions, and perceived inequity in wage rates and working conditions. In many instances, it is an unpleasant and negative personal experience that prompts workers to seek out unions and become active and accept leadership positions in the labor organization.

Unions exist because employees need a spokesperson that can stand as an equal with the employer in a labor/management bargaining relationship. It gives employees a measure of independence and control over their own affairs in the workplace. Management no longer has the single and/or final word. Those employees who believe they have been unfairly dealt with can have a hearing and be represented by an agent who is backed by a powerful organization and is on their side. The union is often prized not simply because of a belief that it will win higher wages for employees, but because it can stand up against management decisions that are regarded as unfair or capricious.

Most unions and union representatives are motivated by a sincere desire to competently represent their members at the bargaining table and stand strong against perceived inequities perpetrated against their member. The latter activity manifests itself throughout the grievance process and is a primary element in most collective bargaining agreements.

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Unions also desire to improve the lot of those they represent by engaging in cooperative projects with management whenever possible to improve specific working conditions or deal with new problems encountered at the worksite. These may include the use of new technologies or addressing current safety concerns.

Labor organizations often take an active role in attempting to influence public policy decisions and lobby for the passage of laws that are perceived as beneficial to their constituencies and their organizations. Thus, unions have played important roles in the passage of laws such as the *Fair Labor Standards Act*, states' minimum wage, and the.

In addition to maintaining their role as advocates for their members, unions are sensitive to the fact that they are organizations whose continued healthy existence is vital not only to their members, but to the union's own employees. Consequently, unions have a stake in providing for their institutional goals through the protection of their status under federal and state legislation and the pursuit of union security provisions in collective bargaining agreements.

In order to understand the decision-making process that typically occurs in the context of any labor/management relationship, it is necessary to understand the organizational structure of the union and employer involved.

- **Union Organization**—National unions represent workers throughout the United States and, in some instances, workers in other countries. Most unions have individual branches known as locals that may represent workers in a geographic area or particular municipality, school district, hospital, or industrial plant. Many unions have regional offices that represent several locals in a particular area. Approximately 56 national and international unions are affiliated with the American Federation of Labor—Congress of Industrial Organizations (AFL-CIO). In 2005, several of the largest unions withdrew to form the Change to Win Coalition. Change to Win currently consists of six affiliated unions. These are:
 - International Brotherhood of Teamsters (IBT)
 - Service Employees International Union (SEIU)
 - United Farm Workers of America (UFW)
 - United Food and Commercial Workers International Union (UFCW)
 - United Auto Workers
 - Communication Workers of America

Locals, which function in a specific geographic area or a particular work location, often are provided professional help in negotiations and grievance processing. Professional staff employed by the international or regional offices furnish this assistance. Larger locals sometimes employ full-time professional staff, but most are represented at the worksite by locally elected officers or stewards who are also full-time employees at the worksite.

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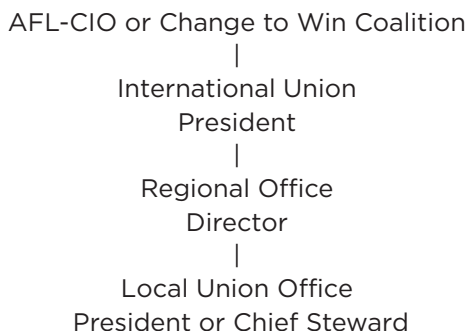
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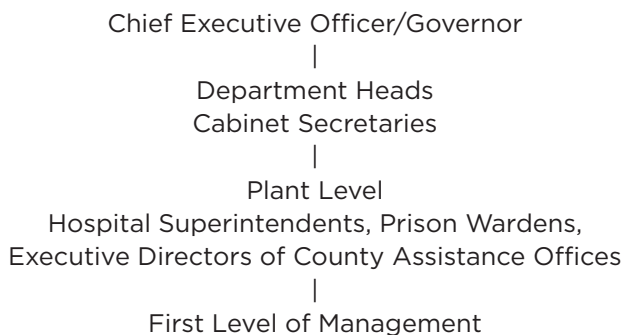
A typical union might be organized as illustrated below:



The AFL-CIO and Change to Win Coalition represent the interests of their affiliated unions by providing a national voice for the member unions. They may head national lobbying efforts to further the groups' legislative agenda, support political candidates sympathetic to labor's goals, and provide training to union staff in a variety of areas. The AFL-CIO and Change to Win Coalition do not engage in collective bargaining with employers. The roles of the national union, regions, and locals in the bargaining process vary with the unionized employers' size and market. The national union takes the lead in negotiations with the auto industry, say, but the local union with the support of its regional office would make bargaining decisions in a small plant, township, or school district.

Unions are more likely than employers to give locals a level of autonomy in dealing with contractual issues provided for in local agreements. However, decisions made for agreement that affect a multisite or statewide level are generally made at the international level of the union's structure.

- **Employer Organization**—The management structure will dictate how and at what level decisions are made with regard to collective bargaining issues. For an example from a large organization, a state government for instance, the management structure may be as follows:



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Large employers most often have employee relations specialists that deal with problems in the negotiation and day-to-day administration of labor agreements. They make decisions and delegate authority to lower levels of the organizations to resolve issues at the local level, frequently with upward communication necessary prior to a final action.

It is vital that at all levels of the organization, an individual's role is clearly defined and understood as it pertains to the decision-making process. The typical role of human resources staff is to provide training regarding the particular organization's structure and each individual's role in that overall structure.

Many organizations have made successful enterprises out of labor/management cooperative efforts. In some cases, standing labor-management committees have been formalized with the goal of joint problem solving on issues that are of mutual concern. Such efforts are particularly successful and rewarding in dealing with health and safety issues at the workplace or in establishing joint educational programs to foster better understanding and, therefore, a better ongoing relationship between the parties.

Even if such efforts do not reach final solutions for each problem presented, they serve as a valuable communication tool for both entities and sometimes allow the concerns of each side of a controversy to be aired in a constructive, nonconfrontational atmosphere. This can build trust between management and labor that can make the negotiation and grievance process more effective.

Building a positive labor/management relations atmosphere depends on establishing trust between the parties in the process. Trust is based upon experience with members on the other side of the table who consistently provide honest and direct responses to concerns expressed by the other side. Both sides need to be willing and open to relating their desires and concerns to each other on an ongoing basis without fear of recrimination.

In such an effort, both sides need to speak the truth to one another and, just as importantly, listen to the concerns raised by the other side and empathize with their efforts to address issues that are important to their constituents. Opportunities for successful solutions should be recognized and acted upon expeditiously, whether the solution is a unilateral correction or change or one brought about through compromise.

In labor/management relations, formalized interaction takes place during the negotiation process, the grievance procedure, and structured labor/management committees. Labor representatives and managers and supervisors should approach each other in their day-to-day interactions with recognition of each other's role and a mutual respect for the responsibility of the other.

When approaching labor or management issues that need to be resolved between the parties, it is most effective to treat the potential confrontation of opposing views as a problem-solving opportunity rather than a contest of wills. In order to be successful with such an approach, the parties may wish to follow the steps designed for interest based bargaining:

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- **First, separate the problem from the person**—Too often in any negotiation, the parties' relationship tends to become intertwined with the substantive discussions. Egos, instead of objective evaluation, drive the discussion.
- **Second, focus on interests rather than**—A position is something you have decided upon; an interest is what caused you to decide. An employee may take the position that he/she must have a parking space in the employee parking lot. His/her interest is that he/she does not want to pay for parking. Focusing on the interest rather than the position allows for solutions to be investigated that may resolve his/her interest without agreeing to his position, which may not be possible.
- **Third, invent options for mutual gain**—One way of accomplishing this is to have both sides brainstorm suggestions for possible solutions. For example:
 - What if the company paid for public parking?
 - Can changing hours make more parking available?
 - Could carpooling be a possibility?

It may be that the employer's concern is not the cost of parking but the space available in the employee parking lot.

- **Fourth, insist on objective criteria**—In situations where options for a win-win solution are not available, both sides should attempt to agree on criteria that should be used to analyze the merits of the need to address the interest of the party. For example:
 - Should disabled employees be given preference for parking?
 - What are the consequences if the issue is not resolved? Will a valued employee leave work?
 - Are the costs involved reasonable?

The point of interest based bargaining is to focus on problem-solving, not positional or power-related bargaining. Not all issues can be resolved using this technique, but for those that are, the effort leads to more creative solutions than may otherwise be achieved and sets the stage for a better, more cooperative labor/management relationship.

Mediation is a process that has a traditional role in collective bargaining and functions successfully in the grievance process. Detailed descriptions of the role mediation plays in collective bargaining and grievance procedures appear in Part Five and Part Eight of this module.

The term strategic partnering most often refers to structured agreements between organizations to take advantage of technological opportunities or to respond to customers more effectively than could be achieved in isolation. It commonly

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involves corporations working together to achieve common goals. Within any given organizational structure, strategic partnering may occur between various departments or entities to accomplish a common goal. For instance, in a state government, several departments that deal with human services, such as separate agencies overseeing welfare and aging services, may develop joint projects to assist their mutual constituencies. Another example might be several police departments that work together on a regional taskforce.

Usually, management and the unions that represent their employees do not become involved as partners in achieving mutually desired goals. However, there are examples of cooperative efforts between labor and management that have succeeded in achieving mutual goals involving job security, workplace effectiveness, and improved productivity. Southwest Airlines and the International Association of Machinists and Aerospace Workers formed an effective workforce partnership that helped both parties achieve goals desired by each party. The union and the employer work together as partners with the mutual goal of achieving necessary changes to maintain the company's viability and increase its competitive position.

It is typically the function of human resources in any organization to provide expert consultation for the management and supervisory staff in all aspects of labor/management relations where they have any responsibility. The relationship between the human resources professionals and management is in fact a strategic partnership that becomes more prominent during specific activities necessitated by the labor/management relationship. Human resources professionals:

- Gather information regarding management and supervisory concerns prior to the commencement of negotiations;
- Keep management and supervisors updated as to the progress of the collective bargaining process;
- Coordinate the preparation of strike plans;
- Assist supervisors and managers in the processing and settlement of grievances;
- Provide assistance for line staff in the investigation and predisciplinary elements, as well as with the administration of employee discipline;
- Provide training for management staff to increase their knowledge and skills in labor-management relations.

There is no commodity that is more valued in an employee relations specialist for either side than the specialist's reputation for honesty and integrity. The success of any labor/management relationship is dependent upon the trust of the parties that the word of their bargaining partner is inviolate. Such a reputation is earned over years of maintaining an honest and frank relationship with the other party in the labor/management relationship. It can be lost with one duplicitous act or breach of confidentiality.

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The most effective practitioners in labor/management relations may often be tough bargainers, but they can be relied on never to go back on their word or break a confidence shared by his/her opposite number. An effective labor/management partnership cannot be achieved in the absence of mutual trust.

Exercise

1. Describe the relationship that exists between unions or employees and management in your organization.
2. Are any of the strategies discussed in this portion of the course in use in your organization or they could be used effectively to improve relations? If so, indicate which strategies and how they might be used.

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Part Two: Collective Bargaining Statutes

There are a number of federal laws that affect or govern collective bargaining processes in many public organizations. These include:

- The **National Labor Relations Act** (NLRA), often referred to as the *Wagner Act*, was passed by the Congress in 1935. The NLRA established the right of workers to organize and bargain collectively and prohibited specific actions by private employers meant to interfere with those rights. To protect employees' rights, the NLRA prohibited employers from committing unfair labor practices identified in the law. Those practices specified as illegal included:
 - Interfering, restraining, or coercing employees in the exercise of their right to organize or bargain collectively;
 - Dominating or interfering with the formation or administration of any labor organization;
 - Encouraging or discouraging membership in any labor organization by discriminating in regard to hiring, tenure, or conditions of employment;
 - Discharging or otherwise discriminating against an employee because he or she filed charges or gave testimony under the act;
 - Refusing to bargain collectively with representatives of the employees.

The NLRA also established the **National Labor Relations Board** (NLRB) as an independent body to enforce the provisions of the law.

Through the passage of this law, the federal government declared that its official policy was to encourage collective bargaining as an appropriate method to resolve conflicts between employers and employees in the private sector. While the NLRA does not apply to public sector collective bargaining, it is significant because many of the tenets and concepts are embodied in the public collective bargaining statutes that were subsequently enacted. The act established the right of workers to organize unhampered by employer interference through the prohibition of unfair labor practices.

The NLRA was subsequently amended and employees' rights were modified first by the **Taft-Hartley Act** (*Labor Management Relations Act*) in 1947 and later, in 1959, by the **Landrum-Griffin Act** (*Labor Management Reporting and Disclosure Act*).

Following are brief summaries of laws with collective bargaining implications:

The **Taft-Hartley Act** amended the NLRA and established a code of conduct for unions who represent employees under the law. This act prohibited unions from engaging in unfair labor practices, similar to the prohibitions already placed on employers in the NLRA. Specifically, coercion, discrimination against nonunion workers, refusing to bargain, excessive membership fees, and other

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practices were made unfair practices under the law. The law also established the **Federal Mediation and Conciliation Service (FMCS)** as an independent agency tasked with assisting management and labor settle labor contract disputes. The act required that the FMCS be notified of disputes that were not resolved within thirty days after the expiration of the contract. The law also added a provision to allow the U. S. president to declare that a strike presents a national emergency if the strike is one that would impact on industry or a major part of it in such a way that the nation's economy would be significantly affected. In such cases, the act provides that the president may declare an 80 day cooling off period during which the strike would stop while union and management negotiators returned to the bargaining table. Over the decades, national emergency strikes were identified and the cooling off period used in labor conflicts in the airline industry, passenger railroad, shipping, and other industries.

The *Taft-Hartley Act* also prohibits the establishment of a closed shop, which is a form of union security. A closed shop requires individuals to join a union before they can be hired. The law also enables states to pass laws that restrict compulsory union membership. Since its passage, a significant number of states, many in the southern part of the United States, have passed right to work laws that discourage unionization. As of 2017, twenty-eight states had right to work laws.

In 1974, an amendment extended coverage of the act to private, nonprofit hospitals and nursing homes.

- The **Landrum-Griffin Act** requires unions to establish bylaws, make financial reports, and provide union members with a bill of rights. The act appointed the U.S. Secretary of Labor to act as a watchdog of union conduct under the law.
- With regard to federal employees, the passage of the **Civil Service Reform Act** of 1978 made major changes in how the federal government deals with unions. The act identified areas subject to bargaining and it established the **Federal Labor Relations Authority (FLRA)** as an independent agency that functions similarly to the NLRB. It should be pointed out that there are significant differences in the scope of collective bargaining vis-a-vis the federal government and state and local governments, as wages are not a negotiable issue for federal employees.
- The **Postal Reorganization Act** of 1970 established the U.S. Postal Service as an independent entity. It prohibited postal employees from striking and established a dispute resolution process for the resolution of employee-employer disputes.

No federal statute sets a standard that governs the public sector's duty to bargain in individual states.

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State Statutes

Individual state governments throughout the United States have passed legislation that established collective bargaining rights for public employees within those states. Presently, 22 states permit collective bargaining of public sector employees. Twenty-eight states either prohibit or substantially limit collective bargaining.

States that do not formally permit collective bargaining for public employees may have some employee relations policies, such as employees' right to join unions or employee associations, public employee grievance procedures, dues check off, meet and confer procedures, informal bargaining at the local level, and/or bargaining without the statutory regulation provided by a labor relations law. Labor relations policies may be established by local ordinance or on an ad hoc basis by mayors, city managers, school boards, et al.

Generally, some form of bilateral decision-making between public employers and workers takes place somewhere within public organizations that do not have state laws permitting collective bargaining for public employees. Dispute resolution methods are particularly important in noncollective bargaining environments, and they frequently take the form of policies and procedures developed mutually by employee associations and management. A good introduction to all of this is Richard C. Kearney's *Labor Relations in the Public Sector*, which was published in its fifth edition in 2014.

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Part Three: Other Laws

There are a number of other laws that may, from time to time, have application to employee relations activities. In this portion of the course, we will briefly outline some of these laws and their application to employee relations and collective bargaining issues. We need to point out, however, that federal and state laws typically take precedence over any local or state collective bargaining practices. For example, an organization could not bargain over a different standard of reasonable accommodations from that included in the ADA or redefine the FLSA requirements for exempt and nonexempt employees.

The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

While the First Amendment identifies the rights to assemble and to petition the government, the text of the amendment does not make specific mention of a right to association. Nevertheless, the Supreme Court held in *NAACP v. Alabama*¹ that freedom of association is an essential part of the freedom of speech because, in many cases, people can engage in effective speech only when they join with others.

The right to associate is not an independent constitutional right but is derived from and dependent on the First Amendment guarantees of freedom of speech and expression. The evolution of the principles espoused in *NAACP v. Alabama* provides the constitutional basis for employees' right to join together and bargain collectively with their employers.

In most of the world, the freedom of association is a right identified under international labor standards as the right of workers to organize and bargain collectively. Freedom of association is recognized as a fundamental human right by a number of human rights documents, including Article 20 of the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in 1948.²

Section One of the Fourteenth Amendment states:

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.

¹ 357 US 449 (1958) Text: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces Freedom of Speech."

² Universal Declaration of Human Rights pages at Columbia University (Center for the Study of Human Rights), including article by article commentary, video interviews, discussion of meaning, drafting and history.

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The United States Constitution addresses the issue of religion in two places: in the First Amendment and the Article VI prohibition on religious tests as a condition for holding public office. The First Amendment prohibits the federal government from making a law “respecting an establishment of religion, or prohibiting the free exercise thereof.” This provision was later expanded to state and local governments through the incorporation of the Fourteenth Amendment. The due process clause of the Fourteenth Amendment has been used to apply most of the Bill of Rights to the states. This clause has also been used to recognize procedural due process rights requiring that certain steps, such as a hearing, be followed before a person’s “life, liberty, or property” can be taken away. The amendment’s equal protection clause requires states to provide equal protection under the law to all people within their jurisdictions.

Although the U.S. Supreme Court has recognized a First Amendment right of access to government records in limited situations and a few states have placed a right of access in their state constitutions, statutes, and the common law are more frequently invoked to create a presumption of openness.³

All states, the District of Columbia, and the federal government have enacted open records, of freedom of information, laws that guarantee access to government documents. These laws are amended regularly and in recent years, there has been an effort to address electronic records when it is not absolutely clear that the law of the jurisdiction guarantees access to electronic records. For example, the *Federal Electronic Freedom of Information Act Amendments of 1996* mandated that the federal government’s electronic records are public to the same extent as their paper counterparts. Changes in agency regulations and court rules also are occurring because so many records are now maintained in electronic format.

Open meetings, or sunshine, statutes give the public the right to attend the meetings of commissions, councils, boards, and other bodies. Some states permit electronic meetings so long as public access to the meetings is assured.

Open records and sunshine laws vary from jurisdiction to jurisdiction. The jurisdiction of the agency determines which freedom of information law applies. State open records laws cover most state agencies. In some states, nongovernmental entities that receive public funds or perform a governmental function also are subject to the disclosure laws. Agencies of the federal government are covered by the *Federal Freedom of Information Act*.⁴ This law does not apply to other entities that receive federal funds.

No government—state or federal—maintains a centralized system of access to information. Although a growing number of states and counties have contracted with private companies to provide electronic access to records, the agency or local government generally remains responsible for complying with access laws.

Most open records laws are based on the presumption that everything is public unless specifically exempted. Some states specify certain categories of information

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³ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Florida, Louisiana, Montana, New Hampshire, North Dakota and Tennessee are among those states whose constitutions recognize a right of access to government documents.

⁴ U.S.C. § 552 (2003).

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that always are public. Most exceptions to public access are subject to agency discretion, so you can always try to convince officials that it would be in the public's interest to release the requested information. In most states, only a few specifically designated types of records are required to be kept secret. The number and kinds of exemptions vary from state to state, but state and federal laws usually have exemptions for:

- **Personal privacy**—Some states have specific exemptions for personnel, medical, and similar files. In other states, more general exemptions for privacy apply.
- **Law enforcement and investigative files**—These may be exempt across the board or may be available under the federal statute, which permits information to be withheld only when some specified harm to the investigation or an individual involved would result from disclosure.
- **Commercially valuable information**—These exemptions usually seal information provided by private companies to the government, such as sensitive information in licensing or contract applications.
- **Predecisional documents**—These exemptions are designed to allow staffers to debate alternatives frankly and openly before an agency reaches a final decision. Final agency action, however, rarely can be withheld from the public, and predecisional materials are sometimes available once the agency makes its final decision.

Other common exceptions at the state and local level cover information relating to government acquisition of real estate, library circulation records, civil service examinations and answer keys, and student records.

Federal law includes exemptions for national security, information relating to banking or financial institutions, and oil and gas wells. Under federal and all state laws, legislatures may enact specific statutes exempting additional classes of documents from public access laws.

We have previously discussed the application of a number of the following laws in other modules of the course, and so we do not feel the need to review their requirements further as part of this Module:

- **Title VII of the *Civil Rights Act of 1964***
- ***Family Medical Leave Act (FMLA)***
- ***Americans with Disabilities Act (ADA)***
- ***Equal Pay Act (EPA)***
- ***Fair Labor Standards Act (FLSA)***

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Part Four: Bargaining Units

We should note at the outset of this section that many of the topics addressed here can apply even without state laws permitting collective bargaining if informal bargaining exists. There is great variety among so-called noncollective bargaining jurisdictions.

A bargaining unit consists of all appropriate employees eligible to be represented by a union for the purpose of negotiating a collective bargaining agreement with the employer. There are a number of activities that are typically associated with the establishment of collective bargaining process. These include:

- **Unit Determination**

A designation of a bargaining unit is important because it determines which employees may be represented under the law by an exclusive representative for collective bargaining purposes. The process of determining a bargaining unit includes grouping certain jobs together and designating the group of employees who occupy those positions as members of an appropriate bargaining unit.

Requirements mandated by statute, administrative decisions, employers, union agreements, and court decisions can and do factor into the determination of bargaining units. At the federal level, the FLRA is authorized to make these decisions under Executive Order 2218. In the private sector, the NLRB sets the standards. At the state level, many state statutes have designated a public employee labor relations board to perform the same function.

Criteria for unit determination varies greatly in different jurisdictions, but the determination must take into account the following factors:

- Community of interest of employees;
- Prior bargaining history and prior union organization;
- Potential effect on the efficiency of employer operations; and
- Effect of overfragmentation.

Community of interest between employees of the designated bargaining unit ensures that the employees of the unit share sufficient employment interests in common that the exclusive bargaining representative entity can effectively represent all of the interests of the collective body of employees. Collective bargaining will function best when the represented employees work under similar conditions and have similar problems and concerns.

Types of considerations that factor into these criteria include:

- Similarity in the method and criteria for determining wages, hours, and other employment terms and conditions;

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- The frequency of contact and interaction among employees;
- The interconnected nature of the work being performed, such as dietary employees and bus drivers at a school district or nursing aides and maintenance employees at a hospital;
- Common supervision and labor relations policies;
- Relationship to the administrative body of the employer;
- Collective bargaining history; and
- Wishes of the parties.

Categories of employees in relation to unit determination typically include:

- **Management employees** are considered employees who are involved directly in the determination of policy or who responsibly direct the implementation of such policy. They are often defined as all employees above the first level of supervision.
- **Confidential employees** are defined as employees who work in the human resources department of a public employer and have access to information subject to use by the public employer in collective bargaining, or any employees who work in a close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer. Note that both management and confidential employees are normally excluded by law from membership in a collective bargaining unit.
- **Supervisors** are also often excluded from collective bargaining, but may be included in meet and discuss or meet and confer units in some legislation. A supervisor is typically defined as an individual who has authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or to effectively recommend such action.
- **Professional employees** may be defined as those employees whose work is predominantly intellectual and varied in character, requires the consistent exercise of discretion and judgment, and requires knowledge of an advanced nature customarily acquired by specialized study in an institution of higher learning. Such work must be of such character that the output cannot be standardized in relation to a given period of time. Many laws include provisions that provide for professional separability. Such provisions allow professional employees to vote against inclusion in a particular bargaining unit during the representation election.

- **Representation Election**—Once a bargaining unit has been designated by the appropriate authority, the unit is formally certified under the law. In states that have public employee collective bargaining statutes, the certification is made by the public employee labor relations board or its equivalent. These boards

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have the responsibility to authorize and conduct elections to ascertain who will be selected to be the exclusive representative of employees covered by the bargaining unit.

Employee organizations qualify for placement on the ballot by submitting documentation that at least thirty percent of employees in the unit support their effort to become the exclusive representative. Under many of the state statutes, the choice of no representative also must be included on the ballot. This is a generally accepted practice that was borrowed from the NLRB and adopted by most public sector organizations. Organizations must receive a majority vote in order to be certified as the exclusive bargaining representative of the designated bargaining unit. When none of the choices on the ballot receives a majority, a runoff election must be held between the two choices receiving the highest and second highest number of ballots cast in the election.

- **Decertification Election**—If there is a certified representative, a public employee or a group of public employees may file a petition for decertification, provided it is supported by a thirty percent showing of interest. Decertification elections are limited usually to no more than one such election in any twelve month period. Likewise, such elections are barred during the term of any collective bargaining agreement that does not exceed three years.

There are six basic types of union security provisions that have developed to protect unions. They are:

- **Closed Shop**—requires that an employee, as a condition of employment, must become a member of the union prior to being employed. The closed shop was legal under the NLRA as originally enacted in 1935. The amendments to the law required by the passage of the *Taft-Hartley Act* in 1947 prohibited the closed shop. Currently, a closed shop is illegal in both the public and private sector.
- **Union Shop**—requires that an employee, as a condition of employment, become a member of the union within a stipulated period, usually 30 or 60 days, after being hired or after the effective date of the collective bargaining agreement containing the union shop language, whichever is later. The NLRA specifically provides that private sector employers and unions may negotiate union shop agreements except where such agreements are prohibited by state right to work laws. In the public sector, a small number of states have legalized the negotiation of union shop clauses for public employees.
- **Maintenance of Membership**—requires that once an employee becomes a member of a union, he/she must continue to be a member as a condition of employment. There is no requirement that an employee become a member of the union. Usually, an employee may resign from the union during specified periods. An example of this negotiated timeframe might be two weeks prior to the expiration of the collective bargaining agreement.
- **Agency Shop**—requires that employees in the bargaining unit, as a condition of employment, pay the union an amount equal to the union dues of that organization. Employees are not required to become union members.

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- **Fair Share**—requires that employees represented by the bargaining unit, as a condition of employment, pay a proportionate share of the cost of collective bargaining activities, excluding the cost of other union activities. This amount is less than union members pay as their union dues. Under this provision, employees who are members of the bargaining unit are not required to join the union.

The United States Supreme Court decided on June 27, 2018, in the case of *Janus v. American Federation of State, County, and Municipal Employees* that the First Amendment is violated by requiring the payment of agency or fair share fees by employees who are not members of the union representing the employees. In the 5-4 decision written by Justice Alito, the Supreme Court stated that “In simple terms, the First Amendment does not permit the government to compel a person to pay for another party’s speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.”

The Supreme Court overturned its 1977 decision in the case of *Abood v. Detroit Board of Education*, which held that requiring such fees was constitutional to cover union expenditures related to collective bargaining activities, but not political or ideological activities undertaken by the union. While noting the importance of following precedent, the majority opinion found that the *Abood* decision was “poorly reasoned.”

This case was brought by Mark Janus, an Illinois state employee who refused to join the union representing his unit since he opposed many of its positions. Under Illinois law he was required to pay the union, which was the exclusive representative of all the employees, an agency fee to cover its collective bargaining activities. Mr. Janus contended that requiring him to pay an agency fee violated his First Amendment rights.

The Supreme Court concluded that no deductions can be made from non-members of the union without first obtaining affirmative consent. Where non-members agree to pay a fee, they are waiving their First Amendment rights and the court did not believe that “such a waiver can be presumed.”

Following the decision, lawsuits have been filed seeking repayment of all agency fees paid by non-members to unions. The plaintiffs in these cases contend that the *Janus* decision should be applied retroactively. State legislatures may pass laws attempting to limit the impact of the *Janus* decision. Legislation has been introduced in the Congress that would require mandatory bargaining for public safety employees as well as a broader proposal that would give all public employees the right to join unions and engage in collective bargaining activities.

- **Dues Check-off**—provides a mechanism by which the employer agrees to deduct periodic union dues or fair share contributions from the employees pay and remit the amount collected to the union. Usually, such a clause provides that upon receipt of a written authorization from an employee, the employer will begin payroll deductions. Most such agreements contain a hold harmless

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clause to protect the employer from liability that may arise from disputes between the union and individual employees related to actions taken under the dues deduction clause.

Exercise

1. Describe the status of employees in your workforce with regard to their collective bargaining rights.
2. If organized, identify the bargaining units represented and the employee organizations designated as their exclusive representative.
3. What type of union security provisions are provided by the collective bargaining agreement or other agreements between the representatives of the employees of your workforce and their employer.

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Part Five: Collective Bargaining Models

All topics discussed in this portion of the course, except formal collective bargaining, may apply in organizations that have employee/labor relations policies but do not permit collective bargaining by state law. The extent depends upon the particular labor relations policies.

There are a number of collective bargaining concepts that need to be explained before launching into a discussion of collective bargaining models. They are:

- **Duty to Bargain**—Federal and state legislation empowering the organization of private and public sector employees all contain language that imposes upon the parties a duty to bargain. The laws require that the employer and the employee representative bargain in good faith over wages, hours, and other terms and conditions of employment. Over the years, litigation and the creation of rules and regulations by administrative bodies have defined the basic elements of that obligation. These elements typically include:
 - Possess a willingness to meet and participate in the bargaining process and to reduce the agreements reached through this process to writing;
 - Demonstrate a sincere effort to reach common ground; and
 - Possess the authority to bargain and, in the end, effectively recommend a tentative agreement for ratification.

- **Scope of Bargaining**—Since the passage of the NLRA, a vast body of judicial decisions and opinions has been developed dealing with what the parties must bargain about, what they may bargain about, and what they are forbidden to bargain about. The following summarizes the broad categories established over the years:

Mandatory subjects for bargaining include such issues as:

- Wages and benefits of employees;
- Grievances and their procedures for resolutions;
- Work hours and schedules;
- Union security issues;
- Seniority;
- Health and safety rules;
- Paid and unpaid time off from work; and
- Retirement and pension coverage.

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Permissive issues are not mandatory subjects for bargaining, but they are issues that the parties may choose to negotiate over if both parties agree to do so. Such issues may include the negotiation of benefits for retired employees and discounts of employer products for employees.

Illegal issues are issues that parties are forbidden to negotiate over. Bargaining over any of these would require one or both parties to engage in an illegal action. This would include bargaining that would take away an individual's civil rights.

It is important to note that the limitations of bargainable issues in the public sector are more problematic than in the private sector. This is true because the power relationship between the parties in the private sector is primarily economic. Bargaining is an attempt to resolve the conflicting interests between two private parties. In the public sector, decisions made at the bargaining table can be seen as possibly usurping the citizens' right to participate, through their elected representatives, in the determination of public policy. Examples of areas of bargaining in the public sector that illustrate this point are the demands of teachers in school districts to negotiate class size, to jointly determine student disciplinary policies, and to guide curriculum development. Similar issues create similar problems in caseload bargaining for social workers and minimum staffing issues for police and guards at prisons and mental hospitals.

Consequently, in public sector organizations there are a wide variety of issues that may or may not become mandatory or permissible bargaining issues. In general the scope of bargaining in the public sector is more restrictive than in the private sector, and this is still evolving through a multitude of state, county, and municipal laws and court decisions. Typically these conflicts are inherent in public sector collective bargaining. Caseload, class size, etc. are seen by unions as legitimate issues affecting working conditions. Others may view them as a legitimate exercise of sovereign power, which if contained in a collective bargaining agreement may negatively impact the public. Generally, the trend has been an expansion of mandatory issues in some states.

Collective bargaining in public sector legislation is defined as the performance of mutual obligation of the public employer and the representative of the public employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, as well as the execution of a written contract incorporating any agreement reached. The obligation does not compel either party to agree to a proposal or require the making of a concession.

Some public sector legislation has defined a different relationship between employees and first level supervisors. For example, the Pennsylvania Public Employee Relations Act (PERA) provides that:

Public employers shall not be required to bargain with units of first level supervisors or their representatives but shall be required to meet and discuss with first level supervisors or their representatives on matters deemed to be bargainable for other public employees covered by this act.⁵

⁵ Pennsylvania Public Employee Relations Act,—PA Stat. Ann., Title 43, §§1101.101—1101.2301, Article VII, Scope of Bargaining, Section 704.

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PERA also defines “meet and discuss” this way:

Meet and Discuss means the obligation of a public employer upon request to meet at reasonable times and discuss recommendations submitted by representatives of public employees: Provided, that any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final on any issue or issues raised.⁶

The obligation of collective bargaining is not enforceable by the courts without legislation authorizing or requiring such activity. For example, in Pennsylvania, the obligation to meet and discuss with the segment of employees identified as first level supervisors compels a process that may not be followed in other public locations without a similar legislative mandate or authorization. Some states have formalized laws that are called meet and confer or meet and consult statutes.

Meet and confer and meet and consult are synonymous terms. Meet and confer in good faith can be defined as an obligation of both the public employer and the public employee organization to meet at reasonable times to exchange openly and without fear information, views, and proposals, and to strive to reach agreement on matters relating to wages, hours, and other terms and conditions of employment.

Meet and confer laws are generally less comprehensive than those governing collective bargaining. These laws are often less specific on questions defining representatives, administrative machinery, unfair labor practices, and dispute settlement apparatus. Under these laws, the outcome of public employer/employee representative conferences depends on management determination rather than on bilateral decisions between equals.

In states where meet and confer statutes exist, public employers are required to discuss the terms and conditions of employment with employee organizations and are given the authority to enter into nonbinding memoranda of understanding with such representatives. In the absence of any statutory authorization or laws specifically prohibiting such actions, other jurisdictions have conferred or negotiated with their employees on a *de facto* basis. In some states and local jurisdictions, government representatives have refused to enter into any type of discussions with employee organizations.

The collective bargaining process formally begins when the moving party (usually the union) notifies the other party that it wishes to present its initial demands for a new contract or begin negotiation for a successor agreement when the parties already have a written agreement about to expire. Some states have a notice requirement prior to expiration that must be met or the parties lose the right to negotiate. In the public sector, the beginning of this process is proscribed by law such that the parties shall begin negotiations at least X number of days before the government entity’s budget submission date. There are a number of activities that make up the collective bargaining process:

⁶ Ibid. Article III, Definitions, Section 301(17)

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- **The Negotiation Team**—Prior to the commencement of negotiations, both the employer and the union designate teams of negotiators. The union membership selects those members who are able to communicate the wishes of its members across the bargaining table and who are knowledgeable about the wishes and concerns of its constituency. Management generally appoints members who are authorized and capable of effectively speaking for the governing body of their organization. Both teams may contain content experts able to address the specifics of negotiation proposals and counterproposals. For many management teams, human resource staff are typically included as part of the team.

The chief spokespersons are often skilled negotiators experienced in legal ramifications and bargaining techniques and strategies. They may be outside consultants hired for this function or in-house experts who are permanent staff of the employer or the union.

If negotiations are to be conducted in good faith, the parties' negotiation teams will contain negotiators who can bargain and make decisions rather than people who do not have the authority to make decisions at the table. They will be able to effectively recommend the final agreement to their constituencies for ratification.

- **Ground Rules**—Before the commencement of negotiations, or at the first bargaining session, it is common for the negotiators to jointly establish procedural ground rules for the process to focus on the issues. Examples of ground rules may include:
 - Starting and ending times for the negotiation sessions;
 - Location of negotiation meetings;
 - Agreement to reduce proposals to writing and to sign off on tentative language as agreement is reached;
 - Agreements about payment status for employees attending the negotiations as union representatives;
 - Information sharing;
 - Confidentiality of discussions;
 - Public disclosure of progress of negotiations/press releases/newsletters or emails/reports to members or management staff;
 - Civility across the table between team members; and
 - Roles of the chief spokesperson and team members.

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- **Preparing Economic and Noneconomic Proposals and Counterproposals**—Prior to presenting initial proposals and counterproposals, the parties will analyze the needs and the priorities of their respective groups.
 - **Economic Proposals**—In preparing proposals for salary and benefits, unions research similar organizations in surrounding locations for comparison data to justify their employees' desires. In the private sector, employees working as forklift operators will compare themselves to forklift operators in the same geographic location and ask questions such as what are competitors paying and how much was the last negotiated raise. In the public sector, teachers compare salaries and premium share of health costs, etc. to the surrounding school districts. Employers also do research to bolster their arguments regarding issues such as current economic trends in the nation or public sector, budget restrictions, and public sentiment for raises and health insurance premium costs.
 - **Noneconomic Proposals**—These proposals are often varied and more complicated than economic issues. Employees may be concerned about health and safety issues because of a recent accident or injury, the application of seniority to job openings, parking spaces for employees, uniforms, etc. Members of the management team typically poll their managers to determine if any changes are desired and needed in noneconomic areas such as shift bidding procedures based on seniority defeat the need to be flexible or work rules in current contract need to be adjusted because of desire to install more efficient technologies. They will also often research claims made by the union at the bargaining table about circumstances that prompted contract demands by employees.
- **Costing Proposals Collections and Use of Survey Data**—Proposals made during the contract negotiation need to be costed out. The costs must be adjusted as proposals and counterproposals are made throughout the bargaining process. Costing a proposal may be more complicated in various economic and noneconomic areas. Examples of items that may need to be considered include:
 - **Retirement increase**—Cost of retirement; attritional savings made because new replacement employees will cost less than more senior employees at the highest step of the salary scale;
 - **Health care contributions**—Savings if such contributions are pre-tax;
 - **Holidays, Personal Days, Sick Days**—May include overtime costs for replacement workers.

Underlying the entire bargaining relationship is the power relationship between the parties at the table:

- **Private Sector**—If the industry will lose sales and possibly long-term contracts to competitors should a strike occur that stops production and the union is willing to strike, the bargaining power of the union is the stronger in the

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relationship. If the plant is able to withstand a prolonged strike because its inventory is high, the employer is in the stronger position.

- **Public Sector**—In the public sector, strikes are illegal in many circumstances. Even where they are legal, definite procedures must be satisfied before a strike can legally occur. The power of employee organizations in the private sector arises out of the economic concerns of both parties. In the public sector, it is the political reality that affects the power relationship between the parties. Public negotiations are much more responsive to public opinion than private sector bargaining.

Throughout the process, there are a number of activities that occur:

- **Communication**—The more effectively the parties communicate their essential needs to the other side, the higher the possibility of success. Much of this communication is achieved by testing proposals and counterproposals throughout the negotiations. There is an expectation by both sides that initial proposals introduced in the give and take will include proposals that later may be withdrawn or traded for concessions and compromises throughout the bargaining.
- **Compromise**—During the ongoing negotiation process, both parties look for compromises that will bring the two sides closer to an agreement while achieving their highest priority bargaining needs. In order to achieve this objective, a realistic assessment must be made of the other bargaining team's negotiation priorities. If both teams cannot achieve minimally acceptable concessions for their essential priorities, an agreement will not be achieved.
- **Conclusion**—After an agreement has been tentatively agreed to by the negotiators at the bargaining table, both parties return to their respective constituencies for votes and ratification of the labor agreement. It is expected that the negotiators for both sides will work to ensure the mutual acceptance of the contract they have negotiated.

There are two types of collective bargaining that the union and management might choose to use:

- **Positional Bargaining**—In the traditional model used in the collective bargaining process, both parties involved in the process begin by designing bargaining positions. When negotiators bargain over positions, they often lock themselves into those positions. The more one fights and argues to defend a position, the more committed one becomes to it. Positional bargaining lends itself to win-lose outcomes.
- **Interest Based Bargaining**—This represents a positive approach to negotiation, intended to create a win-win. In a collective bargaining situation between parties who are looking for a more efficient and effective way to achieve compromise and who have a relationship that enables the parties to experiment with a nontraditional model for negotiation, interest based bargaining has been successful in improving the bargaining process and the long-term relationships of the parties.

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In this process, the parties agree to approach the resolution of the differences between them as a joint problem-solving exercise, not a contest between two parties that produces a winner and a loser. In interest based bargaining, the parties agree not to begin by taking positions. Instead, they are asked to identify and focus on their interests. For example, instead of proposing a seven percent yearly increase in salaries, the union may state that their membership has an interest in obtaining reasonable wage increases commensurate with similarly situated workers in surrounding locations. Management may state its interest in achieving more flexibility in its job assignments in short-staff situations instead of demanding that the union eliminate a strict seniority formula for job reassignments.

After both parties' interests have been identified, the parties brainstorm to create options to address the needs of the other party without compromising their own interests. Both parties seek to find options that create mutual gain. In evaluating options, the parties are required to use objective criteria to evaluate the options.

This approach to collective bargaining relies on a high level of trust between the parties, but it will not solve every issue. The more distributive issues such as salary and other cost items will still require hard decisions not likely to be solved by mutual problem-solving techniques. However, for issues that lend themselves to win-win compromises, this negotiation effort often produces more elegant solutions than the traditional process, and it frequently has the further advantage of improving the long-term trust relationship between the parties.

When the bargaining process does not result in the achievement of an agreement, the parties are often obligated to seek help through a mediation and fact-finding process. If either of these processes fails to produce a settlement, the union may resort to a strike or management may impose a lockout. In the public sector police, firemen, and prison guards are typically prohibited from striking. Some state laws governing these employees provide for binding interest arbitration as the final step in the process.

Mediation is a process often mandated by legislation in the public sector. This is sometimes required as a prerequisite to taking the next step in the negotiation process, whether that is a legal job action such in jurisdictions where such actions are allowed such as a strike or lockout or the submission of the dispute to binding interest arbitration.

Mediation works best when it is jointly requested by both parties. If one or both of the parties is not willing to invite a mediator into the dispute, it can be compelled by a law in certain situations. The mediator has no authority to compel a settlement. He or she seeks to resolve the labor dispute by using logic and persuasion techniques and methods learned through years of experience and education in the collective bargaining process. The parties are free to reject the mediator's suggestions and attempts to help achieve an agreement without abdicating any of their rights. Despite this lack of authority, mediation has proven to be an effective process for the resolution of labor disputes that have reached impasse. Sometimes the use of a mediator can help to clarify the issues and areas of disagreement.

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The Federal Mediation and Conciliation Service maintains a cadre of professional mediators with experience in the private and public sectors. In states that have authorized public employee bargaining, bureaus of mediation or equivalent bodies employ skilled and experienced professionals to assist in the collective bargaining process. If mediation fails to resolve employee-employer disputes, the process of fact-finding is often required or made an option by many public employee bargaining laws. Finders of fact are often appointed by an independent agency such as a public employee relations board.

Fact finders are vetted by the administrative agency that appoints them. They are impartial, judicious-minded experts in labor relations and the employment fields to which they are appointed. They have good reputations and character, attesting to their competence and lack of bias.

The degree of formality in the fact-finding process is determined by the fact finder in consultation with the parties to the labor dispute. The parties are required to submit the complete list of issues remaining in dispute. They are then given a full opportunity to make their case for their established positions. Fact finders are free to do their own research and to call witnesses on their own motion. This is to ascertain the objective facts, as opposed to what the parties may or may not have alleged during negotiations.

At times, fact finders may assume a mediation role. They will try to get the parties to agree on settlement terms before a report is issued or, at least, reduce the numbers of issues remaining in dispute. If an agreement is not achieved during the fact-finding process, a report is issued that reflects the recommendation of the fact finder for how to settle the dispute. This recommendation is based on the assessment of the data received from the parties, which often includes cost of living data, comparable rates for other employees in similar jobs, and an assessment of the potential acceptability of the recommendations to both parties.

After the recommendation is issued, each of the parties accepts or rejects the recommendation. If it is accepted by both parties, it becomes the new collective bargaining agreement. If either of the parties reject the recommendations, it is often released by the public employee relations board or similar agency to the public for a specified period of time. The fact-finding process is usually limited to a specified period of time under law or administrative rule. The joint acceptance rate is commonly below 50 percent of the cases heard. However, the process often results in laying the groundwork for a renewed negotiation effort with a reduction of open issues. Indeed, the fact finder's report may eventually form the basis for the new collective bargaining agreement.

Many state statutes permit voluntary binding interest arbitration for some categories of public employees. Some state laws require binding interest arbitration for police and firefighters, corrections officers at prisons and mental hospitals, and employees of the courts. Binding interest arbitration transfers some of the powers of decision-making about contract terms from the economic and political powers of the parties to neutral arbitrators.

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In binding interest arbitration, unresolved bargaining issues are submitted to a panel of arbitrators or a single arbitrator for final resolution. The decision of the panel is final and binding upon the parties. Typically, a three-person panel consists of a representative of the employer, a representative of the employees, and a neutral arbitrator appointed by a governmental agency or, in the case of voluntary binding interest arbitration, by the agreement of the parties.

In voluntary binding interest arbitration, the process generally follows the traditional arbitration model. A hearing is held at which the parties make their case for the acceptance of their positions by presenting data, facts, and information that details their respective positions. The arbitration panel debates the merits in executive session and reaches a consensus decision. In the end, the neutral arbitrator and at least one of the panel members must agree on the final and binding decision.

Various laws providing for arbitration restrict the panel's award by applying specific criteria, including a requirement that awards requiring legislation such as a tax increase to implement are not to be effective until such legislation is adopted. Some collective bargaining statutes allow the arbitrator to select item by item from each party's submission, while other statutes limit the arbitrator to picking the entire packet of one side or the other as the best offer.

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Part Six: Collective Bargaining Agreement

The result of the bargaining process is a mutual agreement between the parties. The document produced by this negotiation is called a collective bargaining agreement, and its provisions are binding on both parties. The terms of the agreement cannot be unilaterally changed by either party. Disputes between the parties to the agreement are usually subject to binding arbitration and are enforceable through the legal system.

The following types of agreements can exist where the use of the formal collective bargaining agreement is not desirable or permitted:

- **Memorandum of Understanding (MOU)**—A memorandum of understanding is an agreement between two or more parties that concur on a common line of action. It may be legally binding if it contains mutual consideration, legally enforceable obligations of the parties, and is reached free of fraud, duress, lack of mental capacity or age, etc. In some states, MOUs are used between the public employer and the meet and discuss units, which are typically composed of first level supervisors.
- **Memorandum of Agreement (MOA)**—A memorandum of agreement is written between two or more parties to describe a joint cooperative effort to achieve an agreed upon goal or objective. It can be used to resolve disputes, to work together as partners, or to work separately to achieve a commonly accepted project or goal.
- **Letter of Understanding (LOU)**—A letter of understanding is a formal, written letter detailing the terms of agreement between two parties. In collective bargaining situations, an LOU is used when parties want to agree to specific terms related to a single issue and do not want to formalize it in either contract or MOU language. Such LOUs usually are not automatically carried over to successor agreements without being renegotiated. Often, LOUs may find their way into successor contract language or, conversely, they may be eliminated when no longer relevant or applicable.

All three forms of agreement listed may be used in jurisdictions that do not formally permit collective bargaining by state law but have a variety of labor relations policies.

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Part Seven: Work Interruptions

In organizations where strikes are permitted, employees may engage in a job action when the parties have reached impasse and have exhausted all required dispute settlement techniques. This type of action should not occur in a noncollective bargaining environment, but aberrations can occur. These employee actions typically involve one or more of the following:

- **Strike**—A strike is defined in Title V, Section 501 of the *Labor Management Relations Act* as “any concerted stoppage of work by employees ... and any concerted slow-down or other concerted interruption of operations by employees.”
- **Picketing**—Picketing is a publicity mechanism employed by labor organizations to advise the public that an employer does not employ members of or have a contract with a labor organization. Over the years, legal decisions have basically ruled that picketing is a proper exercise of free speech. The *Norris-LaGuardia Act* (1932) made it easier for workers to picket by restricting the use of court injunctions against strikes. The *Taft-Hartley Act* (1947) outlawed mass picketing.
- **Blue Flu**—“Blue Flu” is a slang term for a form of police job action in which police officers who are prohibited from striking call off sick in mass numbers. The term has come to signify any job action of any employee group when employees call in sick in numbers large enough to significantly disrupt the function of the work for which they were hired.
- **Rolling Strikes**—Rolling strikes are work actions that involve more than one location or function of an employer on a continuous basis. Employees at one location used by a single employer will strike for a day or a week and then return to work. Upon their return, a different group of employees will strike at a different employer location. Such actions make countermeasures by the employer more difficult and minimize the loss of wages for striking members.

Employers engaged in stressful collective bargaining activities in which a strike is a possibility work within their organizations to establish a strike plan to prepare management and nonorganized staff to cope with its effects. Human resources staff, along with the organization’s legal and labor relations experts, play a key role in organizing such efforts. Mechanisms and plans must be put in place to provide management with clear and timely information about the onset of any type of work stoppage. Contingency plans must be developed for every action to cope with the situation, and such plans must be developed far in advance of any potential strike. These plans typically include identifying operations to be curtailed during a strike, planning for court injunctions to prohibit illegal or excessive picketing, and assignments of management staff to perform mission-critical tasks normally performed by the striking employees.

Exercise

Describe any work interruptions or employee job actions that occurred in your organization in the past two years.

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Part Eight: Grievance and Arbitration

Collective bargaining agreements often contain language that reflects the consensus of the parties and define a grievance in various ways. Some limit grievances to allegations that the contract has been violated. Some contain broader language.

A good working definition of a grievance as it appears in the average contract refers to a “formal complaint by a person or persons who believe they have been wronged.”

Employee dissatisfaction on some level is an inevitable occurrence in every work situation. The effects of employee dissatisfaction can lead to disruptions and inefficiencies in overall job performance if allowed to continue without resolution. This reality presents a challenge for employers. Therefore, in order to maintain an effective workforce and treat employees with respect and concern, an outlet for resolving problems related to employee dissatisfaction should be designed to ensure that effective communication channels are available to both employees and management.

If employees are members of a bargaining unit represented by an employee organization, they will most likely have negotiated a collective bargaining agreement or MOU that contains a grievance procedure for adjudicating and resolving employee complaints and grievances under the contract. Employees who have no collective bargaining relationship with their employer often have access to a grievance process within which they may air their complaints and receive management attention and a formal response.

Without a grievance procedure, management may not be aware of employee concerns and potential problems because the issues have no formalized path for upward communication within the workplace. A formal grievance procedure provides a valuable communication tool for employers, whether a union is present or not. Grievance procedures, including hearing processes, may exist in jurisdictions in noncollective bargaining states through labor relations policies, ordinances, or state law. Grievance and interest arbitration are customarily limited to collective bargaining environments.

Grievance procedures typically provide four or five steps through which the grievance may proceed. In procedures that are negotiated between the employer and employee representatives and placed into the collective bargaining agreement, the final step is binding arbitration. In procedures designed by the employer where no collective bargaining contract exists, the final step is usually review by the chief administrative officer or employer.

A typical grievance procedure consists of the following steps:

- **Step One**—The employer discusses his/her grievance with his/her immediate supervisor. The grievance may or may not be in writing, and the union steward may accompany the employee or the employee may be alone.
- **Step Two**—The union steward, usually accompanied by the grievant, discusses the grievance with the supervisor’s manager, employee relations specialist, or human resources manager.

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- **Step Three**—The union representative, accompanied by the grievant, discusses the issue with the senior management level of the organization.
- **Step Four**—The representative of the national union and the organization’s CEO designee, or the organization’s employee relations officer will review and attempt to resolve the grievance. The grievant is usually present at this meeting.
- **Step Five**—The grievance is presented to an arbitrator or other designated impartial third party for a final decision and resolution. In some jurisdictions, employees, including unionized employees, can also take their case to a civil service or merit system hearing board.

The human resource function is typically heavily involved in working with and preparing operational staff to handle grievances. Human resource staff typically will:

- Assist in designing the grievance procedure;
- Provide training for supervisors and managers to prepare them to perform their responsibilities in examining and, where possible and appropriate, resolving grievances;
- Assist in preparing grievance cases for presentation at arbitration;
- May have the responsibility to negotiate settlements of grievances;
- Keep track of grievance rates and monitor the effect of grievance activity on the organization; and
- May advise management on how to respond at each stage of the grievance process and on what to do when problems arise.

When a grievance is filed, it is important and necessary for both sides to conduct an investigation into the allegations presented by the grievant. Investigations should include the identification of and interviews with witnesses, if appropriate. The process should gather and preserve necessary documents and any physical evidence relevant to the complaint. An example of the investigative function in a grievance involving an employee who complains that he was passed over for an overtime opportunity. Data needed to properly examine the situation could include:

- Contractual obligations dealing with the assignment of overtime;
- A description of the overtime assignment in question, such as number of hours, type of work involved, time of day of the assignment, etc.;
- Documentation of the process used by the supervisor who assigned the overtime Documentation of the process used by;
- If phone calls were made in the process of assigning overtime, records of the calls should be maintained; and

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- Overtime lists, seniority lists, and employee availability for the date and time of the assignment should be gathered and preserved.

Once a grievance is filed, the investigatory information gathering should be accomplished as soon as possible to ensure that records and recollections are accurate and fresh. This documentation should be preserved for the entire duration of the grievance process. The information and documentation can be an effective tool for resolving grievances early. If the grievance is not resolved early and the matter proceeds to arbitration, the data obtained early in the process will form the basis of the presentation used at the arbitration hearing.

Although timely and accurate gathering of information relevant to any grievance is always important, it is particularly so when the grievance concerns a disciplinary action taken by the employer. This issue will be dealt with in more detail in Part Nine of this module.

Although the grievance procedure is a valuable tool for fostering upward communication between employees, their representatives, and the employer, it only becomes operative and useful after an employee or employees become dissatisfied with some aspect of their work environment and/or with their supervisor or manager. Other tools and mechanisms are available that foster labor/management cooperation, which often prevents situations from arising and potentially eliminate the need for a grievance. Some examples of proactive programs and concepts that can lead to a more productive, satisfied, and efficient workforce include:

- Joint labor/management committees at the worksite;
- Employee involvement teams; and
- Interactive training programs in which managers and supervisors and employees interact and role-play each other's responsibilities, such as in interest-based bargaining.

Human resource professionals can play a major role in seeking out, evaluating, and presenting such proactive programs with the goal of reducing dissatisfaction in the organization's workforce.

The grievance process works best if both parties make available to each other all of the facts at their disposal that are relevant to the issue being grieved. Such disclosure should precede an open discussion of each party's position on the issue and should identify the specific provision(s) of the agreement or contract in dispute. This information should be exchanged at the earliest possible opportunity in the grievance process.

The goals of both parties throughout the steps of the grievance process should be to solve the problem presented and resolve the grievance to the satisfaction of both parties, as opposed to winning a contest. When both sides adopt this mindset, the grievance process is often extremely successful in resolving a majority of grievances presented. This does not mean that some percentage of cases will not involve issues for which joint solutions are not easily attainable. However, honest

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and sincere discussions about the interests of the parties, rather than personalizing the dispute, can result in a long-term relationship that encourages a positive employer/employee climate at all levels of the organization.

If the leadership of the employer's organization has adopted this approach, it is often the function of the human resources division to guide its implementation. Often managers and supervisors may see the grievance process and, more specifically, the filing of a grievance in their area of responsibility as an annoyance or, worse, a threat. They may perceive their function as supervisors as exclusively relating to achieving the goals of the organization, and they are not often comfortable with the role of adjudicator, conciliator, or defender of policy. Training and orientation are necessary to communicate to line staff that the resolution of complaints and grievances is a part of their responsibility and is related to the development of a productive workforce.

Supervisors can often resolve a grievance in the early stages of the procedure simply by being an attentive listener to the complaining employee. Sometimes, there is no further action necessary; in other cases, a solution can be achieved by making a small adjustment or correcting a misunderstanding. However, supervisors may have limited authority to resolve grievances because of organizational concerns regarding uniformity of application or the setting of precedents. This limitation should be clearly communicated to all line staff, and access to expert advice should be easily available so that timely answers to labor/management questions can be achieved.

Grievances may be resolved or settled at any step of the grievance process. Generally, settling a grievance means that the dispute that gave rise to the grievance is no longer an issue between the parties. Grievances filed are usually settled in one of three ways:

- The moving party withdraws the grievance, usually without prejudice, which means that the grievant does not concede that the allegations made in the grievance are not in violation of the agreement but is declining to pursue the grievance at this time.
- The employer agrees with the contention presented in the grievance and grants the remedy requested. This would usually set a precedent for future identical grievances.
- Both the employer and the employee representative agree to resolve the grievance through some sort of compromise. Such a solution may or may not set a precedent. Parties often formalize settlements in writing and may include language in the settlement agreement which states that both parties agree that the actions taken will not set a precedent for any future similar grievances.

For settlements that are the product of mutual agreement between the parties, the negotiators on both sides must possess the authority to commit to and sign such an agreement. Both designate who has such authority and the parties' limitations at each level of the grievance process.

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As stated earlier, many grievances are settled or resolved at the first level of the grievance process. To protect both sides, grievance articles in contracts often specify that settlements made at this level shall not set precedent for future grievances. Other than the early levels of the grievance process, the majority of formal settlements are reached at the grievance step immediately preceding the submission of the grievance to an arbitrator for a binding decision.

Settlements are sometimes made between parties in the grievance process because both parties have made an evaluation of the risk to their organizations that a neutral third party may rule in favor of the opposing party and thus create a precedent for future actions that cannot easily be overcome. Both recognize that a compromise made between the parties is preferable to the decision of a neutral observer. In disciplinary cases, the employer may be influenced by the actions taken by a dismissed employee, such as seeking help with alcohol addiction or the resolution of family issues. A compromise reinstatement with some restrictions may be offered. Most disciplinary grievances are settled without precedent.

Settlements may be actively pursued and accomplished by both sides to avoid the cost in money and staff time that could occur if the grievance is pursued through arbitration. This is particularly true if the resolution does not present an unreasonable cost and the grievance can be settled without precedent. It must be noted here that it is unwise to settle a grievance that, in the assessment of the negotiator, has no merit simply to avoid the cost of pursuing an award. It is more likely in most cases that the merits of the dispute are objectively unclear and that an adverse decision from a neutral third party could result.

Grievance mediation is a process in which a neutral third party who is qualified and knowledgeable about the industry is inserted by mutual request of the parties into the discussion process between the labor and management representatives involved in the grievance process. The neutral mediator has no authority to compel the parties to reach an agreement or impose a solution. Grievance mediation is normally inserted into the grievance procedure after the final step of the process prior to arbitration. In this process, the mediator uses his/her expertise and experience in labor relations to assist the parties in their pursuit of a solution, sometimes issuing nonbinding recommendations for the parties to consider for settlement. The Federal Mediation and Conciliation Service offers this service when requested, and many state bureaus of mediation make mediators available to both public and private sector clients.

The mediation process has proven to be successful by increasing grievance settlements and reducing arbitration requests in situations where labor and management have committed to the effort.

Two types of arbitration used in collective bargaining are interest arbitration and contract arbitration. Both are processes that result in decisions that are legally binding on the parties who submit disputes to these procedures:

- **Interest arbitration** involves the resolution of disputes over unresolved issues or proposals in the negotiation of collective bargaining agreements. An award is issued, usually by a panel of arbitrators, which establishes the final outcome on

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each issue and, in effect, determines the substance of the collective bargaining agreement that is in force between the parties and with which they must comply. This form of arbitration was discussed earlier with in Part Five of this module.

- **Binding arbitration** is the method used for deciding the final outcome of disputes between the parties of a collective bargaining agreement about issues that are governed by that agreement—essentially issues surrounding the interpretation of the contract language. Binding arbitration is usually the final step of the grievance procedures established in each contract. In some jurisdictions, the arbitration of grievances or disputes arising out of the interpretation of the contract is required by law. In other locations, it is voluntary. Arbitration has several advantages over the litigation of disputes between employee organizations and employers.
 - It saves time. Arbitrators are more available than courts. Also, since arbitration is often voluntary, advocates for both sides have an interest in expediting the scheduling of hearings.
 - It is less expensive than pursuing disputes through the legal system.
 - It can be accomplished by neutrals with specific expertise in the functions and operations of the employer and the jobs of the employees, and who are likely to be jointly selected by the parties to hear and decide the case.
 - The U.S. Supreme Court has acknowledged that arbitration is superior to litigation for resolving disputes under collective bargaining agreements⁷ and has supported the authority of arbitration awards “so long as it draws its essence from the collective bargaining agreement.”⁸

Once a grievance filed under a collective bargaining agreement reaches the arbitration step, either party may submit the unresolved grievance to arbitration. Thereafter, the parties together must select an arbitrator to hear the case. In cases where the parties are unable to agree upon the selection of an arbitrator, the parties can request a list of arbitrators from an agency or entity, usually agreed upon in advance or mandated by legislation. Lists of qualified arbitrators are maintained and distributed by governmental agencies such as the FMCS and the state bureaus of mediation or public employee relations boards. Private organizations such as the American Arbitration Association also provide lists of arbitrators to parties in need of such services.

The list sent to the parties usually contains seven names of qualified arbitrators. If the parties cannot mutually agree to select an arbitrator on the the list, names are struck from the list by both parties, each alternately striking a name until only one remains.

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⁷ *Steelworkers v. Warrior & Gulf Navigation Co.*, 80 S.Ct. 1347, 46 LRRM 2416, 34 LA 561 (1960).

⁸ *Steelworkers v. Enterprise Wheel and Car Corp.*, 80 S.Ct. 1358, 46 LRRM 2423, 34 LA 569 (1960).

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After the selection of the arbitrator, a mutually convenient location, date, and time for an arbitration hearing is scheduled. Prior to the hearing, both sides will review the documentation and information regarding the grievance and, if necessary, have the arbitrator subpoena witnesses.

At the hearing, both sides are given a full opportunity to present evidence and documentation in support of their positions, as well as to examine and cross-examine any witnesses. The witnesses are usually sworn to an oath to present truthful testimony. Transcripts may be taken and posthearing briefs may be submitted at the discretion of the parties.

Although the arbitration may have some of the formalities of a court hearing, it is often less formal. The arbitrator generally errs on the side of hearing as much testimony as possible without ignoring the standard rules of evidence. When the participants have completed their presentations, the hearing will be closed.

After receiving any additional information, such as posthearing briefs, the arbitrator will begin his/her deliberations. Decisions are commonly returned within sixty days after the receipt of all information. In some complicated issues, which require extensive research, decisions may take longer.

As a matter of law, arbitration decisions may be appealed to the courts, but such appeals are rare. This is because the grounds for overturning arbitration decisions are narrow. The appellant must show that the arbitration award disregards the collective bargaining agreement and does not draw its essence from the contract, that the award orders conduct that is illegal, or that the arbitrator lacked jurisdiction over the case.

As a general policy, many employers and employee organizations are reluctant to appeal arbitration awards. This is not only because it is extremely costly with a low chance of favorable outcome, but also because adopting such a practice on a regular basis defeats the purpose of the agreed-upon grievance resolution process. This type of action could threaten to damage whatever goodwill that has been achieved between the parties due to their willingness to pursue a peaceful method of grievance resolution and it is very often viewed as a bad faith action taken by one bargaining partner.

In the federal state, and local jurisdictions, together with industries, an increased emphasis is being placed on the use of alternative dispute resolution (ADR). This process employs consensus decision-making in resolving disputes between management and labor. The process is often successful in improving labor/management relationships.

ADR is an informal process that allows parties to discuss and develop their interests in order to resolve the underlying issues and problems in their relationship. The discussion is facilitated by a neutral third party who is skilled in guiding the parties to ensure a productive dialogue. The system encourages everyone at the table to take an active part in the decision-making process. Solutions are adopted by consensus and reflect an understanding of the interests of all parties. As a result of this approach, the solutions obtained are tailored to the needs of the participants.

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The ADR process encourages creative, innovative solutions that move away from the win-lose dynamics of traditional, position-based, adversarial proceedings. It has the advantage of resolving disputes while preserving good relationships and helps to create a productive work environment.

The NLRA spells out activities that violate the law because they are defined as unfair labor practices. State legislation pertaining to collective bargaining laws often uses the same or similar language to define unfair labor practices. The list of these practices includes:

- It shall be an unfair labor practice for the employer:
 - To interfere with, restrain, or coerce employees in the exercise of their right to self organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing or the right to refrain from such activity;
 - To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to;
 - To discriminate in regard to hire or tenure of employment or any term or condition of employment; to encourage or discourage membership in any labor organization;
 - To discharge or otherwise discriminate against any employee because he has filed charges or given testimony under this act;
 - To refuse to bargain collectively with the exclusive representative of his employees.
- It shall be an unfair labor practice for a labor organization or its agents:
 - To restrain or coerce employees in the exercise of their rights in the choice of their bargaining representative, or to restrain or coerce an employee in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances;
 - To cause an employer to discriminate against an employee;
 - To refuse to bargain collectively with the employer of the employees it represents;
 - To engage in secondary boycott;
 - To require of employees it represents the payment of excessive dues;
 - To engage in featherbedding, e.g., requiring an employer to pay for unneeded workers;

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- To enter into hot cargo agreements, e.g., refusing to handle goods from an anti-union employer;
- To strike or picket a health care establishment without giving the required notice.

Exercise

1. Describe any grievance or employee appeals processes typically used in your organization. Do you feel that they are effective in satisfactorily resolving employee issues? If not, why not?
2. What causes workplace grievances, and how can they be prevented?

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Part Nine: Discipline

In 1975, the U.S. Supreme Court issued its *Weingarten* decision.⁹ In that decision, the Supreme Court upheld the NLRB position, which had been rejected by the U.S. Court of Appeals, that individual employees have the right under the NLRA to refuse to submit without representation to an investigatory interview that the employee reasonably believes may result in disciplinary action.

The Court elaborated on the “contours and limits” of those rights as described by the NLRB in its award:

- **First**, the right inheres in Section 7’s guarantee of the right of the employees to act in concert for mutual aid and protection.
- **Second**, the right arises only in situations where the employee requests representation. In other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.
- **Third**, the employee’s right to request representation as a condition of participating in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. The Board “would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview.”
- **Fourth**, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow Union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one.
- **Fifth**, the employer has no duty to bargain with the union representative at an investigatory interview. “The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee’s own account of the matter under investigation.”¹⁰

In subsequent litigation, the NLRB ruled “an employer has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of, and acting upon, a previously made disciplinary decision.”¹¹ If an employer in such a meeting engages in any conduct beyond merely informing the

⁹ *NLRB v. J. Weingarten, Inc.*, 95 S.Ct. 959, 963, 965, 88 LRRM 2689 (1975).

¹⁰ *Ibid.*

¹¹ *Baton Rouge Water Works Co.*, 246 NLRB 995, 103 LRRM 1056, 1058 (1980).

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employee of a previously made disciplinary decision, the NLRB has pointed out that such actions may activate the protection and possible remedies under *Weingarten*.

In another ruling,¹² the board reversed its previous holding that *Weingarten* rights are applicable to nonunion employees. Consequently, the *Weingarten* decision may not be applicable in organizations or jurisdictions that do not allow collective bargaining or in other noncollective bargaining environments. Some employers still choose to follow the tenets of the *Weingarten* decision because of the appearance of openness and fairness it provides.

In the years since the Supreme Court ruling established *Weingarten* rights, many employers have found it prudent and useful to their investigations to allow, if not to encourage, the presence of union representatives at investigatory interviews. It provides a sense of integrity to the investigatory process and dispels doubt about the fairness of the investigation in the event the disciplinary action taken is challenged through grievance and arbitration procedures.

It is well established that the employer has the right to apply reasonable rules of conduct to be followed by the employees of the organization. Many types of misconduct need not be put in written policy directives. In the context of employee discipline for, for instance, fighting, theft, intoxication, or falling asleep on the job are obvious behaviors that employees would understand might lead to the loss of their job. Other employer rules may not be as evident. Such rules must be communicated to each employee upon their hire, and this is typically accomplished through the provision of an employee handbook as part of the onboarding process. These books also contain benefits information and in nonunion environments may contain information about bringing grievances or complaints to management's attention. When new rules or policies are adopted that change employee work conditions and/or responsibilities, these new directives need to be communicated to all employees. Records need to be retained noting the date and circumstances in which the information was disseminated to each employee. Employees should sign for handbooks and for the receipt of written policy changes.

Supervisors and managers need to be trained regarding the importance of clearly communicating not only the production goals of the organization, but also the expectations set by management for employee conduct and responsibilities at the worksite.

In discussing the grievances and arbitrations (refer to Part Five and Part Eight of this module), we explained the advantage of grievance procedures for fostering upward communication and as necessary and helpful for maintaining operational efficiency. Likewise, the clear and effective communication and dissemination of rules and policies to employees are necessary and appropriate processes that protect the organization and employees by setting definitive expectations, which may become the basic justification for disciplinary action. Some fundamental elements that should be considered are:

¹² *E.I. Dupont de Nemours & Co.*, 289 NLRB 627, 128 LRRM 1233 (1988). Also see *Sears, Roebuck & Co.*, 274 NLRB 230, 118 LRRM 1329 (1985) in which one board member, noting that union representatives have certain knowledge, skills and experience in investigatory interviews, found that there was no equivalent quality of representation in nonunion settings which would justify an extension of *Weingarten* rights.

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- Rules should be reasonably related to the efficient, safe, and orderly accomplishment of the organization’s goals, objectives, and production.
- The rules should be communicated in writing with an explanation by management officials or their designee(s). Human resources may play a role by conducting or coordinating orientation sessions for new employees.
- Records should be maintained, documenting the dissemination of rules to each employee.
- If an existing rule or policy has not been enforced by management in the past and the organization has decided to begin enforcing the rule such as a dress code, no smoking rule, etc., the rule and its new importance must be recommunicated to employees before employees are disciplined for violations.

Most grievances arise out of the imposition of discipline, and it is important that we review the use of grievance procedures as they relate to discipline. Progressive discipline is defined as a system of imposing disciplinary actions in a series of steps when an employee commits and then later repeats the same or similar rule violation. The typical stages of progressive discipline in the workplace are:

- First offense—Counseling or a verbal warning/reprimand
- Second offense—Written warning/reprimand
- Third offense—Suspension or demotion
- Fourth offense—Discharge from employment

The system of responses to undesirable behavior that becomes more severe after each repeat offense will depend on a variety of factors that include the severity and potential consequences of the action, the previous work record of the employee, and the time between infractions.

Many collective bargaining agreements prescribe particular discipline for each infraction in a particular area. This language is often applied for infractions related to absenteeism and lateness. Such language commonly expunges the disciplinary action from the employee’s record after a period of time worked with no similar infractions.

In the United States, criminal prosecutions and civil cases are governed by guarantees of procedural rights under the Bill of Rights. Most of these rights have been incorporated under the 14th Amendment to the U.S. Constitution. Procedural due process has been broadly construed by the courts to protect individuals by guaranteeing that statutes, regulations, and administrative actions must ensure that no one is deprived of life, liberty or property without a fair opportunity to affect the judgment or result. Due process is essentially based on the concept of fundamental fairness. In the courts, providing fundamental fairness entails guaranteeing an individual’s right to be adequately notified of charges or proceedings, the opportunity to be heard at hearings, and making sure the final decision in the

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matter is impartial. Put simply, where an individual is facing a deprivation of life, liberty, or property, procedural due process mandates that he/she be entitled to adequate notice, a hearing, and a neutral judge.

In the case of employee discipline issued by management in a work setting, the consideration of workplace due process as a component of just cause is widely accepted by arbitrators. Under due process, employers must meet certain requirements before arbitrators will uphold the discipline or discharge against the employee. These due process tests may include:

- Notice of rules and penalties;
- Conducting a reasonable and fair investigation;
- Giving the accused employee a right to be heard before the disciplinary action is imposed;
- Giving the accused employee a right to question his/her accuser.

Equal treatment as applied to the concept of disciplinary action imposed on an employee in a work environment means that the employer's work rules and penalties for violations are applied evenhandedly and without discrimination. Generally, employees who commit the same offense should receive the same penalty. However, different penalties for the same offense may be appropriate if, after a review of each employee's work history and prior disciplinary record, it is shown that a certain employee has a significantly better work record than another.

Every employer is eventually forced at some time to consider taking a disciplinary action against an employee or group of employees. Every alleged offense requires that an investigation be made prior to the decision to discipline.

For some offenses, an **investigation** may be adequately conducted in less than a day; for others, weeks or even months may be necessary before all facts are gathered and conclusions recommended. Whether investigations are conducted in a short period of time or a longer period, the basic elements of the process are the same:

- The investigation begins when the employer or his/her designee becomes aware that an incident may have occurred that could lead to disciplinary action.
- Management is responsible for designating an individual(s) to conduct an investigation as quickly as possible. In simple cases, such as tardiness or unauthorized absenteeism, the investigator may be the supervisor or the department manager. In larger cases, such as theft or vandalism, it may involve the HR staff and/or outside investigators such as auditors and police. Many investigations are coordinated by the human resources staff.
- The investigator should immediately begin to gather all relevant facts surrounding the incident. This may be very simple. For example, in the case of an employee who arrives at work an hour late, the supervisor may ask

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him/her to explain the reason for his/her tardiness. In the case of theft or fighting, employee witnesses and participants need to be interviewed, signed statements taken, and documentary evidence gathered.

- If it appears that a disciplinary action may have occurred, the employee(s) to be charged needs to be confronted with the charges and asked to relate their side of the incident before any final decision is made regarding discipline. This is a meeting in which *Weingarten* rights apply.
- The evidence and documentation should be reviewed. If it is decided that discipline will be issued, the affected employee must be notified.

Investigations should be conducted in a fair and impartial manner. The investigator cannot be the accuser or a witness to the incident. The investigator should be aware of due process requirements and should have access to advice from experts in the disciplinary procedures and labor relations responsibilities of the organization.

Accusations against employees need to be carefully considered to see if they are supported by facts, and witness interviews need to be documented. The investigator must strive to ensure that both sides of the incident are researched and fairly presented. Circumstantial evidence is not considered conclusive when judging the facts. Personality factors recognized as such and unfounded theories or assumptions should be eliminated from final consideration.

The definition of **just cause** has been referenced in many arbitration awards, and some collective bargaining agreements codify the concept in the language of their contract. Although the versions often vary in the words used to describe the concept, the following famous list of questions outlined by arbitrator Carroll R. Daugherty¹³ is frequently used in determining just cause and is commonly accepted as a good representative explanation of the standard:

- Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
- Was the company's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company's business?
- Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
- Was the company's investigation conducted fairly and objectively?
- At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
- Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

¹³ *Grief Bros. Cooperage Corp.*, 42 LA 555

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- Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's offense and (b) the record of the employee in his service with the company?

Answering no to any of the above questions will result in a conclusion that just cause did not exist for the action taken and in the grievance being sustained by the arbitrator.

Documentation is the completion of paperwork and information that may be relevant to a particular employer action. In this section, we are focusing on documentation related to disciplinary actions. Each disciplinary action contains a unique set of facts. Therefore, documentation necessary as background or evidence will vary in each disciplinary case.

The following is a list of various types of documents that should be gathered and maintained as part of the disciplinary file:

- Employee handbook outlining work rules and records that establish the date and circumstances that the disciplined employee received and reviewed the work rules;
- Specific email or posting records of specific relevant policies, together with the record of receipt by the disciplined employee;
- Employee file containing records of performance evaluations, commendations, and/or prior disciplinary actions with any other relevant work history, such as date of hire, etc.;
- All documents gathered during the investigation of the incident leading to discipline, such as witness statements, employee statements, photographs, emails related to the offense, etc.;
- All records of investigation and related correspondence; and
- Records of other disciplinary actions taken with other employees for the same or similar offenses.

This list is by no means exhaustive. For any particular case, the documentation record might contain more items or fewer.

It is a common function of the human resources staff in many organizations to coordinate and organize the gathering of such material. A well-documented record related to any disciplinary action will facilitate preparation for any adjudication of the matter, and, perhaps more importantly, will provide information for labor and management review during the grievance process that will minimize the possibility that further appeals will be pursued.

In organizations in which a collective bargaining relationship does not exist between the parties, employees are not protected from inappropriate disciplinary actions by a just cause provision in the contract. These employees may find themselves

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in an employment-at-will arrangement with their employers. Employment at will is a common law doctrine that states that employers have the right to hire, fire, demote, or promote whomever they choose unless there is a law or contract which supercedes that right.

Over the past 30 years, numerous state courts have addressed the fairness of an employer's decision to fire an employee without just cause or due process. In general, the courts have recognized three rationales for hearing employment at will cases:

- **Public policy exception**—This exception to employment at will holds that an employee can sue if he or she was fired for a reason that violates public policy. For example, if an employee refused to commit perjury and was fired, he/she can sue the employer.
- **Implied contract exception**—This exception to employment at will holds that an employee should not be fired as long as he or she does the job. Long service, promises of continued employment, and lack of criticism of job performance imply continuing employment.
- **Good faith and fair dealing exception**—This exception to employment at will suggests that a covenant of good faith and fair dealing exists between the employer and the at-will employee. If the employer breaks this covenant by unreasonable behavior, the employee may seek legal recourse.

Nearly all states have enacted statutes to limit an employer's right to discharge employees. National restrictions include prohibitions against the use of race, age, sex, national origin, religion, and disabilities as bases for termination. Restrictions on other areas vary from state to state.¹⁴

Organizations that employ at-will employees often provide complaint procedures and/or employer designed grievance processes to provide for a due process element in the review of issues related to discipline. Other mechanisms may be made available to enhance communication about employee performance and potential disciplinary issues including an open door policy that provides for an opportunity to speak to his/her supervisor, manager, or a human resources representative.

Some employers provide a forum for appeal of disciplinary actions to an internal committee of co-employees who are empowered to review complaints and make recommendations. Another system to help ensure fairness in resolving employee complaints provides for the use of an ombudsman, who is an individual outside of the normal chain of command who mediate differences between employees and management in order to provide solutions to concerns.

Peer review panels, ombudsmen, and employer-established grievance or complaint systems all can have a positive affect on employee job satisfaction. If employees view their employers' efforts to provide them with a fair and effective procedure to redress their grievances, they are less likely to seek other employment or

¹⁴ Robert J. Lanza and Martin Warren, "United States: Employment at Will Prevails Despite Exceptions," Legal Report SHRM, October/November 2005, 1-8.

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commence litigation against the organization. Further, if legal action is pursued, the organization's position in that process will increase the likelihood that its position will prevail.

If organizations provide mechanisms that are perceived by employees to provide a fair and responsible avenue for the resolution of their complaints, the employees will respond with a positive attitude toward their employer.

In the public sector, some employees are not represented by organizations that have the legal right to bargain collectively with their employers. Most of these employees may, however, avail themselves of the protections under a local or state civil service act that covers their employment. Under civil service acts at the federal, state, and local level, administrative procedures allow employees to pursue wrongful disciplinary actions through a civil service commission or merit hearing board. These bodies typically exercise broad legal powers to compel compliance with its awards. The civil service commission or merit hearing board's hearings provide due process mechanisms and just cause protection for these employees.

For those public employees not covered by civil service systems, many states and other public jurisdictions provide an employer-run grievance process. In the case of civil service employees also covered by collective bargaining agreements, most contracts provide that once the employee has pursued his/her grievance through the civil service procedure, action taken through the collective bargaining agreement will cease, thus preventing the possibility of two potentially conflicting binding decisions.

In both the private sector and the public sector, employers are increasingly cognizant of their responsibilities and obligations to provide for basic just cause and due process elements in their approach to the administration of disciplinary actions and forums for employees to seek redress.

Exercise

1. Describe the progressive discipline policy within your organization.
2. Do you feel that managers and supervisors in your organization use the discipline process effectively?

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Module Seven: Equal Employment Opportunity and Diversity

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Reading Assignment for Equal Employment Opportunity and Diversity Module

Chapter Three, *Human Resource Management*, Fifteenth Edition, by Robert L. Mathis, John H. Jackson, Sean R. Valentine, and Patricia A. Meglich

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Part One: Major Federal and State EEO Laws, Cases, and Regulations

With all the difficulty and complexity inherent in running a public or private organization, why be concerned about workforce diversity? As long as management believes their hiring practices appear reasonable, what could go wrong?

The simple answer is a great deal can go wrong. If a company or organization utilizes discriminatory practices, it may be in violation of a number of federal and state laws prohibiting employment discrimination.

The Federal Equal Employment Opportunity Commission (EEOC) outlines the extent of its enforcement capabilities on its website:

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered.

The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits.

Employment discrimination takes different forms. Employment discrimination is illegal and generally results when a person is treated differently (usually less favorably) because of his or her race, color, religion, sex, or national origin. In addition, employment discrimination can result when a neutral policy or practice has an adverse impact on the members of any race, sex, or ethnic group and the policy or practice is not job-related or required by business necessity.

Something equally puzzling for many employers is the concept of having a diverse workforce. What does diversity mean in this context? As Kim Abreu stated in her December 2014 *Entrepreneur* article "*The Myriad Benefits of Diversity in the Workplace*,"

In the age of technology, the world has become smaller. Smartphones and other mobile devices make it possible to interact with customers, vendors, or employees on the other side of the world any time of day or night. As businesses and individual communities have become more globalized, most companies are operating within a diverse marketplace.

You may be doing business with customers and vendors around the world, but even if you're not, chances are that the demographics in your neighborhood are also becoming more diverse.

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That's why it's more important than ever before to build a diverse staff for your business: Recruiting and retaining a diverse, inclusive group of employees lets your company reflect the world around you and makes your team better able to develop fresh ideas that will meet the needs of the whole marketplace.

The following is a brief description of the major laws with which public and private organizations must be in compliance:

- Title VII of the *Civil Rights Act of 1964* (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin;
- *Age Discrimination in Employment Act of 1967* (ADEA), which protects individuals who are 40 years of age or older;
- Title I and Title V of the *Americans with Disabilities Act of 1990* (ADA) and the *Americans with Disabilities Act Amendments Act of 2008* (ADAAA), which prohibit employment discrimination against qualified individuals with disabilities in the private sector and state and local governments;
- *Equal Pay Act of 1963* (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;
- Sections 501 and 505 of the *Rehabilitation Act of 1973*, which prohibit discrimination against qualified individuals with disabilities who work in the federal government;
- *Immigration Reform and Control Act of 1986*; and
- *Civil Rights Act of 1991*, which, among other things, provides monetary damages in cases of intentional employment discrimination.

Title VII of the *Civil Rights Act of 1964* “makes it unlawful for an employer to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his/her compensation, terms, conditions, or privileges of employment, because of an individual’s race, color, religion, sex, or national origin. This covers hiring, firing, promotions, and all workplace conduct. There are a number of requirements that must be met in order to properly file an appeal:

- **Filing Requirements and Limitations Period**—In general, an individual must prefile a charge with the EEOC within 180 days after the alleged unlawful practice occurred unless he or she has first filed a charge with an appropriate state agency, in which case the complainant has the earlier of 300 days from the date of the alleged violation or 30 days ‘after receiving notice that the state or local agency has terminated the proceedings under the state or local law.’ Notwithstanding the above, the EEOC regulations allow 300 days for filing a complaint in a state where the state or local fair employment practices agency has subject matter jurisdiction over the claims, regardless of whether the claimant has first filed a claim with the state agency. Unless excused by the court, an action must be filed within 90 days after receipt of a right-to-sue letter.

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- **Jurisdiction**—As reported by the Employment Law Information Network (www.ELinfonet.com), “An employer (a person engaged in an industry affecting commerce) must have fifteen or more employees for each working day in each of twenty or more calendar weeks (in the current or preceding calendar year) to be covered by Title VII.”

We discussed Title VII in some detail in Module One, but following is a brief summary highlights how it fits into the overall fabric of EEO and diversity. Before the *Civil Rights Act of 1964*, an employer could reject a job applicant because of his or her race, religion, sex, or national origin. An employer could turn down an employee for a promotion, decide not to give him or her a particular assignment, or in some other way discriminate against that person because he or she was black or white, Jewish, Muslim, or Christian, a man or a woman, or Italian, German or Swedish, and it would all be legal.

When **Title VII of the *Civil Rights Act of 1964*** was passed, employment discrimination based upon one’s race, religion, sex, national origin, and color became illegal. This law protects employees of all private and public employers as well as job applicants. All companies and organizations with 15 or more employees are required to adhere to the rules set forth by Title VII. The law also established the Equal Employment Opportunity Commission (EEOC) which continues to enforce this and other laws that protect against employment discrimination.

As indicated earlier, Title VII protects both employees and job applicants. Here are some ways in which it does that, according to the EEOC:

- An organization cannot make hiring decisions based on an applicant’s color, race, religion, sex, or national origin. An organization cannot discriminate based on these factors when recruiting job candidates, advertising for a job, or testing applicants.
- An organization cannot decide whether or not to promote a worker based on the employee’s color, race, religion, sex, or national origin. The organization cannot use this information when classifying or assigning workers.
- An organization cannot use an employee’s race, color, religion, sex, or national origin to determine his or her pay, fringe benefits, retirement plans, or disability leave.
- An organization cannot harass an employee because of their race, color, religion, sex, or national origin.

In 1978, the *Pregnancy Discrimination Act* amended Title VII, and made it illegal to discriminate against pregnant women in matters related to employment.

The *Civil Rights Act of 1991* made major changes in the federal laws against employment discrimination enforced by EEOC. Enacted in part to reverse several Supreme Court decisions that limited the rights of persons protected by these laws, the Act also provides additional protections. The Act authorizes compensatory and punitive damages in cases of intentional discrimination, provides for obtaining

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attorney's fees, and allows for the possibility of jury trials. It also directs the EEOC to expand its technical assistance and outreach activities.

Since it is not as widely known as its predecessor, the following provisions from the text of the *Civil Rights Act of 1991*, as contained on the EEOC's website, outline Congress' intent and rationale in modifying and strengthening the *Civil Rights Act of 1964*:

To amend the *Civil Rights Act of 1964* to strengthen and improve federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, This Act may be cited as the "*Civil Rights Act of 1991*."

The Congress hereby finds and declares that:

- (1) additional remedies under federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;
- (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of federal civil rights protections; and
- (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

The purposes of this Act are:

- (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
- (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989);
- (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the *Civil Rights Act of 1964* (42 U.S.C. 2000e et seq.); and
- (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Regarding the **The Age Discrimination in Employment Act**, an EEOC website states that the ADEA

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prohibits any employer from refusing to hire, discharge, or otherwise discriminate against any individual because of age. The Act covers compensation, terms, conditions, and other privileges of employment including health care benefits. This Act specifically prohibits age-based discrimination against employees who are at least 40 years of age. The purpose of the Act is to promote the employment of older persons and to prohibit any arbitrary age discrimination in employment.

The ADEA's broad ban against age discrimination also specifically prohibits:

- Statements or specifications in job notices or advertisements of age preference and limitations. An age limit may only be specified in the rare circumstance where age has been proven to be a bona fide occupational qualification;
- Discrimination on the basis of age by apprenticeship programs, including joint labor-management apprenticeship programs; and
- Denial of benefits to older employees. An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

Title I of the Americans with Disabilities Act of 1990 (ADA), covers employment. Since 1994, it has required that employers of more than 15 people must make reasonable accommodations that allow a qualified job applicant with a disability to complete the application process or a disabled employee to carry out the duties of his or her job. According to the ADA, “an individual is considered to have a disability if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.”

It is illegal to require a job candidate to take a medical examination prior to a job offer being made. Nor can the employer try to ascertain whether a job candidate has a disability. Therefore, it is sometimes up to the employee to decide whether to disclose his or her disability to the employer. The choice is truly the individual's in the case of invisible disabilities. Invisible disabilities are ones which aren't readily obvious to anyone else but may keep the individual from performing certain essential job duties. An example may be a chronic illness like arthritis or a mental illness. While one may have reasons for keeping a disability a secret from an employer, revealing it may require the employer to provide certain accommodations that will allow a worker to perform his or her job.

“The ADA prohibits discrimination on the basis of disability in all employment practices. It is necessary to understand several important ADA definitions to know who is protected by the law and what constitutes illegal discrimination.” This information is from the EEOC website Laws, Questions and Answers:

- **Individual with a Disability**—An individual with a disability under the ADA is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded

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as having such an impairment. Major life activities are activities that an average person can perform with little or no difficulty such as walking, breathing, seeing, hearing, speaking, learning, and working.

- **Qualified Individual with a Disability**—A qualified employee or applicant with a disability is someone who satisfies skill, experience, education, and other job-related requirements of the position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of that position.
- **Reasonable Accommodation**—Reasonable accommodation may include, but is not limited to, making existing facilities used by employees readily accessible to and usable by persons with disabilities; job restructuring; modification of work schedules; providing additional unpaid leave; reassignment to a vacant position; acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials, or policies; and providing qualified readers or interpreters. Reasonable accommodation may be necessary to apply for a job, to perform job functions, or to enjoy the benefits and privileges of employment that are enjoyed by people without disabilities. An employer is not required to lower production standards to make an accommodation. An employer generally is not obligated to provide personal use items such as eyeglasses or hearing aids.
- **Undue Hardship**—An employer is required to make a reasonable accommodation to a qualified individual with a disability unless doing so would impose an undue hardship on the operation of the employer’s business. Undue hardship means an action that requires significant difficulty or expense when considered in relation to factors such as a business’ size, financial resources, and the nature and structure of its operation.
- **Prohibited Inquiries and Examinations**—Before making an offer of employment, an employer may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in the same job category. Medical examinations of employees must be job-related and consistent with business necessity.
- **Drug and Alcohol Use**—Employees and applicants currently engaging in the illegal use of drugs are not protected by the ADA when an employer acts on the basis of such use. Tests for illegal use of drugs are not considered medical examinations and, therefore, are not subject to the ADA’s restrictions on medical examinations. Employers may hold individuals who are illegally using drugs and individuals with alcoholism to the same standards of performance as other employees.

On September 25, 2008, the president signed the *Americans with Disabilities Act Amendments Act*. The ADAAA emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis.

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The ADAAA makes important changes to the definition of the term disability by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

The ADAAA retains the ADA's basic definition of disability as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that those statutory terms should be interpreted in several ways. Most significantly, the ADAAA directs EEOC to revise that portion of its regulations defining the term substantially limits. The final regulations were approved and were published in the *Federal Register* on March 25, 2011. According to the EEOC website:

The EEOC regulations implement the ADAAA—in particular, Congress's mandate that the definition of disability be construed broadly. Following the ADAAA, the regulations keep the ADA's definition of the term "disability" as a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability. But the regulations implement the significant changes that Congress made regarding how those terms should be interpreted.

The regulations implement Congress's intent to set forth predictable, consistent, and workable standards by adopting "rules of construction" to use when determining if an individual is substantially limited in performing a major life activity. These rules of construction are derived directly from the statute and legislative history and include the following:

- **The term "substantially limits" requires a lower degree of functional limitation than the standard previously applied by the courts.** An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered 'substantially limiting.' Nonetheless, not every impairment will constitute a disability.
- **The term 'substantially limits' is to be construed broadly** in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.
- The determination of whether an impairment substantially limits a major life activity **requires an individualized assessment**, as was true prior to the ADAAA.
- With one exception ("ordinary eyeglasses or contact lenses"), the determination of whether an impairment substantially limits a major life activity shall be made **without regard to the ameliorative effects of mitigating measures**, such as medication or hearing aids.
- **An impairment that is episodic or in remission is a disability** if it would substantially limit a major life activity when active.

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- In keeping with Congress's direction that the primary focus of the ADA is on whether discrimination occurred, **the determination of disability should not require extensive analysis.**

As required by the ADAAA, the regulations also make it easier for individuals to establish coverage under the “regarded as” part of the definition of “disability.” As a result of court interpretations, it had become difficult for individuals to establish coverage under the ‘regarded as’ prong. Under the ADAAA, the focus for establishing coverage is on how a person has been treated because of a physical or mental impairment (that is not transitory and minor), rather than on what an employer may have believed about the nature of the person’s impairment.

The regulations clarify, however, that an individual must be covered under the first prong (“actual disability”) or second prong (“record of disability”) in order to qualify for a reasonable accommodation. The regulations clarify that it is generally not necessary to proceed under the first or second prong if an individual is not challenging an employer’s failure to provide a reasonable accommodation.

The Equal Pay Act, which is part of the *Fair Labor Standards Act* (FLSA) of 1938, as amended, and which is administered and enforced by the EEOC, prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions.

As reported by the U.S. Department of Labor’s *Highlights of Women’s Earnings, 2008*, “Male-female income disparity, also referred to as a ‘gender gap in earnings’, in the United States, also known as the ‘gender wage gap,’ the ‘gender earnings gap’ and the ‘gender pay gap’, is used by government agencies and economists to refer to statistics gathered by the U.S. Census Bureau, as part of the Current Population Survey, comparing median male wages to median female wages. The gender gap is usually expressed as the ratio of female to male earnings among full-time, year-round (FTYR) workers.”

In its women’s earning report six years late, the Labor Department stated, “In 2014, women who were full-time wage and salary workers had median usual weekly earnings of \$719. Women’s median earnings were 83 percent of those of male full-time wage and salary workers (\$871). In 1979, the first year for which comparable earnings data are available, women’s earnings were 62 percent of men’s. Since 2004, the women’s-to-men’s earnings ratio has ranged from 80 to 83 percent.”

As reported by the American Association of University Women (AAUW) in its *The Simple Truth about the Gender Pay Gap* (Fall 2016),

“Did you know that in 2015, women working full time in the United States typically were paid just 80 percent of what men were paid, a gap of 20 percent? While the number has gone up one percentage point from 2014, the change isn’t statistically significant—because the increase is so small, mere tenths of a percent, it doesn’t amount to perceptible change. According to the U.S. Census

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Bureau, the earnings ratio hasn't had significant annual change since 2007. The gap has narrowed since the 1970s, due largely to women's progress in education and workforce participation and to men's wages rising at a slower rate. Still, the pay gap does not appear likely to go away on its own. At the rate of change between 1960 and 2015, women are expected to reach pay equity with men in 2059. But even that slow progress has stalled in recent years. If change continues at the slower rate seen since 2001, women will not reach pay equity with men until 2152."

To gain a better understanding of the *Equal Pay Act*, it may be helpful to go to the source and briefly review select provisions, listed below.

Minimum Wage

SEC. 206. [Section 6]

(d) Prohibition of sex discrimination

(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 chapter.

(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.

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Additional Provisions of *Equal Pay Act of 1963*:

An Act

To prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the “*Equal Pay Act of 1963*.”

Declaration of Purpose:

Not Reprinted in U.S. Code [*Section 2*]

(a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex:

- (1) depresses wages and living standards for employees necessary for their health and efficiency;
- (2) prevents the maximum utilization of the available labor resources;
- (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;
- (4) burdens commerce and the free flow of goods in commerce; and
- (5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

Note that:

- Employers may not reduce wages of either sex to equalize pay between men and women.
- A violation of the *Equal Pay Act* may occur where a different wage was/is paid to a person who worked in the same job before or after an employee of the opposite sex.
- A violation may also occur where a labor union causes the employer to violate the law.

As reported on the EEOC website,

Under the laws enforced by EEOC, it is illegal to discriminate against someone (applicant or employee) because of that person’s race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or

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older), disability, or genetic information. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

The law forbids discrimination in every aspect of employment.

The laws enforced by EEOC prohibit an employer or other covered entity from using neutral employment policies and practices that have a disproportionately negative effect on applicants or employees of a particular race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), or national origin, or on an individual with a disability or class of individuals with disabilities, if the policies or practices at issue are not job-related and necessary to the operation of the business. The laws enforced by EEOC also prohibit an employer from using neutral employment policies and practices that have a disproportionately negative impact on applicants or employees age 40 or older, if the policies or practices at issue are not based on a reasonable factor other than age.

In addition, the EEOC website provides: “The laws enforced by EEOC require employers to keep certain records, regardless of whether a charge has been filed against them. When a charge has been filed, employers have additional recordkeeping obligations. The EEOC also collects workforce data from some employers, regardless of whether a charge has been filed against the company. Employers are required to post notices describing the federal laws prohibiting job discrimination based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information.

The Immigration Reform and Control Act (IRCA), also known as the *Simpson-Mazzoli Act* (Pub. L. No. 99-603, 100 Stat. 3359), reformed United States immigration law.

The Act made it illegal to knowingly hire or recruit unauthorized aliens (illegal immigrants who do not possess lawful work authorization), required employers to attest to their employees’ immigration status, and granted amnesty to unauthorized aliens who entered the United States before January 1, 1982 and had resided there continuously.

The law criminalized the act of knowingly hiring an illegal immigrant and established financial and other penalties for those employing illegal aliens under the theory that low prospects for employment would reduce illegal immigration. It introduced the I-9 Form to ensure that all employees presented documentary proof of their legal eligibility to accept employment in the United States. These sanctions would only apply to employers that had more than three employees and that did not make a sufficient effort to determine the legal status of the worker. IRCA also established a provision that if ‘wide-spread’ discrimination was caused through employer sanctions, according to a three year report by the General Accounting Office, now the Government Accountability Office (GAO), then the sanctions would be repealed. The GAO found discrimination in 10% of cases studied, and the employment sanctions were not repealed.

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Concerning Speak English Only rules, the EEOC advises on its website:

The EEOC has stated that rules requiring employees to speak only English in the workplace violate the law unless the employer can show that they are justified by business necessity.

- A rule requiring employees to speak only English in the workplace at all times, including breaks and lunch time, will rarely be justified.
- An English-only rule should be limited to the circumstances in which it is needed for the employer to operate safely or efficiently.
- Circumstances in which an English-only rule may be justified include: communications with customers or coworkers who only speak English; emergencies or other situations in which workers must speak a common language to promote safety; cooperative work assignments in which the English-only rule is needed to promote efficiency.
- Even if there is a need for an English-only rule, an employer may not take disciplinary action against an employee for violating the rule unless the employer has notified workers about the rule and the consequences of violating it.

As also stated on the EEOC website,

What is the *Immigration Reform and Control Act* and must my business comply with it?

- The *Immigration Reform and Control Act of 1986* (IRCA) makes it unlawful for an employer to hire any person who is not legally authorized to work in the United States, and it requires employers to verify the employment eligibility of all new employees.
- IRCA also prohibits discrimination in hiring and discharge based on national origin (as does Title VII) and on citizenship status. IRCA's anti-discrimination provisions are intended to prevent employers from attempting to comply with the Act's work authorization requirements by discriminating against foreign-looking or foreign-sounding job applicants.
- IRCA's anti-discrimination provisions apply to smaller employers than those covered by EEOC-enforced laws.
- IRCA's national origin discrimination provisions apply to employers with between 4 and 14 employees (who would not be covered by Title VII).
- IRCA's citizenship discrimination provisions apply to all employers with at least 4 employees.

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- IRCA is enforced by the U.S. Department of Justice. For information on IRCA's anti-discrimination provisions, contact:

United States Department of Justice
Office of Special Counsel for Immigration-Related
Unfair Employment Practices
(800) 255-8155 (employer hotline/voice)
(800) 237-2515 (TDD)
<http://www.usdoj.gov/crt/osc>

The ***Patient Protection and Affordable Care Act (PPACA)***, commonly called the *Affordable Care Act (ACA)* or Obamacare, is a United States federal statute enacted by President Barack Obama on March 23, 2010. According to the website of the U.S. Department of Health & Human Services, “[t]he *Affordable Care Act* put in place comprehensive health insurance reforms that have improved access, affordability, and quality in health care for Americans.” The website also provides:

Of The Health Care Law

2010: A new Patient’s Bill of Rights goes into effect, protecting consumers from the worst abuses of the insurance industry. Cost-free preventive services begin for many Americans.

2011: People with Medicare can get key preventive services for free, and also receive a 50% discount on brand-name drugs in the Medicare “donut hole.”

2012: Accountable Care Organizations and other programs help doctors and health care providers work together to deliver better care.

2013: Open enrollment in the Health Insurance Marketplace begins on October 1st.

2014: All Americans will have access to affordable health insurance options. The Marketplace allows individuals and small businesses to compare health plans on a level playing field. Middle and low-income families will get tax credits that cover a significant portion of the cost of coverage. And the Medicaid program will be expanded to cover more low-income Americans. All together, these reforms mean that millions of people who were previously uninsured will gain coverage, thanks to the *Affordable Care Act*.

During the 2016 presidential campaign, now Republican President Donald J. Trump vowed to repeal and replace Obamacare. With a Republican-controlled United States Congress, President Trump may be successful in keeping that promise. An attempt to do so was, however, unsuccessful in March of 2017.

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Part Two: Federal, State, and Local Regulatory/Enforcement Agencies

The federal organization viewed as the lead agency in enforcing discriminatory laws is the EEOC. According to the commission's website:

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered.

The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits.

As to its authority and role, the EEOC website provides:

The EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. Our role in an investigation is to fairly and accurately assess the allegations in the charge and then make a finding. If we find that discrimination has occurred, we will try to settle the charge. If we aren't successful, we have the authority to file a lawsuit to protect the rights of individuals and the interests of the public. We do not, however, file lawsuits in all cases where we find discrimination.

We also work to prevent discrimination before it occurs through outreach, education, and technical assistance programs.

The EEOC provides leadership and guidance to federal agencies on all aspects of the federal government's equal employment opportunity program. EEOC assures federal agency and department compliance with EEOC regulations, provides technical assistance to federal agencies concerning EEO complaint adjudication, monitors and evaluates federal agencies' affirmative employment programs, develops and distributes federal sector educational materials and conducts training for stakeholders, provides guidance and assistance to our Administrative Judges who conduct hearings on EEO complaints, and adjudicates appeals from administrative decisions made by federal agencies on EEO complaints.

The **Office of Federal Contract Compliance Programs, (OFCCP)** is a part of the Department of Labor. Its mission "is to enforce, for the benefit of job seekers and wage earners, the contractual promise of affirmative action and equal employment opportunity required of those who do business with the federal government."

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The Department of Labor's website states:

In carrying out its responsibilities, the OFCCP uses the following enforcement procedures:

- Offers technical assistance to federal contractors and subcontractors to help them understand the regulatory requirements and review process.
- Conducts compliance evaluations and complaint investigations of federal contractors and subcontractors personnel policies and procedures.
- Obtains Conciliation Agreements from contractors and subcontractors who are in violation of regulatory requirements.
- Monitors contractors and subcontractors progress in fulfilling the terms of their agreements through periodic compliance reports.
- Forms linkage agreements between contractors and Labor Department job training programs to help employers identify and recruit qualified workers.
- Recommends enforcement actions to the Solicitor of Labor.
- The ultimate sanction for violations is debarment—the loss of a company's federal contracts. Other forms of relief to victims of discrimination may also be available, including back pay for lost wages.

Workplace Laws Enforced by Other Federal Agencies

As provided on the EEOC's website, the following laws prohibiting discrimination or regulating workplace issues are not enforced by the EEOC:

- The *Civil Service Reform Act of 1978* (CSRA)
- The *Immigration Reform and Control Act of 1986* (IRCA)
- Executive Order 11246
- Title VI of the *Civil Rights Act of 1964*
- Title II of the *Americans with Disabilities Act* (ADA)
- Title III of the ADA
- The *Family and Medical Leave Act* (FMLA)
- The *Occupational Safety and Health Act of 1970* (OSHA)
- Section 503 of the *Rehabilitation Act*
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- Section 508 of the *Rehabilitation Act*
- The *Social Security Act*
- The *Fair Labor Standards Act*
- *National Labor Relations Act*
- Section 1981 of the *Civil Rights Act of 1866*
- Workers Compensation Law
- Title I of *Genetic Information Nondiscrimination Act*

The Civil Service Reform Act of 1978 (CSRA)

This law makes it illegal to discriminate against a federal employee or job applicant on the basis of race, color, national origin, religion, sex, age, or disability. The CSRA also prohibits discrimination on the basis of certain other factors that don't adversely affect employee's performance, such as marital status, political association, and sexual orientation. The CSRA makes it illegal to fire, demote, or otherwise retaliate against a federal employee or job applicant for whistleblowing or for exercising the right to file a complaint, grievance, or an appeal.

The [Office of Special Counsel](#) (OSC) and the [Merit Systems Protection Board](#) (MSPB) enforce the CSRA. For more information, contact the Office of Personnel Management at 202-653-7188 or visit <http://www.opm.gov>.

The Immigration Reform and Control Act of 1986 (IRCA)

This law makes it illegal for certain employers to fire or refuse to hire a person on the basis of that person's national origin or citizenship. This law also makes it illegal for an employer to request employment verification only from people of a certain national origin or only from people who appear to be from a foreign country. An employer who has citizenship requirements or gives preference to U.S. citizens may violate IRCA.

For more information, contact the Immigrant and Employee Rights Section at: 1-800-255-7688 (voice); 1-800-237-2515 (TTY for employees/applicants); or 1-800-362-2735 (TTY for employers) or visit <https://www.justice.gov/crt/immigrant-and-employee-rights-section>

Executive Order 11246

This law makes it illegal for federal contractors and certain subcontractors to discriminate on the basis of race, color, religion, sex, or national origin. It also requires federal contractors and subcontractors to take steps to ensure equal employment opportunity in the workplace.

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For more information, contact the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) at:

1-866-487-2365 (voice),
1-877-889-5627 (TTY), or
visit <https://www.dol.gov/ofccp/>

Title VI of the *Civil Rights Act of 1964*

This law makes it illegal to discriminate on the basis of race, color, or national origin in programs and activities receiving federal financial assistance.

For more information, contact the Department of Justice's Civil Rights Division at:
202-514-2151 (voice),
202-514-0716 (TTY), or
visit <https://www.justice.gov/crt/fcs/TitleVI>

Title II of the *Americans with Disabilities Act (ADA)*

This law makes it illegal to discriminate against people with disabilities in all programs, activities, and services offered by state and local government agencies. This includes public transportation services and physical access to state and local government buildings.

For more information, contact the U.S. Department of Justice's Civil Rights Division:
800-514-0301 (voice),
800-514-0383 (TTY), or
visit https://www.ada.gov/ada_title_II.htm

Title III of the *ADA*

This law prohibits disability discrimination by private entities that provide services to the public (also known as "public accommodations.") Public accommodations include, for example, restaurants, hotels, movie theaters, stores, doctors' offices, parks, and schools. The law applies to buildings, programs, and services. Under the law, public accommodations may have to provide auxiliary aids and services such as sign language interpreters, assistive listening devices, or large print materials unless doing so would cause significant difficulty or expense.

For more information, contact the U.S. Department of Justice's Civil Rights Division:
800-514-0301 (voice),
800-514-0383 (TTY), or
visit https://www.ada.gov/ada_title_III.htm

The *Family and Medical Leave Act (FMLA)*

This law requires certain employers to grant up to 12 weeks of leave during a 12 month period to eligible employees who need time off because of a serious health condition that they or someone in their family is experiencing. FMLA leave can sometimes overlap with Title VII requirements concerning leave for pregnancy and pregnancy-related conditions and with ADA and *Rehabilitation Act* requirements concerning leave as an accommodation for an employee with a disability.

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For more information, contact the U.S. Department of Labor's Wage and Hour Division: 1-866-487-9243 (voice and TTY) or visit <https://www.dol.gov/whd/fmla/index.htm>

The Occupational Safety and Health Act of 1970 (OSHA)

This law sets out safety requirements for workplaces. The Occupational Safety and Health Administration works with states to investigate and enforce OSHA requirements.

For more information, contact the Occupational Safety and Health Administration: 1-800-321-6742 (voice), 1-877-889-5627 (TTY), or visit <http://www.osha.gov/>

Section 503 of the Rehabilitation Act

This law prohibits certain federal contractors and subcontractors from discriminating against qualified employees and job applicants with disabilities. Section 503 also requires contractors to take affirmative steps to hire and promote qualified people with disabilities. The nondiscrimination provisions of Section 503 mirror those found in the ADA and Section 501 of the *Rehabilitation Act*.

For more information, contact the U.S. Department of Labor, Office of Federal Contract Compliance Programs: 1-866-487-2365 (voice), 1-877-889-5627 (TTY), or visit <https://www.dol.gov/ofccp/regs/compliance/section503.htm>

Section 504 of the Rehabilitation Act

This law prohibits disability discrimination in programs and activities that receive federal financial assistance. This includes discrimination against qualified applicants and employees with disabilities, as well as discrimination in the services and activities provided by federal agencies to the public. The nondiscrimination provisions of Section 504 are similar to those found in Title I of the ADA, covering employment discrimination, and in Title II of the ADA, covering the programs, activities, and services offered by state and local governments.

For more information, contact the U.S. Department of Justice's Civil Rights Division: 800-514-0301 (voice), 800-514-0383 (TTY), or visit <https://www.dol.gov/oasam/regs/statutes/sec504.htm>

Section 508 of the Rehabilitation Act

This law requires federal agencies to ensure that electronic and information technology used by the government can be accessed and used by people with disabilities.

For more information, contact the U.S. Access Board: 202-272-5434 (voice), 202-272-5449 (TTY), or visit <http://www.access-board.gov/>

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Information can also be obtained from the U.S. General Services Administration:
202-501-4906 (voice),
202-501-2010 (TTY), or
visit <http://www.section508.gov/>

The Social Security Act

This law provides Social Security Disability Insurance (SSDI) to certain individuals with severe disabilities who can no longer work. The *Social Security Act* definition of disability is different from the ADA definition of disability. For this reason, whether or not you are eligible to receive disability benefits does not determine coverage under the ADA.

For more information, contact the U.S. Social Security Administration:
1-800-772-1213 (voice),
1-800-325-0778 (TTY),
or visit <http://www.ssa.gov/disability/>

The Fair Labor Standards Act

This law regulates workplace practices related to minimum wage, overtime pay, and child labor.

For more information, contact the U.S. Department of Labor's Wage and Hour Division:
1-866-487-9243 (voice),
1-877-889-5627 (TTY),
or visit <https://www.dol.gov/whd/regs/compliance/hrg.htm>

National Labor Relations Act

This law protects workers who wish to form, join, or support unions; workers who are already represented by unions; and workers who join together as a group (two or more employees) without a union seeking to modify their wages or working conditions.

For more information, contact the National Labor Relations Board:
1-866-667-NLRB (1-866-667-6572)
TTY 1-866-315-NLRB (1-866-315-6572)
<https://www.nlr.gov/>

Section 1981 of the Civil Rights Act of 1866

This law protects the equal right of all persons within the jurisdiction of the United States to make and enforce contracts without respect to race. This includes all contractual aspects of the employment relationship, such as hiring, discharge, and the terms and conditions of employment. The Supreme Court has held that the statute also prohibits retaliation against persons who complain about race discrimination prohibited by the statute. This law is enforced by individuals, not a federal agency.

For more information, visit [Civil Rights Act of 1866 & Civil Rights Act of 1871 - CRA - 42 U.S. Code 21 §§1981, 1981A, 1983, & 1988](#)

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Workers' Compensation

Every state and the federal government has a law that provides compensation for on-the-job injuries and illnesses. Some workers' compensation programs require employers to provide job modifications or alternative assignments that may also may be reasonable accommodations under the ADA. If an employee's occupational injury is covered under both workers' compensation and the ADA or *Rehabilitation Act*, the employee may be entitled to a job modification or reassignment under both laws.

Title I of the *Genetic Information Nondiscrimination Act (GINA)*

This title of GINA addresses the use of genetic information in health insurance. The provisions are enforced primarily by the Department of Labor's Employee Benefits Security Administration, with the Department of Health & Human Services' Office for Civil Rights enforcing Section 105 of Title I of GINA, which relates to GINA's protections for genetic information under the *Health Insurance Portability Accountability Act* privacy rule.

For more information, contact the Department of Labor's Employee Benefits Security Administration at:
1-866-444-EBSA (3272)
1-877-889-5627 TTY

<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/gina.pdf>

Department of Health & Human Services's Office for Civil Rights at:
1-877-696-6775

<http://www.hhs.gov/ocr/privacy/hipaa/understanding/special/genetic/index.html>

Each state government has a unit or organization that serves as their enforcement agency to investigate discriminatory acts or practices. A summary of how state laws prohibiting discrimination on the basis of sexual orientation and gender identity apply to religious, nonprofit, and government organizations appears in the addendum to this module.

Many states and municipalities also have enacted protections against discrimination and harassment based on status as a parent, marital status, and political affiliation. For more information, contact the nearest EEOC office.

It is important that HR professionals have a working understanding of the EEOC's process to be used in filing a complaint. The following, from the EEOC website, is information on the EEOC's Charge Processing Procedures. This information should prove useful to individuals who are responsible for responding to discrimination charges from EEOC:

Time Limits For Filing A Charge

The anti-discrimination laws give you a limited amount of time to file a charge of discrimination. In general, you need to file a charge within 180 calendar days from the day the discrimination took place. The 180 calendar day filing

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deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. The rules are slightly different for age discrimination charges. For age discrimination, the filing deadline is only extended to 300 days if there is a **state** law prohibiting age discrimination in employment and a state agency or authority enforcing that law. The deadline is not extended if only a local law prohibits age discrimination.

Note: Federal employees and job applicants have a [different complaint process](#), and generally must [contact an agency EEO Counselor](#) within 45 days. The time limit can be extended under certain circumstances.

Regardless of how much time you have to file, it is best to file as soon as you have decided that is what you would like to do.

Time limits for filing a charge with EEOC generally will not be extended while you attempt to resolve a dispute through another forum such as an internal grievance procedure, a union grievance, arbitration or mediation before filing a charge with EEOC. Other forums for resolution may be pursued at the same time as the processing of the EEOC charge.

Holidays and weekends are included in the calculation, although if the deadline falls on a weekend or holiday, you will have until the next business day. Figuring out how much time you have to file a charge is complicated. If you aren't sure how much time is left, you should contact one of our field offices as soon as possible so we can assess whether you still have time.

If More Than One Discriminatory Event Took Place

Also, if more than one discriminatory event took place, the deadline usually applies to each event. For example, let's say you were demoted and then fired a year later. You believe the employer based its decision to demote and fire you on your race, and you file a charge the day after your discharge. In this case, only your claim of discriminatory discharge is timely. In other words, you must have filed a charge challenging the demotion within 180/300 days from the day you were demoted. If you didn't, we would only investigate your discharge. There is one exception to this general rule and that is if you are alleging ongoing harassment.

Ongoing Harassment

In harassment cases, you must file your charge within 180 or 300 days of the last incident of harassment, although we will look at all incidents of harassment when investigating your charge, even if the earlier incidents happened more than 180/300 days earlier.

Equal Pay Act and Time Limits

If you plan to file a charge alleging a violation of the *Equal Pay Act* (which prohibits sex discrimination in wages and benefits), different deadlines apply. Under the *Equal Pay Act*, you don't need to file a charge of discrimination with EEOC. Instead, you are allowed to go directly to court and file a lawsuit. The deadline for filing a charge or lawsuit under the EPA is two years from the day you received the last discriminatory paycheck (this is extended to three years in the case of willful discrimination).

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[Equal Pay Act and Title VII and Time Limits](#)

Keep in mind, Title VII also makes it illegal to discriminate based on sex in the payment of wages and benefits. What this means is, if you have an *Equal Pay Act* claim, you may also want to file a Title VII claim. In order to pursue a Title VII claim, you must file a charge with EEOC first. Filing a Title VII charge will not extend the deadline for filing an EPA lawsuit. Figuring out how much time you have to file a charge is complicated. It also can be difficult to figure out the pros and cons of filing a charge under the EPA instead of a lawsuit. Our field office staff would be happy to speak with you to explore your options.

Filing a Charge of Discrimination

If you believe that you have been discriminated against at work because of your race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information, you can file a Charge of Discrimination. All of the laws enforced by EEOC, except for the *Equal Pay Act*, require you to file a **Charge of Discrimination** with us before you can [file a job discrimination lawsuit](#) against your employer. In addition, an individual, organization, or agency may file a charge on behalf of another person in order to protect the aggrieved person's identity. There are [time limits](#) for filing a charge.

Note: Federal employees and job applicants have similar protections, but a [different complaint process](#).

If you file a charge, you may be asked to try to settle the dispute through [mediation](#). Mediation is an informal and confidential way to resolve disputes with the help of a neutral mediator. If the case is not sent to mediation, or if mediation doesn't resolve the problem, the charge will be given to an investigator.

If an investigation finds no violation of the law, you will be given a Notice of Right to Sue. This notice gives you permission to file suit in a court of law. If a violation is found, we will attempt to reach a voluntary settlement with the employer. If we cannot reach a settlement, your case will be referred to our legal staff (or the Department of Justice in certain cases), who will decide whether or not the agency should file a lawsuit. If we decide not to file a lawsuit, we will give you a Notice of Right to Sue.

In some cases, if a charge appears to have little chance of success, or if it is something that we don't have the authority to investigate, we may dismiss the charge without doing an investigation or offering mediation.

Many states and local jurisdictions have their own anti-discrimination laws, and agencies responsible for enforcing those laws ([Fair Employment Practices Agencies](#), or FEPAs). If you file a charge with a FEPA, it will automatically be "dual-filed" with EEOC if federal laws apply. You do not need to file with both agencies.

[How to File a Charge of Employment Discrimination](#)

Note: Federal employees and job applicants have a [different complaint process](#).

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You may file a charge of employment discrimination at the EEOC office closest to where you live, or at any one of the [EEOC's 53 field offices](#). Your charge, however, may be investigated at the EEOC office closest to where the discrimination occurred. If you are a U.S. citizen working for an American company overseas, you should file your charge with the EEOC field office closest to your employer's corporate headquarters.

Where the discrimination took place can determine [how long you have to file a charge](#). The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a state or local law that prohibits employment discrimination on the same basis. The rules are slightly different for age discrimination charges. For age discrimination, the filing deadline is only extended to 300 days if there is a state law prohibiting age discrimination in employment and a state agency or authority enforcing that law. The deadline is not extended if only a local law prohibits age discrimination.

Many states and localities have agencies that enforce laws prohibiting employment discrimination. EEOC refers to these agencies as Fair Employment Practices Agencies (FEPAs). EEOC and some FEPAs have worksharing agreements in place to prevent the duplication of effort in charge processing. According to these agreements, if you file a charge with either EEOC or a FEPA, the charge also will be automatically filed with the other agency. This process, which is defined as [dual filing](#), helps to protect charging party rights under both federal and state or local law.

Online Assessment System

EEOC does not accept charges online. However, we do have an [online assessment tool](#) that can help you decide if EEOC is the correct agency to assist you. You can then complete an Intake Questionnaire that you may print and either bring or mail to the appropriate EEOC field office to begin the process of filing a charge.

Filing in Person

Each field office has its own procedures for appointments or walk-ins. Please check our field office list for your office's procedures.

It is always helpful if you bring with you to the meeting any information or papers that will help us understand your case. For example, if you were fired because of your performance, you might bring with you the letter or notice telling you that you were fired and your performance evaluations. You might also bring with you the names of people who know about what happened and information about how to contact them.

You can bring anyone you want to your meeting, especially if you need language assistance and know someone who can help. You can also bring your lawyer, although you don't have to hire a lawyer to file a charge. If you need special assistance during the meeting, like a sign language or foreign language interpreter, let us know ahead of time so we can arrange for someone to be there for you.

By Telephone

Although we do not take charges over the phone, you can get the process started over the phone. You can call 1-800-669-4000 to submit basic information about a

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possible charge, and we will forward the information to the EEOC field office in your area. Once the field office receives your information, they will contact you to talk to you about your situation.

By Mail

You can file a charge by sending us a letter that includes the following information:

- Your name, address, and telephone number
- The name, address and telephone number of the employer (or employment agency or union) you want to file your charge against
- The number of employees employed there (if known)
- A short description of the events you believe were discriminatory (for example, you were fired, demoted, harassed)
- When the events took place
- Why you believe you were discriminated against (for example, because of your race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information)
- Your signature

Don't forget to sign your letter. If you don't sign it, we cannot investigate it.

Your letter will be reviewed and if more information is needed, we will contact you to gather that information or you may be sent a follow up questionnaire. At a later date, we will contact you and may put all of the information you sent us on an official EEOC charge form and ask you to sign it.

What You Can Expect After You File a Charge

Note: Federal employees and job applicants have a [different complaint process](#).

At the time your charge is filed, we will give you a copy of your charge with your charge number. Within 10 days, we will also send a notice of the charge to the employer. In some cases, we will ask both you and the employer to take part in our [mediation program](#). If the laws EEOC enforces do not apply to your claims, if your charge is untimely, or we decide that we probably will not be able to determine if the law was violated, we will close the investigation of your charge and notify you.

Mediation

If you and the employer agree to [mediation](#), a mediator will try to help you both reach a voluntary settlement. Mediation allows you and the employer to talk about your concerns. Mediators don't decide who is right or wrong, but they are very good at suggesting ways to solve problems and disagreements.

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Investigation

If the charge is not sent to mediation, or if mediation doesn't resolve the charge, we usually ask the employer to give us a written answer to your charge (called "Respondent's Position Statement"). You may request the Respondent's Position Statement to review and provide EEOC with your response to it. We ask that you provide a response within 20 days. For more information, see [EEOC Procedures for Respondent Position Statements](#). We may also ask the employer to answer questions we have about the claims in your charge.

How we investigate a charge depends on its facts and the kinds of information we need to gather. In some instances, we visit the employer to hold interviews and gather documents. In other instances, we interview witnesses and ask for documents. After we finish our investigation, we will let you and the employer know the result.

How long the investigation takes depends on many factors, including the amount of information that needs to be gathered and analyzed. It took us—on average—nearly 10 months to investigate a charge in 2015. We are often able to settle a charge faster through mediation (usually in less than 3 months). You can check the status of your charge by using [EEOC's Online Charge Status System](#).

Subpoena

If an employer refuses to cooperate with an EEOC investigation, EEOC can issue an administrative subpoena to obtain documents, testimony, or gain access to facilities.

Possible Action After Investigation Completed

If we aren't able to determine that the law was violated, we will send you a Notice-of-Right-to-Sue. This notice gives you permission to file a lawsuit in a court of law. If we determine the law may have been violated, we will try to reach a voluntary settlement with the employer. If we cannot reach a settlement, your case will be referred to our legal staff (or the Department of Justice in certain cases), who will decide whether the agency should file a lawsuit. If we decide not to file a lawsuit, we will give you a Notice-of-Right-to-Sue.

Confidentiality

Note: Federal employees and job applicants have a [different complaint process](#).

Information obtained from individuals who contact EEOC is confidential and will not be revealed to the employer until the individual files a charge of discrimination. When an individual contacts the EEOC, s/he will be asked to provide information which may include the following:

1. The individual's name, address, telephone number, date of birth
2. Social Security Number (optional)
3. Name, address, and telephone number of the employer

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4. Employer's approximate number of employees
5. Date(s) of harm
6. Employer's explanation for its actions (if available)
7. Why the individual believes that the action taken against him/her was discriminatory
8. Names of individuals who were treated more favorably (if applicable)

This information will be used for record-keeping purposes and to determine whether the situation is covered by EEOC. EEOC employees are subject to strict confidentiality requirements by law.

Once a charge is filed, the individual's name and basic information about the allegations of discrimination will be disclosed to the employer. By law, we are required to send a copy of the charge to the employer within 10 days of the filing date. During the course of the investigation, information about the charging party and the respondent will be kept confidential by EEOC and will not be disclosed to the public by the EEOC.

Remaining Anonymous

When you file a charge, you must give us your name. Your name must appear on the charge, and it must be signed by you. We are required by law to give your charge to the employer so that the employer can answer the claims made in your charge. If you wish to remain anonymous, we will accept a charge that is filed on behalf of someone else who has been the victim of discrimination. The charge can be filed by a person or an organization. In such cases, we usually don't tell the employer who the charge was filed on behalf of, but we do tell the employer the name of the person or organization who filed the charge.

In practice, however, it may be difficult to hide the identity of the person who believes they have been the victim of discrimination during the investigation, even though a name is never released, because of the circumstances of the charge.

A parent may also want to file a charge "on behalf of" a minor child or a child with a mental impairment.

Retaliation by an Employer

Your employer may not fire, demote, harass, or otherwise "retaliate" against you for filing a charge. All of the laws we enforce make it illegal for an employer to retaliate against someone who files a charge or someone who takes part in an EEOC investigation or lawsuit.

If you feel you have been retaliated against, you should promptly contact the investigator looking into your charge. The investigator will talk with you about the situation and add a claim of retaliation to your charge if appropriate. If a claim of retaliation is added to your charge, we will tell the employer and then investigate the retaliation claim along with the rest of your charge. Keep in mind that the strict

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deadlines for filing a charge also apply when you want to add to a charge. The fact that you filed an earlier charge may not extend the deadline. For this reason, you should contact us as soon as possible.

Mediation

Mediation is an informal and confidential way for people to resolve disputes with the help of a neutral mediator who is trained to help people discuss their differences. The mediator does not decide who is right or wrong or issue a decision. Instead, the mediator helps the parties work out their own solutions to problems.

Note: Federal agencies are required to have an [alternative dispute resolution](#) program. Most use mediation, but not necessarily the EEOC process.

Benefits of Mediation

One of the greatest benefits of mediation is that it allows people to resolve the charge in a friendly way and in ways that meet their own unique needs. Also, a charge can be resolved faster through mediation. While it takes less than 3 months on average to resolve a charge through mediation, it can take 6 months or longer for a charge to be investigated. Mediation is fair, efficient, and can help the parties avoid a lengthy investigation and litigation.

EEOC's Mediation Process

Shortly after a charge is filed, we may contact both the employee and employer to ask if they are interested in participating in mediation. The decision to mediate is completely voluntary. If either party turns down mediation, the charge will be forwarded to an investigator. If both parties agree to mediate, we will schedule a mediation, which will be conducted by a trained and experienced mediator. If the parties do not reach an agreement at the mediation, the charge will be investigated like any other charge. A written signed agreement reached during mediation is enforceable in court just like any other contract.

Duration and Cost of Mediation

A mediation session usually lasts from 3 to 4 hours, although the time can vary depending on how complicated the case is. There is no charge to either party to attend the mediation.

Who Should Attend the Mediation

All parties to the charge should attend the mediation session. If you are representing the employer, you should be familiar with the facts of the charge and have the authority to settle the charge on behalf of the employer. Although you don't have to bring an attorney with you to the mediation, either party may choose to do so. The mediator will decide what role the attorney will play during the mediation.

Learn More About Mediation

If you would like to learn more about mediation, we have extensive information about [EEOC's Mediation Program available](#).

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Remedies for Employment Discrimination

Whenever discrimination is found, the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred.

The types of relief will depend upon the discriminatory action and the effect it had on the victim. For example, if someone is not selected for a job or a promotion because of discrimination, the remedy may include placement in the job and/or back pay and benefits the person would have received.

The employer also will be required to stop any discriminatory practices and take steps to prevent discrimination in the future.

A victim of discrimination also may be able to recover attorney's fees, expert witness fees, and court costs.

Remedies May Include Compensatory & Punitive Damages

Compensatory and punitive damages may be awarded in cases involving intentional discrimination based on a person's race, color, national origin, sex (including pregnancy, gender identity, and sexual orientation), religion, disability, or genetic information.

Compensatory damages pay victims for out-of-pocket expenses caused by the discrimination (such as costs associated with a job search or medical expenses) and compensate them for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life).

Punitive damages may be awarded to punish an employer who has committed an especially malicious or reckless act of discrimination.

Limits on Compensatory & Punitive Damages

There are limits on the amount of compensatory and punitive damages a person can recover. These limits vary depending on the size of the employer:

- For employers with 15-100 employees, the limit is \$50,000.
- For employers with 101-200 employees, the limit is \$100,000.
- For employers with 201-500 employees, the limit is \$200,000.
- For employers with more than 500 employees, the limit is \$300,000.

Age or Sex Discrimination & Liquidated Damages

In cases involving intentional age discrimination, or in cases involving intentional sex-based wage discrimination under the *Equal Pay Act*, victims cannot recover either compensatory or punitive damages, but may be entitled to "liquidated damages."

Liquidated damages may be awarded to punish an especially malicious or reckless act of discrimination. The amount of liquidated damages that may be awarded is equal to the amount of back pay awarded the victim.

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After You Have Filed a Charge

Checking the Status of Your Charge

The [Online Charge Status System](#) is available for charges filed on or after September 2, 2015. For charges filed before that date, you can find out the specific status of your charge by calling the [EEOC field office](#) where your charge is filed. If you have your charge number, you can also get more general information about your status by calling EEOC toll-free at 1-800-669-4000 (TTY: 1-800-669-6820 or ASL Video Phone 1-844-234-5122).

Adding to Your Charge

If new events take place after you file your charge that you believe are discriminatory, we can add these new events to your charge and investigate them. This is called “amending” a charge. In some cases, we may decide it is better for you to file a new charge of discrimination. If new events are added to your charge or a new charge is filed, we will send a copy of the new or amended charge to the employer and investigate the new events along with the rest. Keep in mind that the strict deadlines for filing a charge also apply when you want to amend a charge. The fact that you filed an earlier charge may not extend the deadline. For this reason, you should contact your investigator immediately if you think other discriminatory events have taken place.

Updating Your Contact Information

It is important that we know how to contact you while we are investigating your charge. You can update your contact information by calling the [EEOC field office](#) where your charge is filed. Or you can EEOC toll-free at 1-800-669-4000 (TTY: 1-800-669-6820), and we will send your contact information to the appropriate office.

Requesting a Notice-of-Right-to-Sue

You may request a Notice-of-Right-to-Sue by contacting the EEOC office handling your charge. You should submit the request in writing.

If you filed your charge under Title VII (discrimination based on race, color, religion, sex, and national origin), or under the *Americans with Disabilities Act (ADA)* based on disability, you must have a Notice-of-Right-to-Sue from EEOC before you can file a lawsuit in federal court. Generally, you must allow EEOC 180 days to resolve your charge. Although, in some cases, EEOC may agree to issue a Notice-of-Right-to-Sue before the 180 days.

If you filed your charge under the *Age Discrimination in Employment Act* (discrimination based on age 40 and above), you do not need a Notice-of-Right-to-Sue from EEOC. You may file a lawsuit in federal court 60 days after your charge was filed with EEOC.

If you filed your charge under the *Equal Pay Act* (wage discrimination based on sex), you do not need a Notice-of-Right-to-Sue from EEOC. You may file a lawsuit in federal court within two years from the day you received the last discriminatory paycheck.

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Filing a Lawsuit

Note: Federal employees and job applicants have a [different complaint process](#).

If you plan to file a lawsuit alleging discrimination on the basis of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, genetic information, or retaliation, you first have to [file a charge](#) with one of our field offices (unless you plan to bring your lawsuit under the *Equal Pay Act*, which allows you to go directly to court without filing a charge). We will give you what is called a “Notice-of-Right-to-Sue” at the time we dismiss your charge, usually after completion of an investigation. However, we may dismiss for other reasons, including failure to cooperate in an investigation. This notice gives you permission to file a lawsuit in a court of law. Once you receive a Notice-of-Right-to-Sue, you must file your lawsuit within 90 days. We cannot extend this deadline except when the District Director gives the parties a written notice of intent to reconsider before the deadline for filing a lawsuit. If you don’t file in time, you may be prevented from going forward with your lawsuit.

Exceptions When Filing a Lawsuit

If you plan to file an age discrimination lawsuit, you won’t need a Notice-of-Right-to-Sue to file in court. You can file anytime after 60 days have passed from the day you filed your charge (but no later than 90 days after you receive notice that our investigation is concluded). If you plan to file a lawsuit under the *Equal Pay Act*, you don’t have to file a charge or obtain a Notice-of-Right-to-Sue before filing. Rather, you can go directly to court, provided you file your suit within two years from the day the discrimination took place (3 years if the discrimination was willful).

Keep in mind, though, Title VII also makes it illegal to discriminate based on sex in the payment of wages and benefits. If you have an *Equal Pay Act* claim, there may be advantages to also filing under Title VII. In order to pursue a Title VII claim in court, you must have filed a charge with EEOC and received a Notice-of-Right-to-Sue.

Filing Before the Investigation is Completed

If you want to file a lawsuit before we have finished our investigation, you can request a Notice-of-Right-to-Sue. If more than 180 days have passed from the day you filed your charge, we are required by law to give you the notice if you ask for it. If fewer than 180 days have passed, we will only give you the notice if we will be unable to finish our investigation within 180 days. You should request the Notice-of-Right-to-Sue in writing and send it to the Director of the EEOC office where your charge is filed. Include in your request the names of the parties and, if possible, your charge number. Once you have been given a Notice-of-Right-to-Sue, we will close the case and take no further action. So if you want EEOC to continue investigating your charge, don’t request the Notice-of-Right-to-Sue.

EEOC and Filing a Lawsuit

EEOC files employment discrimination lawsuits in select cases. When deciding whether to file a lawsuit, we consider several factors, including the seriousness of the violation, the type of legal issues in the case, and the wider impact the lawsuit could have on our efforts to combat workplace discrimination. Because of limited resources, EEOC cannot file a lawsuit in every case where discrimination has been found.

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However, the EEOC office where your charge is filed may be able to give you a list of attorneys in your area who handle cases involving employment discrimination.”

Responding to discrimination charges is a complex and complicated process. For HR professionals or others who are charged with this specific responsibility, organizations may want to consider the training offered by the Equal Employment Advisory Council [EEAC]. According to the EEAC website:

EEAC is pleased to offer a complete live learning curriculum for EEO/Affirmative Action practitioners, HR specialists, and in-house employment lawyers. Taught by EEAC’s staff experts, our emphasis is on providing participants with the knowledge and skills they need to facilitate compliance by their companies with a wide variety of EEO/AA laws and regulations. Our Affirmative action training includes AAP development, implementation, and managing OFCCP audits; our EEO training includes an overview of Title VII, the ADA, the ADEA, the FMLA, and other federal anti-discrimination laws, as well as guidance on managing an EEOC discrimination charge. A separate course we offer provides the basics on conducting a compensation analysis for potential pay discrimination, and we also offer the option of a comprehensive one-week EEO/AA Immersion course. All EEAC training courses are held in EEAC’s modern [Training Center](#) in Washington, DC.

The EEAC website is <http://www.eeac.org/web/training/> and lists available training, including web workshops and self directed training. For further information on EEAC Training, call 202-629-5655, fax 202-629-5651, or e-mail info@eeac.org.

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Part Three: Basic EEO Concepts

Discussion of EEO concepts needs to begin with a clear understanding of what constitutes equal employment opportunity. We can define equal employment opportunity as the concept that all individuals should have equal treatment in all employment-related actions. In actuality that is an extremely broad definition as equal employment opportunity applies to virtually any phase of the employee-employer relationship from the time the employee is recruited through his/her retirement or termination.

A number of additional terms that are of critical importance to a basic understanding of EEO concepts are defined by Mathis and Jackson:

- **Affirmative Action**—“Proactive actions to make up for historical discrimination against women, minorities, and individuals with disabilities.”
- **Protected Characteristics**—“Individual attributes that are protected under EEO laws and regulations.” These typically include women, minorities, pregnant women, disabled, gender preference, religion, age, etc.
- **Equal Employment Opportunity**—“Employment that is not affected by illegal discrimination.”
- **Disparate Treatment**—“Occurs when individuals with particular characteristics that are not job related are treated differently from others.” This typically occurs when an organization deals with or treats employees in a protected group differently in regard to any of the traditional HR functions (e.g., recruitment, employment, retention, promotion, discipline, training, compensation, performance appraisal, access to benefits, etc.).
- **Disparate Impact**—“Occurs when an employment practice that does not appear discriminatory adversely affects individuals with a particular characteristic so that they are substantially underrepresented as a result of employment decisions that work to their disadvantage.” The criteria used to determine disparate impact are described in some detail by Mathis and Jackson and were discussed earlier in the Module Three: Selection as it related to the use of employment examinations.

While the above definitions are easily understood, the concept and application of affirmative action has come under increasing scrutiny and criticism in recent years. Most of this criticism has been directed at the establishment of goals, which critics decry as quotas intended to create reverse discrimination. Proponents of affirmative action argue that it:

- Is needed to overcome past injustices or eliminate the effects of those injustices;
- Creates more equality for all persons even if temporary injustice to some individuals may result;
- Benefits society by raising the employment level of protected class members;

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- Does not discriminate against males or whites when implemented properly; and
- Confirms that progress is needed until goals, not quotas, are met.

Opponents of affirmative action argue that it:

- Penalizes men and white individuals even though they have not been guilty of practicing discrimination;
- Discriminates against others by creating preferences of certain groups;
- Results in greater polarization and separation along gender and racial lines;
- Stigmatizes those it is designed to help; and
- Turns goals into quotas by forcing employers to play by the numbers.

Public HR professionals should not take sides in the debate over the pros and cons of affirmative action programs. Rather, what they need to focus on is creating policies and procedures that build a workforce in their organization that mirrors the public the organization serves. Public HR professionals also must work to ensure that all their employment practices do not discriminate in any way, shape, or form against any individual or group.

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Part Four: Employer's EEO Policies

Virtually all public organizations have written policies regarding equal employment opportunity. Though the style and substance may differ somewhat, these policies typically outline and affirm the organization's commitment to creating and maintaining policies, procedures, and a work environment that assures equal opportunity and treatment for all staff in regard to the terms and conditions of their employment. Further, the policy typically affirms that the organization does not condone any form of harassment of employees that could be viewed as creating a hostile work environment and establishes expectations for compliance by all employees. These policies are typically issued by the ceo, and are usually disseminated annually to all employees.

Writing and disseminating policies is a good first step, but what happens after that is critical to whether the organization is actually in compliance by walking the walk. There are a number of questions that need to be answered to determine whether the organization is actually serious about equal employment opportunity or just engaged in a bureaucratic process:

- Does every employee receive a copy of the EEO policy, either electronically or paper?
- Does every supervisor/manager reinforce the policy periodically, if not at every employee meeting?
- Is training on EEO, sexual harassment, hostile work environment, workplace violence, etc., provided to new employees as part of the onboarding process? Is this training periodically reinforced with follow-up sessions?
- Have supervisors and managers received training on their obligations to promptly and properly respond to employees' grievances/complaints regarding discrimination, harassment, hostile work environment, etc.?
- Does the organization's EEO compliance (or HR) staff conduct independent investigations when grievances/complaints are filed?
- Is top management made aware of all grievances/complaints filed by employees regarding discrimination, harassment, hostile work environment, etc.?
- Does the organization have written policies that govern the sanctions to be taken against employees who engage in acts that are found to be contrary to the organization's EEO policies?

There needs to be a clear expectation that **all** employees, including managers, supervisors, and top management, understand and adhere to the policies. Positive, proactive action by the organization, as opposed to words on a piece of paper, will ultimately determine whether the organization believes in and adheres to equal employment and a harassment-free work environment. Additionally, the extent to which the organization proactively deals with violations may ultimately determine

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whether it will prevail in any subsequent legal proceeding that may be initiated by an employee. This is a clear example of the old saying that an ounce of prevention is worth a pound of cure. Organizations that avoid dealing with employee grievances/complaints regarding discrimination do so at their own peril.

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Part Five: EEO in Selection: Uniform Guidelines

From the outset, affirmative action was envisioned as a temporary remedy that would end once there was a level playing field for all Americans.

As part of the effort to level the playing field, Uniform Guidelines on Employee Selection Procedures (UGESP) were issued in by the EEOC in 1978. The Statement of Purpose in the guidelines provides insight into why these guidelines were needed:

A. Need for uniformity—Issuing agencies. The federal government’s need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the federal government as are applied to other employers.

B. Purpose of guidelines. These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

C. Relation to prior guidelines. These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession.

These guidelines are intended to be consistent with existing law.

The Uniform Guidelines provided guidance to employers to help them comply with federal laws which prohibit discrimination in employment based on race, color, religion, sex, and national origin. The guidelines apply to employers who are subject to Title VII of the *Civil Rights Act of 1964* or Executive Order 11246.

An employment selection process is considered discriminatory if it has an adverse impact on the hiring, promotion, or other employment opportunities of individuals because of race, sex, or ethnicity; that is, if the selection rate for any race, sex, or ethnic group is less than 80 percent for the group having the highest selection rate. A selection procedure that results in an adverse impact is allowed to stand if the employer can demonstrate that the test measures a trait necessary for successful performance of the job or if the employer can eliminate the factor from the selection process which has caused the adverse impact.

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The guidelines also require maintenance of detailed records on employment selection. All these documents and the processes which develop these documents, which support the referral and selection of candidates, must contain only job-related criteria. The documents become part of the overall documentation supporting selection procedures used.

Several parts of the guidelines have been superseded by provisions of the *Civil Rights Act of 1991*. The language of that statute now provides mandatory guidance to employers on employment test validation that supersede provisions included in the guidelines. The guidelines are intended to establish a uniform basis of selection procedure criteria. A selection procedure is any measure, combination of measures, or procedures used an employment decision. This would apply, but not be limited to, job analysis, interviews, and the selection process itself. As Mathis and Jackson point out, “These guidelines attempt to explain how an employer should deal with hiring, retention, promotion, transfer, demotion, dismissal, and referral. Under the Uniform Guidelines, if sued, employers can choose one of two routes to prove they are not illegally discriminating against employees: no disparate impact and job related validity.”

Organizations need to carefully assess their recruitment and advertising strategies before initiating action. The following three areas for action are discussed in some detail:

- EEOC considerations
- Employment advertising
- Job analysis

Organizations must be mindful of the legal, ethical, and practical issues in hiring. The most important aspect to consider in living up to all three issues is that a formal job analysis has to be conducted for every job. Equally important, job analyses must be used to design selection procedures that accurately measure job-related criteria for success on the job.

EEOC Considerations

The organization needs to assure that all job recruitment and advertising strategies used reach a wide, representative audience. As Mathis and Jackson point out, “Employers demonstrate inclusive recruiting by having diverse individuals represented in company materials, in advertisements, and as recruiters.” The Uniform Guidelines apply to both in-service placement actions and external hiring practices.

Recruiting, as a key employment-related activity, is subject to various legal considerations, especially equal employment laws and regulations. When a particular protected class is underrepresented in an organization, word-of-mouth referral by existing employees has been considered a violation of Title VII of the *Civil Rights Act of 1964* because it continues a past pattern of discrimination.

Mathis and Jackson highlight the requirements that organizations must adhere to as part of the recruitment/selection processes: “Employers must collect data on

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applicant race, sex, and other demographics to fulfill EEO reporting requirements. Many employers ask applicants to provide EEO reporting data on a separate form that may be attached to the application form. To avoid claims of impropriety, it is important that employers review and store this information separately and not use it in any selection decision. Since completing the form is voluntary, employers can demonstrate that they tried to obtain the data in related materials.” With many applications being accepted electronically, employers still need to ensure that their recruitment/selection processes comply with these requirements.

Employment Advertising

As Mathis and Jackson state: “The EEOC guidelines state that no direct or indirect references implying gender or age are permitted. Some examples of impermissible terminology are, ‘young and enthusiastic,’ ‘recent college graduate,’ ‘Christian Values,’ and ‘journeyman lineman.’ Additionally, employment advertisements should indicate that the employer has a policy of complying with equal employment regulations. Advertisements should contain a general phrase, such as Equal Opportunity Employer, or more specific designations, such as EEO/M-F/AA/ADA. Employers demonstrate inclusive recruiting by having diverse individuals represented in company materials, in advertisements, and as recruiters. Microsoft, Prudential Insurance, Bristol-Myers Squibb, and other firms have found that making diversity visible in recruiting efforts has helped them recruit more individuals with more varied backgrounds.”

Organizations should be careful in developing advertisements and distributing recruitment materials that include educational or licensing requirements that cannot be defended. As Mathis and Jackson point out, the U.S. Supreme Court established in their 1971 ruling in *Griggs v. Duke Power* that

- A lack of intent is not sufficient for an employer to prove that a practice is lawful;
- The employer has the burden to show that a selection process is directly job related as a business necessity.

Educational requirements are often based on business necessity. Business necessity is defined as a practice necessary for the safe and efficient organizational operations. The employer, however, must be able to defend the requirement as essential to the performance of the job.

The same concept holds true for bona fide occupational qualifications (BFOQ). The *Civil Rights Act of 1964* states that an employer may discriminate on the basis of sex, religion, or national origin if the characteristic can be justified as a “bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise.” The problem is, what constitutes a BFOQ has been subject to different interpretations in various courts across the United States.

Job Analysis

The only way an organization can be assured that the occupational qualifications and educational requirements advertised or published in recruitment materials are job-related is to conduct a formal job analyses for each type of job.

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If experience and/or educational requirements have changed, any previous recruitment or advertising strategies may be less effective in reaching and attracting potential applicants who meet the new criteria. A professionally prepared job analysis must be performed to identify those aspects of the job that are frequent, important, critical, and prerequisites to successful job performance. These could be work behaviors, work outcomes, knowledge, skills, abilities, or other characteristics of a worker, worker behavior, or outcomes of the work.

The skill sets required for each job are an important issue that needs to be discussed as part of the strategic recruitment planning process. The HR staff, in collaboration with management, should conduct a job analysis of the positions included in the recruitment effort. This analysis may result in changes that may dramatically affect the nature and scope of the recruitment plan and, ultimately, the success of the entire endeavor. This analysis should concentrate on the identification of:

- **Important and essential functions**—What are the important and essential functions that the job(s) will be routinely expected to perform? This information will form the basis for the job information that is ultimately used as part of the recruitment effort. If the nature and mix of job functions has changed, this information must be incorporated into a revised job description or standard.
- **New or revised KSAs**—New or revised functions may also herald the need for new or revised knowledge, skills, and abilities (KSAs). Changes may occur in the KSAs even if there is no substantial change in job functions or duties, but as a result of new work methods, automation, policies, regulations, etc. This information must also be incorporated into a revised job description or standard.
- **Testing**—The KSAs also come into play in developing selection processes that may be used as part of a merit or civil service examination process. Basing test items directly on job duties and responsibilities provides content validity. Content validity is most often addressed in academic and vocational testing, where test items need to reflect the knowledge actually required for a given topic area (e.g., history) or job skill (e.g., accounting).

As we noted earlier in this course, the importance of conducting a proper job analysis cannot be stressed too much. Jobs tend to be dynamic creatures—they may change significantly over time in response to a host of factors. These changes may occur incrementally, with the cumulative effects ignored or discounted in order to respond quickly to the need to develop a recruitment plan. Shortcutting the strategic recruitment planning process may meet management's short-term objectives for speed. Ultimately, as the saying goes speed kills, and basing a major recruitment effort on old job data is a recipe for failure, resulting potentially in a pool of applicants who are ill-equipped for effective job performance. Current, updated job data provides the basis for developing a profile of the ideal candidate in terms of the important functions to be performed and the skill set and competencies needed for successful job performance.

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In response to an inquiry about whether employment tests are legal, the Department of Labor's OFCCP responded:

Yes. Employment tests can be used to make employment decisions if the tests are administered fairly and do not discriminate. Employment tests are unlawful if they disproportionately exclude members of particular groups, and the employer cannot show that the tests are job related and consistent with business necessity.

For example, tests that exclude members of a particular sex, race or ethnic group, national origin, religion, or individuals with disabilities or veterans protected by the laws OFCCP enforces would have to be based on a legitimate job-related or business need.

It is also important for HR professionals to be aware of and stay current on prohibited activities that could potentially lead to sanctions against the organization. In the remainder of this part, we will outline the major prohibited activities and the potential sanctions that could be imposed.

Prohibited Inquiries

Federal and state laws prohibit prospective employers from asking certain questions that are not related to the job they are hiring for. Questions should be job-related and not used to find out personal information.

Preemployment inquiries may be lawful or unlawful, depending upon the subject of inquiry. For example, an inquiry regarding a person's name may not be discriminatory if the intent is to determine if the applicant has ever worked under a different name. However, this same inquiry may be discriminatory if they are inquiring about the original name of a person whose name has been legally changed, or if it is an attempt to find the ethnic association of the person's name.

Given all the protected-class groups, many EEO complaints arise because of inappropriate preemployment inquiries. Questions asked of applicants may be viewed as discriminatory or biased against protected-class applicants. Once an employer tells an applicant he or she is hired (the point of hire), inquiries that were prohibited earlier may be made. After hiring, medical examination forms, group insurance cards, and other enrollment cards containing inquiries related directly or indirectly to sex, age, or other bases may be administered and issued.

In describing prohibited employment practices and policies, the EEOC has included the following on its website:

Pre-Employment Inquiries (General)

As a general rule, the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; whereas, information regarding race, sex, national origin, age, and religion are irrelevant in such determinations.

Employers are explicitly prohibited from making pre-offer inquiries about disability.

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Although state and federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race, color, sex, national origin, religion, or age, such inquiries may be used as evidence of an employer's intent to discriminate unless the questions asked can be justified by some business purpose.

Therefore, inquiries about organizations, clubs, societies, and lodges of which an applicant may be a member, or any other questions which may indicate the applicant's race, sex, national origin, disability status, age, religion, color, or ancestry if answered, should generally be avoided.

Similarly, employers should not ask for a photograph of an applicant. If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.

Pre-Employment Inquiries and:

- Race
- [Height & Weight](#)
- [Financial Information](#)
- [Unemployed Status](#)
- [Background Checks](#)
- [Religious Affiliation Or Beliefs](#)
- [Citizenship](#)
- [Marital Status, Number Of Children](#)
- [Gender](#)
- [Disability](#)
- [Medical Questions & Examinations](#)

Adverse Impact

Under U.S. employment law, adverse impact, also known as disparate impact, is a theory of liability that prohibits an employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class. A facially neutral employment practice is one that does not appear to be discriminatory on its face; rather it is discriminatory in its application or effect.

In the Uniform Guidelines on Employee Selection Procedures, adverse impact is defined as a "substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group." A substantially different rate is typically defined in government enforcement or Title VII litigation using the 80% Rule, statistical significance tests,

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and/or practical significance tests. Adverse impact is often used interchangeably with disparate impact, which was a legal term coined in one of the most significant U.S. Supreme Court rulings on disparate or adverse impact: *Griggs v. Duke Power Co., 1971*.

According to the EEOC website concerning Employment Tests and Selection Procedures,

Title VII also prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not “job-related and consistent with business necessity.” This is called “disparate impact” discrimination.

Disparate impact cases typically involve the following issues:

- Does the employer use a particular employment practice that has a **disparate impact** on the basis of race, color, religion, sex, or national origin? For example, if an employer requires that all applicants pass a physical agility test, does the test disproportionately screen out women? Determining whether a test or other selection procedure has a disparate impact on a particular group ordinarily requires a statistical analysis.
- If the selection procedure has a disparate impact based on race, color, religion, sex, or national origin, can the employer show that the selection **procedure is job-related and consistent with business necessity**? An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job. The challenged policy or practice should therefore be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants’ or employees’ skills, the challenged policy or practice must evaluate an individual’s skills as related to the particular job in question.
- If the employer shows that the selection procedure is job-related and consistent with business necessity, can the person challenging the selection procedure demonstrate that there is a **less discriminatory alternative available**? For example, is another test available that would be equally effective in predicting job performance but would not disproportionately exclude the protected group?
- See 42 U.S.C. § 2000e-2 (k). This method of analysis is consistent with the seminal Supreme Court decision about disparate impact discrimination, *Griggs v. Duke Power Co., 401 U.S. 424 (1971)*.
- In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures or “UGESP” under Title VII. See 29 C.F.R. Part 1607. UGESP provided uniform guidance for employers about how to determine if their tests and selection procedures were lawful for purposes of Title VII disparate impact theory.

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- UGESP outlines three different ways employers can show that their employment tests and other selection criteria are job-related and consistent with business necessity. These methods of demonstrating job-relatedness are called “test validation.” UGESP provides detailed guidance about each method of test validation.

Adverse impact is also known as an unintentional form of discrimination, which occurs when identical standards or procedures are applied to everyone, despite the fact that they lead to a substantial difference in employment outcomes for the members of a particular group and they are unrelated to success on a job. An important thing to note is that adverse impact is not illegal. Adverse impact only becomes illegal if the employer cannot justify the employment practice causing the adverse impact as ‘job related for the position in question and consistent with business necessity’” (Information taken from the *1964/1991 Civil Rights Act*, Section 2000e-2[k] [1] [A]).

For example, a fire department requires applicants to carry a 100 pound pack up three flights of stairs. The upper body strength requirement typically has an adverse impact on women. The fire department would have to show that this requirement is job-related for the position. This typically requires employers to conduct validation studies that address both the Uniform Guidelines and professional standards.

To determine whether a substantially different rate of selection exists, the EEOC adopted a rule of thumb under which they will generally consider a selection rate for any race, sex, or ethnic group which is less than four-fifths or eighty percent of the selection rate for the group with the highest selection rate as a substantially different rate of selection. This rule is not intended as a legal definition, but is a practical means of keeping the attention of the enforcement agencies on serious discrepancies in rates of hiring, promotion, and other selection decisions.

For example, if the hiring rate for whites other than Hispanics is 60%, 45% for American Indians, 48% for Hispanics, and 51% for Blacks, and each of these groups constitutes more than 2% of the labor force in the relevant labor area, a comparison should be made of the selection rate for each group with that of the highest group (whites). These comparisons show the following impact ratios: Native Americans 45/60 or 75%; Hispanics 48/60 or 80%; and Blacks 51/60 or 85%. Applying the 4/5ths or 80% rule of thumb, on the basis of the above information alone, adverse impact is indicated for Native Americans, Indians but not for Hispanics or Blacks.

Adverse impact is determined by a four-step process:

- (1) Calculate the rate of selection for each group (divide the number of persons selected from a group by the number of applicants from that group).
- (2) Observe which group has the highest selection rate.
- (3) Calculate the impact ratios by comparing the selection rate for each group with that of the highest group (divide the selection rate for a group by the selection rate for the highest group).

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(4) Observe whether the selection rate for any group is substantially less (i.e., usually less than 4/5ths or 80%) than the selection rate for the highest group. If it is, adverse impact is indicated in most circumstances.

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Part Six: Discrimination Complaints, Investigation, and Resolution

Addressing, investigating, and resolving discrimination complaints can be a time-consuming and tedious process. As discussed in Part Five, if done improperly, dealing with discrimination complaints can have expensive ramifications for the organization. We will discuss some legal aspects of discrimination in this portion of the course, and also how an investigation needs to be accomplished.

A *prima facie* case is what an employee has to prove in a discrimination case in order to require an employer to explain itself in court. It is that minimum set of facts that a plaintiff has to include in a court complaint and be prepared to actually prove. *Prima facie* is Latin for “on its face” or “at first sight.”

Ken LaMance describes what constitutes a prima facie case in his October 20, 2014, LegalMatch.com article “*Prima facie* basically means that there is enough evidence before the trial to prove the case, unless contradictory evidence is presented at trial.” He further states:

In an employment setting, a prima facie case of discrimination is where the plaintiff has sufficient evidence to prove that their employer discriminated against them. Unless the employer is able to present evidence to the contrary, the employee victim will likely prevail.

In order to establish a prima facie case of [employment discrimination](#), courts will generally require proof that:

- The plaintiff was a member of a “protected group”
- The plaintiff was qualified in all respects for the job they sought
- The plaintiff was rejected in spite of being fully qualified
- After the rejection, the employer continued seeking for applicants with the plaintiff’s qualifications.

In describing the different types of prima facie discrimination, LaMance explains: “For example, when proving a *prima facie* case of [age discrimination](#), it is typically required that the affected employee was over a certain age (usually 40 or 50 years old), and that a younger person was hired in their place despite qualifications. Or, in a *prima facie* case of race discrimination, it may be necessary to prove that the plaintiff was a member of a certain race, and that an employee of a different race was hired instead.”

According to the website Practical Law, McDonnell Douglas burden-shifting is:

An evidentiary framework used to analyze whether a plaintiff’s [disparate treatment \(www.practicallaw.com/8-502-2875\)](#) discrimination claims should survive a defendant employer’s motion for summary judgment. The McDonnell Douglas burden-shifting analysis is applied when a plaintiff lacks direct evidence of discrimination. It takes its name from the U.S. Supreme Court decision that

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created the framework, [McDonnell Douglas Corp. v. Green, 411 U.S. 792 \(1973\)](#). Traditional McDonnell Douglas burden-shifting operates as follows:

- The plaintiff makes out a *prima facie* case, which means demonstrating that:
 - he is a member of a protected class;
 - he was qualified for and applied for an available position;
 - despite being qualified, he was rejected for the position; and
 - the position remained available after the plaintiff's rejection, and the defendant employer continued to seek applicants from persons of plaintiff's qualifications.
- The burden of production shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for the employment action.
- The plaintiff must then demonstrate that the employer's reason was pretext for discrimination.

Although the McDonnell Douglas burden-shifting framework was originally created for claims alleging discriminatory failure to hire on the basis of race under [Title VII of the Civil Rights Act of 1964 \(www.practicallaw.com/0-501-7062\)](#), courts have applied the analysis to various other employment claims under Title VII (for example, failure to promote, retaliation, and termination). It has also been used to analyze claims of discrimination under several other federal laws prohibiting employment discrimination (for example, the [Americans with Disabilities Act of 1990 \(www.practicallaw.com/7-501-9331\)](#) and the [Age Discrimination in Employment Act of 1967 \(www.practicallaw.com/2-501-7061\)](#)).

As HR professionals we need to clearly understand the differences between discrimination, disparate treatment, adverse impact, harassment, retaliation, and denial of accommodation. Each of these concepts is defined in the following paragraphs.

“Disparate treatment is one kind of unlawful [discrimination](#) in [US labor law](#). In the United States, it means unequal behavior toward someone because of a protected characteristic (e.g. race or gender) under Title VII of the United States [Civil Rights Act](#). This contrasts with [disparate impact](#), where an employer applies a neutral rule that treats everyone equally in form, but has a disadvantageous effect on some people of a protected characteristic compared to others.”

“A disparate treatment violation is made out when an individual of a protected group is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion under Title VII. The issue is whether the employer's actions were motivated by discriminatory intent. Discriminatory intent can either be shown by direct evidence, or through indirect or circumstantial evidence.”

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Direct Method

Under the direct method, a plaintiff tries to show that his membership in the protected class was a motivating factor in the adverse job action.

1. He may offer direct evidence, e.g. that the defendant admitted that it was motivated by discriminatory intent or that it acted pursuant to a policy that is discriminatory on its face. Direct evidence of discrimination is rarely available, given that most employers do not openly admit that they discriminate. Facially discriminatory policies are only permissible if gender, national origin, or religion is a bona fide occupational qualification for the position in question. Race or color may never be a bona fide occupational qualification.
2. He may offer any of three types of circumstantial evidence:
 - ‘suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn.’^[8]
 - evidence that other similarly-situated employees not in the protected class received systematically better treatment.^[9]
 - evidence that the plaintiff was qualified for the job, a person not in the protected class got the job, and the employer’s stated reason for its decision is unworthy of belief. This type of circumstantial evidence is substantially the same as the evidence required by the McDonnell Douglas method described below.

Indirect Method/Burden Shifting

In the majority of cases, the plaintiff lacks direct evidence of discrimination and must prove discriminatory intent indirectly by inference. The Supreme Court analyzes these cases using the [McDonnell Douglas burden-shifting formula](#). The analysis is as follows:

- (1) The plaintiff must establish a *prima facie* case of discrimination.
 - (2) The employer must then articulate, through admissible evidence, a legitimate, nondiscriminatory reason for its actions.
 - (3) To prevail, the plaintiff must prove that the employer’s stated reason is a pretext to hide discrimination.
- **Prima facie case:** The elements of the *prima facie* case are:
 - (i) The plaintiff is a member of a protected class.
 - (ii) The plaintiff applied and was qualified for the job.

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(iii) The application was rejected.

(iv) The position remained open after the rejection.

- **Employer’s burden of production:** To rebut the inference of discrimination, the employer must articulate, through admissible evidence, a legitimate, non-discriminatory reason for its actions. The employer’s burden is one of production, not persuasion; the ultimate burden of persuasion always remains with the plaintiff.
- **Plaintiff’s proof of pretext:** Proof that the defendant’s asserted reason is untrue permits, but does not require, a finding of discrimination...
- In addition to producing evidence of the falsity of the employer’s proffered reason, the plaintiff may also attempt to prove pretext using: comparative evidence; statistics; or direct evidence of discrimination.

Mixed Motives

“The plaintiff in a disparate treatment case need only prove that membership in a protected class was a motivating factor in the employment decision, not that it was the sole factor. One’s membership in a protected class will be considered a motivating factor when it contributes to the employment decision. If the employer proves that it had another reason for its actions and it would have made the same decision without the discriminatory factor, it may avoid liability for monetary damages, reinstatement or promotion. The court may still grant the plaintiff declaratory relief, injunctive relief, and attorneys’ fees and costs.”

(The above information was obtained from [Wikipedia, The Free Encyclopedia.](#))

According to the EEOC website concerning Employment Tests and Selection Procedures, Title VII also prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not “job-related and consistent with business necessity.” This is called ‘**disparate impact**’ discrimination.

Disparate impact cases typically involve the following issues:

- Does the employer use a particular employment practice that has a **disparate impact** on the basis of race, color, religion, sex, or national origin? For example, if an employer requires that all applicants pass a physical agility test, does the test disproportionately screen out women? Determining whether a test or other selection procedure has a disparate impact on a particular group ordinarily requires a statistical analysis.
- If the selection procedure has a disparate impact based on race, color, religion, sex, or national origin, can the employer show that the selection **procedure is job-related and consistent with business necessity**? An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job. The challenged policy or practice should therefore be

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associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants' or employees' skills, the challenged policy or practice must evaluate an individual's skills as related to the particular job in question.

- If the employer shows that the selection procedure is job-related and consistent with business necessity, can the person challenging the selection procedure demonstrate that there is a **less discriminatory alternative** available? For example, is another test available that would be equally effective in predicting job performance but would not disproportionately exclude the protected group?
- See 42 U.S.C. § 2000e-2 (k). This method of analysis is consistent with the seminal Supreme Court decision about disparate impact discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
- In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures or 'UGESP' under Title VII. See 29 C.F.R. Part 1607. UGESP provided uniform guidance for employers about how to determine if their tests and selection procedures were lawful for purposes of Title VII disparate impact theory.
- UGESP outlines three different ways employers can show that their employment tests and other selection criteria are job-related and consistent with business necessity. These methods of demonstrating job-relatedness are called 'test validation.' UGESP provides detailed guidance about each method of test validation.

According to the EEOC website concerning harassment,

Harassment is a form of employment discrimination that violates Title VII of the *Civil Rights Act of 1964*, the *Age Discrimination in Employment Act of 1967* (ADEA), and the *Americans with Disabilities Act of 1990* (ADA).

Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or

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mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:

- The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.
- The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
- Unlawful harassment may occur without economic injury to, or discharge of, the victim.

Prevention is the best tool to eliminate harassment in the workplace. Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment. They should clearly communicate to employees that unwelcome harassing conduct will not be tolerated. They can do this by establishing an effective complaint or grievance process, providing anti-harassment training to their managers and employees, and taking immediate and appropriate action when an employee complains. Employers should strive to create an environment in which employees feel free to raise concerns and are confident that those concerns will be addressed.

Employees are encouraged to inform the harasser directly that the conduct is unwelcome and must stop. Employees should also report harassment to management at an early stage to prevent its escalation.

Employer Liability for Harassment

The employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages. If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

When investigating allegations of harassment, the EEOC looks at the entire record, including the nature of the conduct and the context in which the alleged incidents occurred. A determination of whether harassment is severe or pervasive enough to be illegal is made on a case-by-case basis.

If you believe that the harassment you are experiencing or witnessing is of a specifically sexual nature, you may want to see EEOC's information on [sexual harassment](#).

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Organizations also need to protect employees who report instances of wrongdoing. Concerning whistleblowing and retaliation protections, the United States Department of Labor has stated:

Who is Covered

The Occupational Safety and Health Administration (OSHA) administers the employee protection or “whistleblower” provisions of seventeen statutes.

Under the *Occupational Safety and Health Act* (OSH Act), employees may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for exercising any right afforded by the OSH Act, such as complaining to the employer union, OSHA, or any other government agency about workplace safety or health hazards; or for participating in OSHA inspection conferences, hearings, or other OSHA-related activities.

Under the *Surface Transportation Assistance Act* (STAA), employees and certain independent contractors in the trucking industry may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for reporting certain commercial motor vehicle (CMV) safety, health, or security concerns; for refusing to drive under dangerous circumstances or in violation of CMV safety, health, or security rules; for accurately reporting their hours on duty; for cooperating with safety or security investigations conducted by certain federal agencies; or for furnishing information to a government agency relating to any accident or incident resulting in injury or death or damage to property in connection with CMV transportation.

Under the *Asbestos Hazard Emergency Response Act* (AHERA), employees may file complaints with OSHA if they believe they have experienced discrimination or retaliation for reporting alleged violations of environmental laws relating to asbestos in elementary and secondary school systems.

Under the *International Safe Container Act* (ISCA), employees may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for reporting allegations of an unsafe cargo container.

Under the *Energy Reorganization Act* (ERA), certain employees in the nuclear power and nuclear medicine industries may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for reporting alleged violations of nuclear safety laws or regulations.

Under the *Clean Air Act* (CAA), *Safe Drinking Water Act* (SDWA), *Federal Water Pollution Control Act* (FWPCA) <http://www4.law.cornell.edu/uscode/33/1367.html>, *Toxic Substances Control Act* (TSCA) <http://www4.law.cornell.edu/uscode/15/2622.html>, *Solid Waste Disposal Act* (SWDA) <http://www4.law.cornell.edu/uscode/42/6971.html>, *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA) <http://www4.law.cornell.edu/uscode/42/9610.html> employees may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for reporting alleged violations of certain environmental laws or regulations.

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Under the *Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)*, employees of air carriers and their contractors and subcontractors may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for reporting alleged violations of federal air carrier safety laws or regulations.

Under the *Corporate and Criminal Fraud Accountability Act*, Title VIII of the *Sarbanes-Oxley Act (SOX)*, employees of certain publicly traded companies, companies with certain reporting requirements with the Securities and Exchange Commission (SEC), and their contractors, subcontractors, and agents may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for reporting alleged violations of the federal mail, wire, bank, or securities fraud statutes, any rule or regulation of the SEC, or any other provision of federal law relating to fraud against shareholders.

Under the *Pipeline Safety Improvement Act (PSIA)*, employees of owners or operators of pipeline facilities and their contractors and subcontractors may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for reporting alleged violations of federal law regarding pipeline safety or for refusing to violate such provisions.

Under the *Federal Rail Safety Act (FRSA)*, employees of railroad carriers and their contractors and subcontractors may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for reporting an alleged violation of any federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of federal grants or other public funds intended to be used for railroad safety or security; reporting hazardous safety or security conditions; refusing to violate or assist in the violation of any federal law, rule, or regulation relating to railroad safety or security; refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties (under imminent danger circumstances); or for requesting prompt medical or first aid treatment for employment-related injuries.

Under the *National Transit Systems Security Act (NTSSA)*, employees of public transportation agencies and their contractors and subcontractors may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for reporting an alleged violation of any federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of federal grants or other public funds intended to be used for public transportation safety or security; reporting hazardous safety or security conditions; refusing to violate or assist in the violation of any federal law, rule, or regulation relating to public transportation safety or security; or refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties (under imminent danger circumstances).

Under the *Consumer Product Safety Improvement Act (CPSIA)*, employees of manufacturers, private labelers, distributors, and retailers may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for reporting alleged violations of any law or regulation within the jurisdiction of the Consumer Product Safety Commission (CPSC) to the employer, the federal

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government, or a state attorney general; or for refusing to perform assigned tasks that the employee reasonably believes would violate CPSC requirements.

Other Department of Labor agencies, such as the [Wage and Hour Division](#), the [Employee Benefits Security Administration](#), and the [Mine Safety and Health Administration](#), enforce the anti-retaliation provisions of numerous other statutes and Executive Orders. Information concerning many of these additional anti-retaliation protections is available in other sections of the Guide.

Basic Provisions/Requirements

Generally, the employee protection provisions listed above prohibit covered employers from discharging or otherwise discriminating against any employee because the employee engaged in certain activities protected by law.

The protected activities typically include:

- Initiating a proceeding under, or for the enforcement of, any of these statutes, or causing such a proceeding to be initiated;
- Testifying in any such proceeding;
- Assisting or participating in any such proceeding or in any other action to carry out the purposes of these statutes; or
- Complaining about a violation.

Many of the statutes specifically protect an employee's internal complaints to his or her employer, and it is the Department of Labor's position, as set forth in regulations, that employees who express safety or quality assurance concerns internally to their employers are protected under all of the whistleblower statutes administered by OSHA.

Employee Rights

Any employee who believes that he or she has been discriminated or retaliated against in violation of any of the statutes listed above may file a complaint with OSHA. Complaints must be filed within 30 days after the occurrence of the alleged violation under the OSH Act, CAA, CERCLA, SWDA, FWPCA, SDWA, and TSCA; within 60 days under ISCA; within 90 days under AIR21, SOX, and AHERA; and within 180 days under STAA, ERA, PSIA, FRSA, NTSSA, and CPSIA.

If the Secretary of Labor has not issued a final decision within 180 days of the filing of a SOX complaint, one year of the filing of an ERA complaint, or 210 days of a STAA, FRSA, NTSSA, or CPSIA complaint, and there is no showing that there has been delay due to the bad faith of the employee, the employee may bring an action at law or equity in district court under those statutes.

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Recordkeeping, Reporting, Notices and Posters

Notices and Posters

Posters. Although there is no specific Whistleblower Poster, the Whistleblower Protection provisions have the following poster requirements under the *Occupational Safety and Health Act* (OSH Act) and the *Energy Reorganization Act of 1974* (ERA):

All employers covered by the OSH Act are required to display and keep displayed the OSHA “[Job Safety and Health: It’s the Law](#)” poster. The poster is [also available in Spanish](#). There is [a separate poster for federal agencies](#). This poster informs employees of their right to file a retaliation or discrimination complaint with OSHA for making safety and health complaints or for exercising rights under the OSH Act.

The poster must be displayed in a conspicuous place where employees and applicants for employment can see it. Reproductions or facsimiles of the poster shall be at least 8 1/2 by 14 inches with 10 point type. Posting of the notice in languages other than English is not required.

Employers covered by the *Energy Reorganization Act of 1974* (ERA) must display the poster, “[Your Rights Under the Energy Reorganization Act](#),” where employees can readily see it.

Notices. There are generally no notice requirements for employers under most of the Whistleblower Protection provisions administered and enforced by OSHA. For other notice requirements under the OSH Act, see the [OSHA Recordkeeping, Reporting, Poster, and Other Notice Requirements](#) page.

Recordkeeping

There are generally no recordkeeping requirements for employers under most of the Whistleblower Protection provisions administered and enforced by OSHA. For other recordkeeping requirements under the OSH Act, see the [OSHA Recordkeeping, Reporting, Poster, and Other Notice Requirements](#) page.

Reporting

There are generally no reporting requirements for employers under most of the Whistleblower Protection provisions administered and enforced by OSHA. For other reporting requirements under the OSH Act, see the [OSHA Recordkeeping, Reporting, Poster, and Other Notice Requirements](#) page.

Penalties/Sanctions

Upon receipt of a timely complaint, OSHA notifies the employer and, if conciliation fails, conducts an investigation. Where OSHA finds that complaints filed under the OSH Act, AHERA, and ISCA have merit, they are referred to the Solicitor’s Office for legal action. Complaints under these three statutes found not to have merit will be dismissed. Where OSHA finds a violation after investigating complaints under the other statutes listed above, it will issue a determination letter requiring the employer to pay back wages, reinstate the employee, reimburse the employee for attorney and expert witness fees, and take other steps to provide necessary relief. Complaints found not to have merit will be dismissed.

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Parties who object to OSHA's determinations under the other statutes listed above (except for the OSH Act, AHERA, and ISCA) may request a hearing before the [Department of Labor's Office of Administrative Law Judges](#) (OALJ). Administrative Law Judges' decisions are reviewed by the [Department of Labor's Administrative Review Board](#), which the Secretary of Labor has designated to issue final agency decisions.

Under STAA, if OSHA finds in favor of the employee, litigation ordinarily is conducted by the Solicitor's Office, but sometimes by the private party. Under the other statutes, litigation generally is conducted by the private parties themselves. Employers and employees may seek judicial review of an adverse Administrative Review Board decision.

Under the AIR21, SOX, PSIA, FRSA, NTSSA, and CPSIA, employees who file complaints frivolously or in bad faith may be liable for attorney's fees up to \$1,000.

Relation to State, Local, and Other Federal Laws

The Supreme Court has held that the employee protection provisions of the ERA do not preempt existing state statutes and common law claims. The other statutes listed above should be consulted separately to determine whether or not their employee protection provisions are supplementary to protection provided by state laws.

Compliance Assistance Available

The Department of Labor provides employers, workers, and others with clear and easy-to-access information and assistance on how to comply with the Whistleblower Protection provisions, including OSHA's Whistleblower Program website (<https://www.whistleblowers.gov>). Compliance assistance related to the Act, including explanatory brochures, fact sheets, and regulatory and interpretive materials, is available on the [Compliance Assistance "By Law"](#) webpage.

DOL Contacts

[Occupational Safety and Health Administration](#) (OSHA)

Contact OSHA

Tel.: 1-800-321-OSHA (1-800-321-6742); TTY: 1-877-889-5627"

Employees are protected in most states by general statutes or common law barring discrimination or retaliation against whistleblowers. In order to qualify for whistleblower protection in most states and under Federal law, an employee generally must have a good-faith belief that the employer or its employees are in some way violating the law. The employee must also either complain about that violation to the employer or an outside agency, refuse to participate in the violation, or assist in an official investigation of the violation.

According to FindLaw fact sheet titled Whistleblower Retaliation Could Land You in Trouble,

A large number of states have their own whistleblower laws that add to and complement the federal whistleblower laws that are already in place. For example, many states have laws that protect whistleblowers that complain of violations of

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state laws regarding family and medical leave, mandatory time off for jury duty and voting, state antidiscrimination laws, and state wage and hour laws.

In addition to the examples above, many states also allow employees to bring lawsuits when they believe that they were disciplined or terminated “in violation of public policy.” Generally speaking, many of these claims are brought by former employees that believe they were fired for reasons such as exercising a legal right or complaining of their company’s illegal activities. You should look up your state’s laws on this matter as they vary widely from one state to another.

There are some states that only allow an employee to bring a “violation of public policy” lawsuit if they complained to a government agent or agency. Other states allow employees to bring such lawsuits for internal complaints. Some states allow employees to bring lawsuits only when the law that the company allegedly violated contains explicit anti-retaliation clauses, and others do not have such a requirement. Still other states do not allow “public policy” claims at all.

How to Avoid Whistleblower Claims

In addition to being damaging to a company’s bank account, whistleblower lawsuits can also be very damaging to a company’s reputation and goodwill. Because of this, it is always a good idea to do your best to avoid whistleblower claims. Here are a few steps that you can take to reduce the risk that your company will be subject to such a lawsuit:

- **Don’t retaliate**—This first step seems pretty simple, yet it can be very hard to put into practice. You should always try to remember not to treat employees that have complained about your company any differently than those who have not. Many times company owners do not want to believe that their companies are engaging in illegal activity, which makes retaliation seem very desirable. However, taking out your frustrations on the employee that caused you the problem will not do anything to lessen the problems that your company is facing—in fact, it could only deepen them. Try to see the complaint as an opportunity to get your business back on a lawful track instead of a thorn in your side.
- **Have a complaint policy in place and be sure to use it**—A few laws, such as the *Sarbanes-Oxley Act*, make it so that certain publicly traded companies must have specific complaint handling policies in place. However, it is a good idea to have a complaint policy in place even if it is not required by law. Once you have your policy in place, make sure to train and educate your employees in using the system. You should always make it clear that an employee who comes forward will not suffer retaliation. Lastly, once you have your complaint policy in place, be sure to abide by it.
- **Investigate all credible complaints**—If you receive an internal complaint about alleged wrongdoing, be sure to investigate it, so long as it is credible. If you find that the complaint was truthful, take the steps needed to remedy the situation. Keep in mind that if you make it a habit of not investigating complaints, your employees may decide to go to the government before notifying you. This could land your company in serious trouble.

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- **Be careful in disciplining whistleblowers for other misconduct**—If you have a whistleblower in your company that needs to be disciplined for other conduct (for example, an employee that complained about safety code violations, but that is also sexually harassing his secretary), you must be very careful in your discipline. If you are concerned that the employee may turn around and sue you, you should think about contacting a lawyer before engaging in any discipline. Get evidence to support your claim that you are disciplining for reasons other than the whistleblowing and make sure the employee knows the reason he or she is being disciplined.

The Legal Dictionary at Law.com defines a *qui tam* action this way: “From Latin for ‘who as well,’ a lawsuit brought by a private citizen (popularly called a ‘whistle blower’) against a person or company who is believed to have violated the law in the performance of a contract with the government or in violation of a government regulation, when there is a statute which provides for a penalty for such violations. Qui tam suits are brought for ‘the government as well as the plaintiff.’ In a *qui tam* action the plaintiff (the person bringing the suit) will be entitled to a percentage of the recovery of the penalty (which may include large amounts for breach of contract) as a reward for exposing the wrongdoing and recovering funds for the government. Sometimes the federal or state government will intervene and become a party to the suit in order to guarantee success and be part of any negotiations and conduct of the case. This type of action is generally based on significant violations which involve fraudulent or criminal acts, and not technical violations and/or errors.

Denial of ADA accommodation—The Office of Disability Employment Policy (ODEP), a part of the U.S. Department of Labor, is the only nonregulatory federal agency that promotes policies and coordinates with employers and all levels of government to increase workplace success for people with disabilities. The ODEP website states:

Under the *Americans with Disabilities Act*, covered employers are required to provide ‘reasonable accommodations’ to qualified job applicants and employees with disabilities. In the employment context, a reasonable accommodation is defined as any change or adjustment to a job, the work environment, or the way things usually are done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other individuals in the workplace. Accommodations have accurately been described as ‘productivity enhancers’ and come in many shapes and forms, including:

- Physical changes
 - Installing a ramp
 - Modifying a workspace
- Accessible and assistive technologies
 - Ensuring application software is accessible, e.g. online application systems

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- Providing screen reader software
- Utilizing videophones to facilitate communications with colleagues who are deaf
- Accessible communications
 - Providing sign language interpreters or closed captioning at meetings and events
 - Making materials available in Braille or large print
- Policy enhancements
 - Modifying a policy to allow a service animal in a business setting
 - Adjusting work schedules to allow employees with chronic medical issues to go to medical appointments and complete their work at alternate times or locations

These are just examples and not a comprehensive list. Individuals and employers who would like additional information or ideas about accommodations should contact the Job Accommodation Network (JAN). JAN is an ODEP-funded technical assistance center providing free, expert, and confidential guidance on workplace accommodations for applicants and employees with disabilities and other employment-related issues.

Reasonable accommodations should not be viewed as special treatment and in fact often benefit more than the requesting employee. For example, facility enhancements such as ramps and accessible restrooms benefit more than just employees with disabilities.

According to an EEOC website titled Enforcement Guidance: Reasonable Accommodation Under the *Americans with Disabilities Act*,

Title I of the *Americans with Disabilities Act of 1990* (the “ADA”) requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. “In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.” There are three categories of “reasonable accommodations”:

(i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

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(iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.”

The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.

Reasonable accommodation is available to qualified applicants and employees with disabilities. Reasonable accommodations must be provided to qualified employees regardless of whether they work part-time or full-time, or are considered “probationary.” Generally, the individual with a disability must inform the employer that an accommodation is needed.

There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed. These include:

- making existing facilities accessible;
- job restructuring;
- part-time or modified work schedules;
- acquiring or modifying equipment;
- changing tests, training materials, or policies;
- providing qualified readers or interpreters; and
- reassignment to a vacant position.

A modification or adjustment is “reasonable” if it “seems reasonable on its face, i.e., ordinarily or in the run of cases;” this means it is “reasonable” if it appears to be “feasible” or “plausible.” An accommodation also must be effective in meeting the needs of the individual. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. Similarly, a reasonable accommodation enables an applicant with a disability to have an equal opportunity to participate in the application process and to be considered for a job. Finally, a reasonable accommodation allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy.

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Example A: An employee with a hearing disability must be able to contact the public by telephone. The employee proposes that he use a TTY to call a relay service operator who can then place the telephone call and relay the conversation between the parties. This is “reasonable” because a TTY is a common device used to facilitate communication between hearing and hearing-impaired individuals. Moreover, it would be effective in enabling the employee to perform his job.

Example B: A cashier easily becomes fatigued because of lupus and, as a result, has difficulty making it through her shift. The employee requests a stool because sitting greatly reduces the fatigue. This accommodation is reasonable because it is a common-sense solution to remove a workplace barrier being required to stand when the job can be effectively performed sitting down. This “reasonable” accommodation is effective because it addresses the employee’s fatigue and enables her to perform her job.

Example C: A cleaning company rotates its staff to different floors on a monthly basis. One crew member has a psychiatric disability. While his mental illness does not affect his ability to perform the various cleaning functions, it does make it difficult to adjust to alterations in his daily routine. The employee has had significant difficulty adjusting to the monthly changes in floor assignments. He asks for a reasonable accommodation and proposes three options: staying on one floor permanently, staying on one floor for two months and then rotating, or allowing a transition period to adjust to a change in floor assignments. These accommodations are reasonable because they appear to be feasible solutions to this employee’s problems dealing with changes to his routine. They also appear to be effective because they would enable him to perform his cleaning duties.

There are several modifications or adjustments that are not considered forms of reasonable accommodation. An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not a “qualified” individual with a disability within the meaning of the ADA. Nor is an employer required to lower production standards—whether qualitative or quantitative—that are applied uniformly to employees with and without disabilities. However, an employer may have to provide reasonable accommodation to enable an employee with a disability to meet the production standard. While an employer is not required to eliminate an essential function or lower a production standard, it may do so if it wishes.

An employer does not have to provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job. Thus, an employer is not required to provide an employee with a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or similar devices if they are also needed off the job. Furthermore, an employer is not required to provide personal use amenities, such as a hot pot or refrigerator, if those items are not provided to employees without disabilities. However, items that might otherwise be considered personal may be required as reasonable accommodations where they are specifically designed or required to meet job-related rather than personal needs.

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Undue Hardship

The only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship" to the employer. "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship. The ADA's "undue hardship" standard is different from that applied by courts under Title VII of the *Civil Rights Act of 1964* for religious accommodation. [Footnotes omitted].

We will discuss the ADA in more detail in Part 8 of this module.

Documentation—As Mathis and Jackson point out, "All employment records must be maintained as required by the EEOC. Such records include application forms and documents concerning hiring, promotion, demotion, transfer, layoff, termination, rates of pay or other terms of compensation, and selection for training and apprenticeship. Even application forms or test papers completed by unsuccessful applicants may be requested. The length of time documents must be kept varies, but generally three years is recommended as a minimum. Complete records are necessary to enable an employer to respond should a charge of discrimination be made."

Process—The Equal Employment Opportunity Commission describes its process for handling discrimination cases on its website:

What You Can Expect After a Charge is Filed

When a charge is filed against an organization, EEOC will notify the organization within 10 days. A charge does not constitute a finding that your organization engaged in discrimination. The EEOC has authority to investigate whether there is reasonable cause to believe discrimination occurred.

In many cases, the organization may choose to resolve a charge through mediation or settlement. At the start of an investigation, EEOC will advise both the organization and the charging party if the charge is eligible for mediation, but feel free to ask the investigator about the settlement option. Mediation and settlement are voluntary resolutions.

During the investigation, the organization and the Charging Party will be asked to provide information. The EEOC investigator will evaluate the information submitted and make a recommendation as to whether there is reasonable cause to believe that unlawful discrimination has taken place. The organization may be asked to:

- **Submit a statement of position**—This is the organization's opportunity to tell its side of the story. A resource guide on Effective Position Statements is available.

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- **Respond to a Request for Information (RFI)**—The RFI may ask the organization to submit personnel policies, Charging Party’s personnel files, the personnel files of other individuals and other relevant information.
- **Permit an on-site visit**—Such visits greatly expedite the fact-finding process and may help achieve quicker resolutions. In some cases, an on-site visit may be an alternative to a RFI if requested documents are made available for viewing or photocopying.
- **Provide contact information for or have employees available for witness interviews**—A representative of the organization may be present during interviews with management personnel, but the EEOC investigator is allowed to conduct interviews of non-management level employees without the presence or permission of the organization.

There are many charges where it is unclear whether discrimination may have occurred and an investigation is necessary. Employers are encouraged to present any facts that they believe show the allegations are incorrect or do not amount to a violation of the law. An employer’s input and cooperation will assist EEOC in promptly and thoroughly investigating a charge.

- Work with the investigator to identify the most efficient and least burdensome way to gather relevant evidence.
- You should submit a prompt response to the EEOC and provide the information requested, even if it is believed the charge does not have merit.
- If there are extenuating circumstances preventing a timely response from you, contact your investigator to work out a new due date for the information.
- Provide complete and accurate information in response to requests from your investigator.
- The average time it takes to investigate and resolve a charge was about 10 months in 2015.
- Our experience shows that undue delay in responding to requests for information extends the time it takes to complete an investigation.
- EEOC is entitled to all information relevant to the allegations contained in the charge, and has the authority to subpoena such information. If you have concerns regarding the scope of the information requested, advise the EEOC investigator. In some instances, the information request may be modified.
- Keep relevant documents. If you are unsure whether a document is needed, ask your investigator. By law, employers are required to keep certain documents for a set period of time.

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EEOC will:

- be available to answer questions about the investigation.
- respond to inquiries about the status of the investigation, including the rights and responsibilities of the parties.
- allow the organization to respond to the allegations.
- conduct a timely investigation.
- inform the organization of the outcome of the investigation.

Once the investigator has completed the investigation, EEOC will make a determination on the merits of the charge.

- If EEOC is unable to conclude that there is reasonable cause to believe that discrimination occurred, the charging party will be issued a notice called a Dismissal and Notice of Rights. This notice informs the charging party that s/he has the right to file a lawsuit in federal court within 90 days from the date of its receipt. The employer will also receive a copy of this notice.
- If EEOC determines there is reasonable cause to believe discrimination has occurred, both parties will be issued a Letter of Determination stating that there is reason to believe that discrimination occurred and inviting the parties to join the agency in seeking to resolve the charge through an informal process known as conciliation.
- When conciliation does not succeed in resolving the charge, EEOC has the authority to enforce violations of its statutes by filing a lawsuit in federal court. If the EEOC decides not to litigate, the charging party will receive a Notice-of-Right-to-Sue and may file a lawsuit in federal court within 90 days.

Digital Charge System

EEOC's 53 offices implemented Phase I of a Digital Charge System to receive and transmit notices and documents through a secure online portal for charges submitted on or after January 1, 2016.

According to the EEOC's website:

Each year, more than 150,000 individuals contact EEOC with inquiries about discrimination and EEOC receives about 90,000 charges per year, making its charge system the agency's most common interaction with the public. To improve customer service, ease the administrative burden on staff, and reduce the use of paper submissions and files, the EEOC is developing online applications for use by the public. The first application for the private sector charge system is Phase I of a Digital Charge System, which was piloted beginning in May 2015 in eleven EEOC offices (Charlotte, Greensboro, Greenville, Norfolk, Raleigh, Richmond and San Francisco, followed by Denver, Phoenix, Detroit and Indianapolis).

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As of January 1, 2016, all of EEOC's 53 offices have implemented Phase I of the Digital Charge System.

Key Benefits to the Public and to EEOC of a Digital Charge System

- Increases responsiveness to our customers by allowing them to upload and download documents, to communicate online with EEOC, and to provide more detailed info available thru online resources and links to eec.gov;
- Streamlines the enforcement system with dates triggering messages, reminders and action steps;
- Saves resources, including staff time, paper and money using digital documents and communications rather than copying, mailing, phone calls;
- Provides improved management of workflow, and increased accountability and coordination;
- Protects integrity, security, and storage of documents in online system.

Phase I of the Digital Charge System

The first phase of this system allows employers against whom a charge of employment discrimination has been filed to interact online with the EEOC thru a Respondent Portal. The application notifies the respondent by email that a charge has been filed, and through a secure online portal (EEOC Respondent Portal), allows the respondent to:

- View and download the charge;
- Review an invitation to mediate and respond to it;
- Submit a Position Statement and attachments to EEOC;
- Submit a response to a Request for Information to EEOC; and
- Provide/verify respondent contact information, including the designation of a legal representative.

Phase II in 2016

In 2016, EEOC plans to expand the Digital Charge System to add a secure portal for individuals who file a charge of employment discrimination, and to enhance the communications and documents transmitted through the system for both charging parties and respondents.

According to Chapter 6 of EEOC's Management Directive 110, which deals with keeping impartial and factual records,

The three basic types of evidence are direct evidence, circumstantial evidence, and statistical evidence.

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1. Direct Evidence

Direct evidence is evidence that proves a fact without resort to inference or presumption. *Black's Law Dictionary, 9th ed. (2009)*. For example, in the morning the ground is covered with snow. If you looked out the window the night before and saw it snowing then, you have direct evidence that it snowed during the night. You need not draw any inference to reach the factual conclusion that it snowed during the night.

Direct evidence is relevant in cases involving disparate treatment where the question is whether the employer intentionally treated employees differently because of a protected factor. It is also relevant in cases involving the effect of policies where the question is whether the policy disparately treats all employees in the protected class.

Direct evidence is rare. The statement, 'I would never hire you for that job because you are a woman,' is direct evidence of discrimination on the basis of sex in hiring, but would not be direct evidence if the issue involved a performance appraisal, for example.

Agencies must take care to distinguish between direct evidence of bias and direct evidence of discrimination. Direct evidence of bias may be strong but circumstantial evidence of discrimination in a particular case. For example, the statement, "I would never hire a woman for that job," is direct evidence of bias, as not directed towards any specific person. See *Heim v. State of Utah*, 8 F.3d 1541, 1546 (10th Cir. 1993). In contrast, a statement to a complainant that you "may be getting too old to understand the store's new computer programs" was deemed direct evidence of discrimination in *Wright v. Southland Corp.*, 187 F.3d 1287, 1304 (11th Cir. 1999) because it was directed at a specific person.

2. Circumstantial Evidence

Circumstantial evidence is evidence based on inference. *Black's Law Dictionary, 9th ed. (2009)*. In other words, the fact finder must draw an inference from the evidence to reach a factual conclusion.

For example, if you looked out the window at night and the ground was bare, but when you look out the window the next morning, there is snow on the ground, the snow on the ground is circumstantial evidence that it snowed during the night. From the presence of snow on the ground, you reasonably may infer that it snowed during the night. You have drawn an inference to reach the factual conclusion that it snowed during the night.

There are different types of circumstantial evidence. For example, comparative evidence must be sought in every case alleging disparity in treatment on a basis protected by a law enforced by the Commission. Comparative evidence is evidence regarding how similarly situated persons outside of the complainant's protected groups were treated.

In general, similarly situated means that the persons who are being compared are so situated that it is reasonable to expect that they would receive

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the same treatment as the complainant in the context of a particular employment decision. It is important to remember that individuals may be similarly situated for one employment decision, but not for another. For example, a female GS-4 clerk-typist may be similarly situated to a male GS-7 paralegal in a discrimination case involving the approval of annual leave where the same rules are applied to both employees by the same supervisor or where both are in the same unit or subject to the same chain of command. The investigator would be obligated to find out whether there were persons, not named by the complainant but similarly situated, whose treatment could be compared to the complainant's treatment. Both the complainant and the responding management official should provide a list of comparators for the challenged action.

Other types of circumstantial evidence may include general statements indicative of bias (see the example in "Direct Evidence," above), conduct (for example, a selecting official repeatedly has selected only males for job vacancies, despite the availability of best-qualified female candidates), or environment (for example, an absence of Hispanics in the workplace despite their availability in the relevant labor force). Circumstantial evidence may overlap with statistical evidence.

3. Statistical Evidence

Statistical evidence or a survey of the general environment may be conducted as appropriate. For example, this evidence may be probative when claims involve the comparative treatment of groups, as in a claim of a pattern or practice of discrimination, or the adverse effect of an agency policy or practice.

In that same EEOC Management Directive 110: "An investigation of a formal complaint of discrimination is an official review or inquiry, by persons authorized to conduct such review or inquiry, into claims raised in an EEO complaint. The investigative process is non-adversarial. That means that the investigator is obligated to collect evidence regardless of the parties' positions with respect to the items of evidence."

The same EEOC Management Directive 110 further provides concerning the investigation that "the role of the investigator is to collect and to discover factual information concerning the claim(s) in the complaint under investigation and to prepare an investigative summary." That directive also provides:

The investigator may accomplish his/her mission in a variety of ways. The investigator may function as:

1. a presiding official at a fact-finding conference;
2. an examiner responsible for developing material evidence;
3. an issuer of requests for information in the form of requests for the production of documents, interrogatories, and affidavits;

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4. face-to-face interviewer in on-site visits; and/or,

5. any other role so long as appropriate investigative techniques/methods are utilized.

The EEOC provides the following information concerning remedies:

Remedies For Employment Discrimination

Whenever discrimination is found, the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred.

The types of relief will depend upon the discriminatory action and the effect it had on the victim. For example, if someone is not selected for a job or a promotion because of discrimination, the remedy may include placement in the job and/or back pay and benefits the person would have received.

The employer also will be required to stop any discriminatory practices and take steps to prevent discrimination in the future.

A victim of discrimination also may be able to recover attorney's fees, expert witness fees, and court costs.

Remedies May Include Compensatory & Punitive Damages

Compensatory and punitive damages may be awarded in cases involving intentional discrimination based on a person's race, color, national origin, sex (including pregnancy, gender identity, and sexual orientation), religion, disability, or genetic information.

Compensatory damages pay victims for out-of-pocket expenses caused by the discrimination (such as costs associated with a job search or medical expenses) and compensate them for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life).

Punitive damages may be awarded to punish an employer who has committed an especially malicious or reckless act of discrimination.

Limits On Compensatory & Punitive Damages

There are limits on the amount of compensatory and punitive damages a person can recover. These limits vary depending on the size of the employer:

- For employers with 15-100 employees, the limit is \$50,000.
- For employers with 101-200 employees, the limit is \$100,000.
- For employers with 201-500 employees, the limit is \$200,000.
- For employers with more than 500 employees, the limit is \$300,000.

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Age Or Sex Discrimination & Liquidated Damages

In cases involving intentional age discrimination, or in cases involving intentional sex-based wage discrimination under the *Equal Pay Act*, victims cannot recover either compensatory or punitive damages, but may be entitled to “liquidated damages.”

Liquidated damages may be awarded to punish an especially malicious or reckless act of discrimination. The amount of liquidated damages that may be awarded is equal to the amount of back pay awarded the victim.”

If sufficient cause is found to support charges that the alleged discrimination occurred, the next stage involves mediation efforts by the agency and the employer. Mediation is a dispute resolution process in which a third party helps negotiators reach a settlement. The EEOC has found that use of mediation has reduced its backlog of EEO complaints and has resulted in faster resolution of complaints.

If the employer agrees that discrimination has occurred and accepts the proposed settlement, then the employer posts a notice of relief within the company and takes the agreed-on actions. If the employer objects to the charge and rejects conciliation, the EEOC can file suit or issue a right-to-sue letter to the complainant. The letter notifies the complainant that he or she has 90 days to file a personal suit in federal court. In the court litigation stage, a legal trial takes place in the appropriate state or federal court. At that point, both sides retain lawyers and rely on the court to render a decision. The *Civil Rights Act of 1991* provides for jury trials in most EEO cases. If either party disagrees with the court ruling, either can file appeals with a higher court. The U.S. Supreme Court becomes the ultimate adjudication body.

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Part Seven: EEO Related Training

The United States is becoming a far more diverse society than at any time in its past, and it is far more diverse in terms of its ethnic makeup than any other country in the world. This trend toward further diversification will continue into the foreseeable future. As reported by the U.S. Census Bureau on March 3, 2015:

A new U.S. Census Bureau report released today provides an in-depth analysis of the nation's population looking forward to 2060, including its size and composition across age, sex, race, Hispanic origin, and nativity. These projections are the first to incorporate separate projections of fertility for native- and foreign-born women, permitting the Census Bureau to better account for the effects of international migration on the U.S. population.

According to the report, Projections of the Size and Composition of the U.S. Population: 2014 to 2060:

- The U.S. population is expected to grow more slowly in future decades than it did in the previous century. Nonetheless, the total population of 319 million in 2014 is projected to reach the 400 million threshold in 2051 and 417 million in 2060.
- Around the time the 2020 Census is conducted, more than half of the nation's children are expected to be part of a minority race or ethnic group. This proportion is expected to continue to grow so that by 2060, just 36 percent of all children (people under age 18) will be single-race non-Hispanic white, compared with 52 percent today.
- The U.S. population as a whole is expected to follow a similar trend, becoming majority-minority in 2044. The minority population is projected to rise to 56 percent of the total in 2060, compared with 38 percent in 2014.
- While one milestone would be reached by the 2020 Census, another will be achieved by the 2030 Census: all baby boomers will have reached age 65 or older (this will actually occur in 2029). Consequently, in that year, one-in-five Americans would be 65 or older, up from one in seven in 2014.
- By 2060, the nation's foreign-born population would reach nearly 19 percent of the total population, up from 13 percent in 2014.

Diversity, however, goes beyond just issues of ethnicity and race to include other factors. As outlined by Mathis and Jackson, these include:

- Age
- Marital and family status
- Disabilities
- Race/ethnicity

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- Religion
- Gender
- Sexual orientation

This diversity has both positives and negatives associated with its emergence, and as HR professionals we will need to be increasingly involved and concerned with the coming diversification of the workforce. Some of the issues we will need to address include:

- Feelings of isolation or loss by ethnic groups whose percentages either are falling or remaining flat;
- Integration of “new” minorities into the workforce;
- Assuring that policies and procedures are nondiscriminatory; and
- Dealing with allegations of harassment, intimidation, and workplace violence.

The Coca-Cola Company has this to say about diversity education and training:

Our various diversity education programs efforts have moved from minimizing conflict to strengthening our ability to amplify, respect, value, and leverage our differences to drive sustainable business results.

Our three pillars of diversity education are Diversity Training, a Diversity Speaker Series, and our Diversity Library.

Ongoing diversity training helps drive employee engagement, create a work environment that visibly values and leverages diversity and accelerates productivity.

Diversity makes good business and economic sense, and becoming more diverse assists organizations in complying with federal and state antidiscrimination laws. Despite the positive stories, there is some concern regarding the effects of diversity training programs. Mathis and Jackson have effectively summarized most of these concerns: “The results of diversity training are viewed as mixed by both organizations and participants. Studies on the effectiveness of diversity training raise some concern that the programs may be interesting or entertaining, but may not produce longer-term changes in people’s attitudes or behaviors towards others with characteristics different from their own. ... In some firms, it has produced divisive effects, and has not changed the behaviors so that employees can work well together in a diverse workplace. ... Focusing on behavior, seems to hold the most promise for making diversity training more effective. ... Dealing with diversity is not about what people can and cannot say. It is about being *respectful* of others.”

The challenge, then, for HR professionals is to design meaningful and effective training programs that help people of diverse backgrounds communicate and build rapport in work situations. As HR professionals, our goal continues to be to maximize the contributions of the workforce to meet the organization’s goals and objectives.

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Exercise

1. Does your organization provide diversity training? If no, why not? If yes, for whom and how often?
2. If you provide diversity training, do you feel it is effective? If yes, why? If no, what could be done to improve the training?

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Part Eight: Reasonable Accommodations for Persons with Disabilities

As defined by the *Americans with Disabilities Act*, a disabled person is someone who has a physical or mental impairment that substantially limits that person in some major life activities, who has a record of such an impairment, or who is regarded as having such an impairment. The thrust of the ADA legislation is employment-related, offering safeguards to certain individuals who are applicants for jobs or are current workers. In Part 5 of this module, we began discussing the ADA. Part 8 will now go into more detail. According to an EEOC website titled *Enforcement Guidance: Reasonable Accommodation Under the Americans with Disabilities Act*:

Requesting Reasonable Accommodation

1. How must an individual request a reasonable accommodation?

When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use “plain English” and need not mention the ADA or use the phrase “reasonable accommodation.”

Example A: An employee tells her supervisor, “I’m having trouble getting to work at my scheduled starting time because of medical treatments I’m undergoing.” This is a request for a reasonable accommodation.

Example B: An employee tells his supervisor, “I need six weeks off to get treatment for a back problem.” This is a request for a reasonable accommodation.

Example C: A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office. This is a request for reasonable accommodation.

Example D: An employee tells his supervisor that he would like a new chair because his present one is uncomfortable. Although this is a request for a change at work, his statement is insufficient to put the employer on notice that he is requesting reasonable accommodation. He does not link his need for the new chair with a medical condition.

While an individual with a disability may request a change due to a medical condition, this request does not necessarily mean that the employer is required to provide the change. A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer. In some instances, before addressing the merits of the accommodation request, the employer needs to determine if the individual’s medical condition meets the ADA definition of “disability,” a prerequisite for the individual to be entitled to a reasonable accommodation.

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2. May someone other than the individual with a disability request a reasonable accommodation on behalf of the individual?

Yes, a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability. Of course, the individual with a disability may refuse to accept an accommodation that is not needed.

Example A: An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off. This discussion constitutes a request for reasonable accommodation.

Example B: An employee has been out of work for six months with a workers' compensation injury. The employee's doctor sends the employer a letter, stating that the employee is released to return to work, but with certain work restrictions. (Alternatively, the letter may state that the employee is released to return to a light duty position.) The letter constitutes a request for reasonable accommodation.

3. Do requests for reasonable accommodation need to be in writing?

No. Requests for reasonable accommodation do not need to be in writing. Individuals may request accommodations in conversation or may use any other mode of communication. An employer may choose to write a memorandum or letter confirming the individual's request. Alternatively, an employer may ask the individual to fill out a form or submit the request in written form, but the employer cannot ignore the initial request. An employer also may request reasonable documentation that the individual has an ADA disability and needs a reasonable accommodation. (See Question 6.)

4. When should an individual with a disability request a reasonable accommodation?

An individual with a disability may request a reasonable accommodation at any time during the application process or during the period of employment. The ADA does not preclude an employee with a disability from requesting a reasonable accommodation because s/he did not ask for one when applying for a job or after receiving a job offer. Rather, an individual with a disability should request a reasonable accommodation when s/he knows that there is a workplace barrier that is preventing him/her, due to a disability, from effectively competing for a position, performing a job, or gaining equal access to a benefit of employment. As a practical matter, it may be in an employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur.

5. What must an employer do after receiving a request for reasonable accommodation?

The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation. The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.

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The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. In other situations, the employer may need to ask questions concerning the nature of the disability and the individual's functional limitations in order to identify an effective accommodation. While the individual with a disability does not have to be able to specify the precise accommodation, s/he does need to describe the problems posed by the workplace barrier. Additionally, suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. Where the individual or the employer are not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained.

6. May an employer ask an individual for documentation when the individual requests reasonable accommodation?

Yes. When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations. The employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.

Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, an employer, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. This means that in most situations an employer cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation. If an individual has more than one disability, an employer can request information pertaining only to the disability that requires a reasonable accommodation.

An employer may require that the documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional. The appropriate professional in any particular situation will depend on the disability and the type of functional limitation it imposes. Appropriate professionals include, but are not limited to, doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, and licensed mental health professionals.

In requesting documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional.

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As an alternative to requesting documentation, an employer may simply discuss with the person the nature of his/her disability and functional limitations. It would be useful for the employer to make clear to the individual why it is requesting information, i.e., to verify the existence of an ADA disability and the need for a reasonable accommodation.

Example A: An employee says to an employer, “I’m having trouble reaching tools because of my shoulder injury.” The employer may ask the employee for documentation describing the impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee’s ability to perform the activity or activities (i.e., the employer is seeking information as to whether the employee has an ADA disability).

Example B: A marketing employee has a severe learning disability. He attends numerous meetings to plan marketing strategies. In order to remember what is discussed at these meetings he must take detailed notes but, due to his disability, he has great difficulty writing. The employee tells his supervisor about his disability and requests a laptop computer to use in the meetings. Since neither the disability nor the need for accommodation are obvious, the supervisor may ask the employee for reasonable documentation about his impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee’s ability to perform the activity or activities. The employer also may ask why the disability necessitates use of a laptop computer (or any other type of reasonable accommodation, such as a tape recorder) to help the employee retain the information from the meetings.

Example C: An employee’s spouse phones the employee’s supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off. The supervisor can ask the spouse to send in documentation from the employee’s treating physician that confirms that the hospitalization was related to the multiple sclerosis and provides information on how long an absence may be required from work.

If an individual’s disability or need for reasonable accommodation is not obvious, and s/he refuses to provide the reasonable documentation requested by the employer, then s/he is not entitled to reasonable accommodation. On the other hand, failure by the employer to initiate or participate in an informal dialogue with the individual after receiving a request for reasonable accommodation could result in liability for failure to provide a reasonable accommodation.

7. May an employer require an individual to go to a health care professional of the employer’s (rather than the employee’s) choice for purposes of documenting need for accommodation and disability?

The ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer’s choice if the individual provides insufficient information from his/her treating physician (or other

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health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation. However, if an individual provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. Documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation.

Any medical examination conducted by the employer's health professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation. If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).

8. Are there situations in which an employer cannot ask for documentation in response to a request for reasonable accommodation?

Yes. An employer cannot ask for documentation when: (1) both the disability and the need for reasonable accommodation are obvious, or (2) the individual has already provided the employer with sufficient information to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested.

Example A: An employee brings a note from her treating physician explaining that she has diabetes and that, as a result, she must test her blood sugar several times a day to ensure that her insulin level is safe in order to avoid a hyperglycemic reaction. The note explains that a hyperglycemic reaction can include extreme thirst, heavy breathing, drowsiness, and flushed skin, and eventually would result in unconsciousness. Depending on the results of the blood test, the employee might have to take insulin. The note requests that the employee be allowed three or four 10-minute breaks each day to test her blood, and if necessary, to take insulin. The doctor's note constitutes sufficient documentation that the person has an ADA disability because it describes a substantially limiting impairment and the reasonable accommodation needed as a result. The employer cannot ask for additional documentation.

Example B: One year ago, an employer learned that an employee had bipolar disorder after he requested a reasonable accommodation. The documentation provided at that time from the employee's psychiatrist indicated that this was a permanent condition which would always involve periods in which the disability would remit and then intensify. The psychiatrist's letter explained that during periods when the condition flared up, the person's manic moods or depressive episodes could be severe enough to create serious problems for the individual in caring for himself or working, and that medication controlled the frequency and severity of these episodes.

Now, one year later, the employee again requests a reasonable accommodation related to his bipolar disorder. Under these facts,

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the employer may ask for reasonable documentation on the need for the accommodation (if the need is not obvious), but it cannot ask for documentation that the person has an ADA disability. The medical information provided one year ago established the existence of a long-term impairment that substantially limits a major life activity.

Example C: An employee gives her employer a letter from her doctor, stating that the employee has asthma and needs the employer to provide her with an air filter. This letter contains insufficient information as to whether the asthma is an ADA disability because it does not provide any information as to its severity (i.e., whether it substantially limits a major life activity). Furthermore, the letter does not identify precisely what problem exists in the workplace that requires an air filter or any other reasonable accommodation. Therefore, the employer can request additional documentation.

9. Is an employer required to provide the reasonable accommodation that the individual wants?

The employer may choose among reasonable accommodations as long as the chosen accommodation is effective. Thus, as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.

If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective (i.e., it would remove a workplace barrier, thereby providing the individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment). Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. In either situation, the employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation. If more than one accommodation is effective, “the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations.”

Example A: An employee with a severe learning disability has great difficulty reading. His supervisor sends him many detailed memoranda which he often has trouble understanding. However, he has no difficulty understanding oral communication. The employee requests that the employer install a computer with speech output and that his supervisor send all memoranda through electronic mail which the computer can then read to him. The supervisor asks whether a tape recorded message would accomplish the same objective and the employee agrees that it would. Since both accommodations are effective, the employer may choose to provide the supervisor and employee with a tape recorder so that the supervisor can record her memoranda and the employee can listen to them.

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Example B: An attorney with a severe vision disability requests that her employer provide someone to read printed materials that she needs to review daily. The attorney explains that a reader enables her to review substantial amounts of written materials in an efficient manner. Believing that this reasonable accommodation would be too costly, the employer instead provides the attorney with a device that allows her to magnify print so that she can read it herself. The attorney can read print using this device, but with such great difficulty it significantly slows down her ability to review written materials. The magnifying device is ineffective as a reasonable accommodation because it does not provide the attorney with an equal opportunity to attain the same level of performance as her colleagues. Without an equal opportunity to attain the same level of performance, this attorney is denied an equal opportunity to compete for promotions. In this instance, failure to provide the reader, absent undue hardship, would violate the ADA.

10. How quickly must an employer respond to a request for reasonable accommodation?

An employer should respond expeditiously to a request for reasonable accommodation. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed as quickly as possible. Similarly, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of the ADA.

Example A: An employer provides parking for all employees. An employee who uses a wheelchair requests from his supervisor an accessible parking space, explaining that the spaces are so narrow that there is insufficient room for his van to extend the ramp that allows him to get in and out. The supervisor does not act on the request and does not forward it to someone with authority to respond. The employee makes a second request to the supervisor. Yet, two months after the initial request, nothing has been done. Although the supervisor never definitively denies the request, the lack of action under these circumstances amounts to a denial, and thus violates the ADA.

Example B: An employee who is blind requests adaptive equipment for her computer as a reasonable accommodation. The employer must order this equipment and is informed that it will take three months to receive delivery. No other company sells the adaptive equipment the employee needs. The employer notifies the employee of the results of its investigation and that it has ordered the equipment. Although it will take three months to receive the equipment, the employer has moved as quickly as it can to obtain it and thus there is no ADA violation resulting from the delay. The employer and employee should determine what can be done so that the employee can perform his/her job as effectively as possible while waiting for the equipment.

11. May an employer require an individual with a disability to accept a reasonable accommodation that s/he does not want?

No. An employer may not require a qualified individual with a disability to accept an accommodation. If, however, an employee needs a reasonable accommodation to perform an essential function or to eliminate a direct

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threat, and refuses to accept an effective accommodation, s/he may not be qualified to remain in the job.

Reasonable Accommodation and Job Applicants

12. May an employer ask whether a reasonable accommodation is needed when an applicant has not asked for one?

An employer may tell applicants what the hiring process involves (e.g., an interview, timed written test, or job demonstration), and may ask applicants whether they will need a reasonable accommodation for this process.

During the hiring process and before a conditional offer is made, an employer generally may not ask an applicant whether s/he needs a reasonable accommodation for the job, except when the employer knows that an applicant has a disability—either because it is obvious or the applicant has voluntarily disclosed the information—and could reasonably believe that the applicant will need a reasonable accommodation to perform specific job functions. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type.

After a conditional offer of employment is extended, an employer may inquire whether applicants will need reasonable accommodations related to anything connected with the job (i.e., job performance or access to benefits/privileges of the job) as long as all entering employees in the same job category are asked this question. Alternatively, an employer may ask a specific applicant if s/he needs a reasonable accommodation if the employer knows that this applicant has a disability—either because it is obvious or the applicant has voluntarily disclosed the information—and could reasonably believe that the applicant will need a reasonable accommodation. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type.

13. Does an employer have to provide a reasonable accommodation to an applicant with a disability even if it believes that it will be unable to provide this individual with a reasonable accommodation on the job?

Yes. An employer must provide a reasonable accommodation to a qualified applicant with a disability that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job (unless it can show undue hardship). Thus, individuals with disabilities who meet initial requirements to be considered for a job should not be excluded from the application process because the employer speculates, based on a request for reasonable accommodation for the application process, that it will be unable to provide the individual with reasonable accommodation to perform the job. In many instances, employers will be unable to determine whether an individual needs reasonable accommodation to perform a job based solely on a request for accommodation during the application process. And even if an individual will need reasonable accommodation to perform the job, it may not be the same type or degree of accommodation that is needed for the application process. Thus, an employer should assess the need for accommodations for the application process separately from those that may be needed to perform the job.

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Example A: An employer is impressed with an applicant's resume and contacts the individual to come in for an interview. The applicant, who is deaf, requests a sign language interpreter for the interview. The employer cancels the interview and refuses to consider further this applicant because it believes it would have to hire a full-time interpreter. The employer has violated the ADA. The employer should have proceeded with the interview, using a sign language interpreter (absent undue hardship), and at the interview inquired to what extent the individual would need a sign language interpreter to perform any essential functions requiring communication with other people.

Example B: An individual who has paraplegia applies for a secretarial position. Because the office has two steps at the entrance, the employer arranges for the applicant to take a typing test, a requirement of the application process, at a different location. The applicant fails the test. The employer does not have to provide any further reasonable accommodations for this individual because she is no longer qualified to continue with the application process.

Reasonable Accommodation Related to the Benefits and Privileges of Employment

The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the "benefits and privileges of employment" equal to those enjoyed by similarly-situated employees without disabilities. Benefits and privileges of employment include, but are not limited to, employer-sponsored: (1) training, (2) services (e.g., employee assistance programs (EAP's), credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and (3) parties or other social functions (e.g., parties to celebrate retirements and birthdays, and company outings). If an employee with a disability needs a reasonable accommodation in order to gain access to, and have an equal opportunity to participate in, these benefits and privileges, then the employer must provide the accommodation unless it can show undue hardship.

14. Does an employer have to provide reasonable accommodation to enable an employee with a disability to have equal access to information communicated in the workplace to non-disabled employees?

Yes. Employers provide information to employees through different means, including computers, bulletin boards, mailboxes, posters, and public address systems. Employers must ensure that employees with disabilities have access to information that is provided to other similarly-situated employees without disabilities, regardless of whether they need it to perform their jobs.

Example A: An employee who is blind has adaptive equipment for his computer that integrates him into the network with other employees, thus allowing communication via electronic mail and access to the computer bulletin board. When the employer installs upgraded computer equipment, it must provide new adaptive equipment in order for the employee to be integrated into the new networks, absent undue hardship. Alternative methods of communication (e.g., sending written or telephone messages to the employee instead of electronic mail) are likely to be ineffective

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substitutes since electronic mail is used by every employee and there is no effective way to ensure that each one will always use alternative measures to ensure that the blind employee receives the same information that is being transmitted via computer.

Example B: An employer authorizes the Human Resources Director to use a public address system to remind employees about special meetings and to make certain announcements. In order to make this information accessible to a deaf employee, the Human Resources Director arranges to send in advance an electronic mail message to the deaf employee conveying the information that will be broadcast. The Human Resources Director is the only person who uses the public address system; therefore, the employer can ensure that all public address messages are sent, via electronic mail, to the deaf employee. Thus, the employer is providing this employee with equal access to office communications.

15. Must an employer provide reasonable accommodation so that an employee may attend training programs?

Yes. Employers must provide reasonable accommodation (e.g., sign language interpreters; written materials produced in alternative formats, such as braille, large print, or on audio- cassette) that will provide employees with disabilities with an equal opportunity to participate in employer-sponsored training, absent undue hardship. This obligation extends to in-house training, as well as to training provided by an outside entity. Similarly, the employer has an obligation to provide reasonable accommodation whether the training occurs on the employer's premises or elsewhere.

Example A: XYZ Corp. has signed a contract with Super Trainers, Inc., to provide mediation training at its facility to all of XYZ's Human Resources staff. One staff member is blind and requests that materials be provided in braille. Super Trainers refuses to provide the materials in braille. XYZ maintains that it is the responsibility of Super Trainers and sees no reason why it should have to arrange and pay for the braille copy.

Both XYZ (as an employer covered under Title I of the ADA) and Super Trainers (as a public accommodation covered under Title III of the ADA) have obligations to provide materials in alternative formats. This fact, however, does not excuse either one from their respective obligations. If Super Trainers refuses to provide the braille version, despite its Title III obligations, XYZ still retains its obligation to provide it as a reasonable accommodation, absent undue hardship.

Employers arranging with an outside entity to provide training may wish to avoid such problems by specifying in the contract who has the responsibility to provide appropriate reasonable accommodations. Similarly, employers should ensure that any offsite training will be held in an accessible facility if they have an employee who, because of a disability, requires such an accommodation.

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Example B: XYZ Corp. arranges for one of its employees to provide CPR training. This three-hour program is optional. A deaf employee wishes to take the training and requests a sign language interpreter. XYZ must provide the interpreter because the CPR training is a benefit that XYZ offers all employees, even though it is optional.

Types of Reasonable Accommodations Related to Job Performance

Below are discussed certain types of reasonable accommodations related to job performance.

Job Restructuring

Job restructuring includes modifications such as:

- reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability; and
- altering when and/or how a function, essential or marginal, is performed.

An employer never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes.

16. If, as a reasonable accommodation, an employer restructures an employee's job to eliminate some marginal functions, may the employer require the employee to take on other marginal functions that s/he can perform?

Yes. An employer may switch the marginal functions of two (or more) employees in order to restructure a job as a reasonable accommodation.

Example: A cleaning crew works in an office building. One member of the crew wears a prosthetic leg which enables him to walk very well, but climbing steps is painful and difficult. Although he can perform his essential functions without problems, he cannot perform the marginal function of sweeping the steps located throughout the building. The marginal functions of a second crew member include cleaning the small kitchen in the employee's lounge, which is something the first crew member can perform. The employer can switch the marginal functions performed by these two employees.

Leave

Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability. An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees. Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave. For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.

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An employee with a disability may need leave for a number of reasons related to the disability, including, but not limited to:

- obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy;
- recuperating from an illness or an episodic manifestation of the disability;
- obtaining repairs on a wheelchair, accessible van, or prosthetic device;
- avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);
- training a service animal (e.g., a guide dog); or
- receiving training in the use of braille or to learn sign language.

17. May an employer apply a ‘no-fault’ leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?

No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its “no-fault” leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.

18. Does an employer have to hold open an employee’s job as a reasonable accommodation?

Yes. An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship.

If an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.

Example: An employee needs eight months of leave for treatment and recuperation related to a disability. The employer grants the request, but after four months the employer determines that it can no longer hold open the position for the remaining four months without incurring undue hardship. The employer must consider whether it has a vacant, equivalent position to which the employee can be reassigned for the remaining four months of leave, at the

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end of which time the employee would return to work in that new position. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued leave is not required as a reasonable accommodation if a vacant position at a lower level is also unavailable.

19. Can an employer penalize an employee for work missed during leave taken as a reasonable accommodation?

No. To do so would be retaliation for the employee's use of a reasonable accommodation to which s/he is entitled under the law. Moreover, such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation.

Example A: A salesperson took five months of leave as a reasonable accommodation. The company compares the sales records of all salespeople over a one-year period, and any employee whose sales fall more than 25% below the median sales performance of all employees is automatically terminated. The employer terminates the salesperson because she had fallen below the required performance standard. The company did not consider that the reason for her lower sales performance was her five-month leave of absence; nor did it assess her productivity during the period she did work (i.e., prorate her productivity).

Penalizing the salesperson in this manner constitutes retaliation and a denial of reasonable accommodation.

Example B: Company X is having a reduction-in-force. The company decides that any employee who has missed more than four weeks in the past year will be terminated. An employee took five weeks of leave for treatment of his disability. The company cannot count those five weeks in determining whether to terminate this employee.

20. When an employee requests leave as a reasonable accommodation, may an employer provide an accommodation that requires him/her to remain on the job instead?

Yes, if the employer's reasonable accommodation would be effective and eliminate the need for leave. An employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation. Accordingly, in lieu of providing leave, an employer may provide a reasonable accommodation that requires an employee to remain on the job (e.g., reallocation of marginal functions or temporary transfer) as long as it does not interfere with the employee's ability to address his/her medical needs. The employer is obligated, however, to restore the employee's full duties or to return the employee to his/her original position once s/he no longer needs the reasonable accommodation.

Example A: An employee with emphysema requests ten weeks of leave for surgery and recuperation related to his disability. In discussing this request with the employer, the employee states that he could return to work after seven weeks if, during his first three weeks back, he could work part-time and eliminate two marginal functions that require lots of walking. If the

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employer provides these accommodations, then it can require the employee to return to work after seven weeks.

Example B: An employee's disability is getting more severe and her doctor recommends surgery to counteract some of the effects. After receiving the employee's request for leave for the surgery, the employer proposes that it provide certain equipment which it believes will mitigate the effects of the disability and delay the need for leave to get surgery. The employer's proposed accommodation is not effective because it interferes with the employee's ability to get medical treatment.

21. How should an employer handle leave for an employee covered by both the ADA and the *Family and Medical Leave Act (FMLA)*?

An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.

Under the ADA, an employee who needs leave related to his/her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship. An employer must allow the individual to use any accrued paid leave first, but, if that is insufficient to cover the entire period, then the employer should grant unpaid leave. An employer must continue an employee's health insurance benefits during his/her leave period only if it does so for other employees in a similar leave status. As for the employee's position, the ADA requires that the employer hold it open while the employee is on leave unless it can show that doing so causes undue hardship. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (i.e., the employee can perform the essential functions of the position with or without reasonable accommodation).

If it is an undue hardship under the ADA to hold open an employee's position during a period of leave, or an employee is no longer qualified to return to his/her original position, then the employer must reassign the employee (absent undue hardship) to a vacant position for which s/he is qualified.

Under the FMLA, an eligible employee is entitled to a maximum of 12 weeks of leave per 12 month period. The FMLA guarantees the right of the employee to return to the same position or to an equivalent one. An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave. The FMLA requires an employer to continue the employee's health insurance coverage during the leave period, provided the employee pays his/her share of the premiums.

Example A: An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the

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employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship. The employer may consider the impact on its operations caused by the initial 12-week absence, along with other undue hardship factors.

Example B: An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position.

Example C: An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent position. Under the FMLA, the employer could terminate his employment, but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

Modified or Part-Time Schedule

22. Must an employer allow an employee with a disability to work a modified or part-time schedule as a reasonable accommodation, absent undue hardship?

Yes. A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. An employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees.

Example A: An employee with HIV infection must take medication on a strict schedule. The medication causes extreme nausea about one hour after ingestion, and generally lasts about 45 minutes. The employee asks that he be allowed to take a daily 45-minute break when the nausea occurs. The employer must grant this request absent undue hardship.

For certain positions, the time during which an essential function is performed may be critical. This could affect whether an employer can grant a request to modify an employee's schedule. Employers should carefully assess whether modifying the hours could significantly disrupt their operations—that is, cause undue hardship—or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs.

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If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested.

Example B: A day care worker requests that she be allowed to change her hours from 7:00 a.m. - 3:00 p.m. to 10:00 a.m. - 6:00 p.m. because of her disability. The day care center is open from 7:00 a.m. - 7:00 p.m. and it will still have sufficient coverage at the beginning of the morning if it grants the change in hours. In this situation, the employer must provide the reasonable accommodation.

Example C: An employee works for a morning newspaper, operating the printing presses which run between 10 p.m. and 3 a.m. Due to her disability, she needs to work in the daytime. The essential function of her position, operating the printing presses, requires that she work at night because the newspaper cannot be printed during the daytime hours. Since the employer cannot modify her hours, it must consider whether it can reassign her to a different position.

23. How should an employer handle requests for modified or part-time schedules for an employee covered by both the ADA and the *Family and Medical Leave Act (FMLA)*?

An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.

Under the ADA, an employee who needs a modified or part-time schedule because of his/her disability is entitled to such a schedule if there is no other effective accommodation and it will not cause undue hardship. If there is undue hardship, the employer must reassign the employee if there is a vacant position for which s/he is qualified and which would allow the employer to grant the modified or part-time schedule (absent undue hardship). An employee receiving a part-time schedule as a reasonable accommodation is entitled only to the benefits, including health insurance, that other part-time employees receive. Thus, if non-disabled part-time workers are not provided with health insurance, then the employer does not have to provide such coverage to an employee with a disability who is given a part-time schedule as a reasonable accommodation.

Under the FMLA, an eligible employee is entitled to take leave intermittently or on a part-time basis, when medically necessary, until s/he has used up the equivalent of 12 workweeks in a 12-month period. When such leave is foreseeable based on planned medical treatment, an employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position, with equivalent pay and benefits, for which the employee is qualified and which better suits his/her reduced hours. An employer always must maintain the employee's existing level of coverage under a group health plan during the period of FMLA leave, provided the employee pays his/her share of the premium.

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Example: An employee with an ADA disability requests that she be excused from work one day a week for the next six months because of her disability. If this employee is eligible for a modified schedule under the FMLA, the employer must provide the requested leave under that statute if it is medically necessary, even if the leave would be an undue hardship under the ADA.

Modified Workplace Policies

24. Is it a reasonable accommodation to modify a workplace policy?

Yes. It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations, absent undue hardship. But, reasonable accommodation only requires that the employer modify the policy for an employee who requires such action because of a disability; therefore, the employer may continue to apply the policy to all other employees.

Example: An employer has a policy prohibiting employees from eating or drinking at their workstations. An employee with insulin-dependent diabetes explains to her employer that she may occasionally take too much insulin and, in order to avoid going into insulin shock, she must immediately eat a candy bar or drink fruit juice. The employee requests permission to keep such food at her workstation and to eat or drink when her insulin level necessitates. The employer must modify its policy to grant this request, absent undue hardship. Similarly, an employer might have to modify a policy to allow an employee with a disability to bring in a small refrigerator, or to use the employer's refrigerator, to store medication that must be taken during working hours.

Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies. For example, it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability-related medical problems, barring undue hardship. Furthermore, an employer may be required to provide additional leave to an employee with a disability as a reasonable accommodation in spite of a "no-fault" leave policy, unless the provision of such leave would impose an undue hardship.

In some instances, an employer's refusal to modify a workplace policy, such as a leave or attendance policy, could constitute disparate treatment as well as a failure to provide a reasonable accommodation. For example, an employer may have a policy requiring employees to notify supervisors before 9:00 a.m. if they are unable to report to work. If an employer would excuse an employee from complying with this policy because of emergency hospitalization due to a car accident, then the employer must do the same thing when the emergency hospitalization is due to a disability.

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Reassignment

The ADA specifically lists “reassignment to a vacant position” as a form of reasonable accommodation. This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.

An employee must be “qualified” for the new position. An employee is “qualified” for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation. The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.

There is no obligation for the employer to assist the individual to become qualified. Thus, the employer does not have to provide training so that the employee acquires necessary skills to take a job. The employer, however, would have to provide an employee with a disability who is being reassigned with any training that is normally provided to anyone hired for or transferred to the position.

Example A: An employer is considering reassigning an employee with a disability to a position which requires the ability to speak Spanish in order to perform an essential function. The employee never learned Spanish and wants the employer to send him to a course to learn Spanish. The employer is not required to provide this training as part of the obligation to make a reassignment. Therefore, the employee is not qualified for this position.

Example B: An employer is considering reassigning an employee with a disability to a position in which she will contract for goods and services. The employee is qualified for the position. The employer has its own specialized rules regarding contracting that necessitate training all individuals hired for these positions. In this situation, the employer must provide the employee with this specialized training.

Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship. However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee.

“Vacant” means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time. A “reasonable amount of time” should be determined on a case-by-case basis considering relevant facts, such as whether the employer, based on experience, can anticipate that an appropriate position will become vacant within a short period of time. A position is considered

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vacant even if an employer has posted a notice or announcement seeking applications for that position. The employer does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position.

Example C: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that another employee resigned and that that position will become vacant in four weeks. The impending vacancy is equivalent to the position currently held by the employee with a disability. If the employee is qualified for that position, the employer must offer it to him.

Example D: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that an employee in an equivalent position plans to retire in six months. Although the employer knows that the employee with a disability is qualified for this position, the employer does not have to offer this position to her because six months is beyond a “reasonable amount of time.” (If, six months from now, the employer decides to advertise the position, it must allow the individual to apply for that position and give the application the consideration it deserves.)

The employer must reassign the individual to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g., benefits, geographical location) if the employee is qualified for the position. If there is no vacant equivalent position, the employer must reassign the employee to a vacant lower level position for which the individual is qualified. Assuming there is more than one vacancy for which the employee is qualified, the employer must place the individual in the position that comes closest to the employee’s current position in terms of pay, status, etc. If it is unclear which position comes closest, the employer should consult with the employee about his/her preference before determining the position to which the employee will be reassigned. Reassignment does not include giving an employee a promotion. Thus, an employee must compete for any vacant position that would constitute a promotion.

25. Is a probationary employee entitled to reassignment?

Employers cannot deny a reassignment to an employee solely because s/he is designated as “probationary.” An employee with a disability is eligible for reassignment to a new position, regardless of whether s/he is considered “probationary,” as long as the employee adequately performed the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment arose.

The longer the period of time in which an employee has adequately performed the essential functions, with or without reasonable accommodation, the more likely it is that reassignment is appropriate if the employee becomes unable to continue performing the essential functions of the current position due to a disability. If, however, the probationary employee has never adequately performed the essential functions, with or without reasonable accommodation, then s/he is not entitled to reassignment because s/he was never “qualified” for the original position. In this situation, the employee is similar to an applicant

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who applies for a job for which s/he is not qualified, and then requests reassignment. Applicants are not entitled to reassignment.

Example A: An employer designates all new employees as “probationary” for one year. An employee has been working successfully for nine months when she becomes disabled in a car accident. The employee, due to her disability, is unable to continue performing the essential functions of her current position, with or without reasonable accommodation, and seeks a reassignment. She is entitled to a reassignment if there is a vacant position for which she is qualified and it would not pose an undue hardship.

Example B: A probationary employee has been working two weeks, but has been unable to perform the essential functions of the job because of his disability. There are no reasonable accommodations that would permit the individual to perform the essential functions of the position, so the individual requests a reassignment. The employer does not have to provide a reassignment (even if there is a vacant position) because, as it turns out, the individual was never qualified—i.e., the individual was never able to perform the essential functions of the position, with or without reasonable accommodation, for which he was hired.

26. Must an employer offer reassignment as a reasonable accommodation if it does not allow any of its employees to transfer from one position to another?

Yes. The ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused an undue hardship. And, if an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.

27. Is an employer’s obligation to offer reassignment to a vacant position limited to those vacancies within an employee’s office, branch, agency, department, facility, personnel system (if the employer has more than a single personnel system), or geographical area?

No. This is true even if the employer has a policy prohibiting transfers from one office, branch, agency, department, facility, personnel system, or geographical area to another. The ADA contains no language limiting the obligation to reassign only to positions within an office, branch, agency, etc. Rather, the extent to which an employer must search for a vacant position will be an issue of undue hardship. If an employee is being reassigned to a different geographical area, the employee must pay for any relocation expenses unless the employer routinely pays such expenses when granting voluntary transfers to other employees.

28. Does an employer have to notify an employee with a disability about vacant positions, or is it the employee’s responsibility to learn what jobs are vacant?

The employer is in the best position to know which jobs are vacant or will

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become vacant within a reasonable period of time. In order to narrow the search for potential vacancies, the employer, as part of the interactive process, should ask the employee about his/her qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment. However, an employee should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them. If the employer does not know whether the employee is qualified for a specific position, the employer can discuss with the employee his/her qualifications.

An employer should proceed as expeditiously as possible in determining whether there are appropriate vacancies. The length of this process will vary depending on how quickly an employer can search for and identify whether an appropriate vacant position exists. For a very small employer, this process may take one day; for other employers this process may take several weeks. When an employer has completed its search, identified whether there are any vacancies (including any positions that will become vacant in a reasonable amount of time), notified the employee of the results, and either offered an appropriate vacancy to the employee or informed him/her that no appropriate vacancies are available, the employer will have fulfilled its obligation.

29. Does reassignment mean that the employee is permitted to compete for a vacant position?

No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.

30. If an employee is reassigned to a lower level position, must an employer maintain his/her salary from the higher level position?

No, unless the employer transfers employees without disabilities to lower level positions and maintains their original salaries.

31. Must an employer provide a reassignment if it would violate a seniority system?

Generally, it will be “unreasonable” to reassign an employee with a disability if doing so would violate the rules of a seniority system. This is true both for collectively bargained seniority systems and those unilaterally imposed by management. Seniority systems governing job placement give employees expectations of consistent, uniform treatment that would be undermined if employers had to make the type of individualized, case-by-case assessment required by the reasonable accommodation process.

However, if there are “special circumstances” that “undermine the employees’ expectations of consistent, uniform treatment,” it may be a “reasonable accommodation,” absent undue hardship, to reassign an employee despite the existence of a seniority system. For example, “special circumstances” may exist where an employer retains the right to alter the seniority system unilaterally, and has exercised that right fairly frequently, thereby lowering employee expectations in the seniority system. In this circumstance, one more exception (i.e., providing the reassignment to an employee with a

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disability) may not make a difference. Alternatively, a seniority system may contain exceptions, such that one more exception is unlikely to matter. Another possibility is that a seniority system might contain procedures for making exceptions, thus suggesting to employees that seniority does not automatically guarantee access to a specific job.

Other Reasonable Accommodation Issues

32. If an employer has provided one reasonable accommodation, does it have to provide additional reasonable accommodations requested by an individual with a disability?

The duty to provide reasonable accommodation is an ongoing one. Certain individuals require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation. If an individual requests multiple reasonable accommodations, s/he is entitled only to those accommodations that are necessitated by a disability and that will provide an equal employment opportunity.

An employer must consider each request for reasonable accommodation and determine: (1) whether the accommodation is needed, (2) if needed, whether the accommodation would be effective, and (3) if effective, whether providing the reasonable accommodation would impose an undue hardship. If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship. If there is no alternative accommodation, then the employer must attempt to reassign the employee to a vacant position for which s/he is qualified, unless to do so would cause an undue hardship.

33. Does an employer have to change a person's supervisor as a form of reasonable accommodation?

No. An employer does not have to provide an employee with a new supervisor as a reasonable accommodation. Nothing in the ADA, however, prohibits an employer from doing so. Furthermore, although an employer is not required to change supervisors, the ADA may require that supervisory methods be altered as a form of reasonable accommodation. Also, an employee with a disability is protected from disability-based discrimination by a supervisor, including disability-based harassment.

Example: A supervisor frequently schedules team meetings on a day's notice, often notifying staff in the afternoon that a meeting will be held on the following morning. An employee with a disability has missed several meetings because they have conflicted with previously-scheduled physical therapy sessions. The employee asks that the supervisor give her two to three days' notice of team meetings so that, if necessary, she can reschedule the physical therapy sessions. Assuming no undue hardship would result, the supervisor must make this reasonable accommodation.

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34. Does an employer have to allow an employee with a disability to work at home as a reasonable accommodation?

An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship. Whether this accommodation is effective will depend on whether the essential functions of the position can be performed at home. There are certain jobs in which the essential functions can only be performed at the work site—e.g., food server, cashier in a store. For such jobs, allowing an employee to work at home is not effective because it does not enable an employee to perform his/her essential functions. Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer’s ability to adequately supervise the employee and the employee’s need to work with certain equipment or tools that cannot be replicated at home. In contrast, employees may be able to perform the essential functions of certain types of jobs at home (e.g., telemarketer, proofreader). For these types of jobs, an employer may deny a request to work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship.

35. Must an employer withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and consistent with business necessity?

No. An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

36. Must an employer provide a reasonable accommodation for an employee with a disability who violated a conduct rule that is job-related for the position in question and consistent with business necessity?

An employer must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future, barring undue hardship, except where the punishment for the violation is termination. Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual’s disability. Possible reasonable accommodations could include adjustments to starting times, specified breaks, and leave if these accommodations will enable an employee to comply with conduct rules.

Example: An employee with major depression is often late for work because of medication side-effects that make him extremely groggy in the morning. His scheduled hours are 9:00 a.m. to 5:30 p.m., but he arrives at 9:00, 9:30, 10:00, or even 10:30 on any given day. His job responsibilities involve telephone contact with the company’s traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders. The employer disciplines him for tardiness, stating that continued failure to arrive

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promptly during the next month will result in termination of his employment. The individual then explains that he was late because of a disability and needs to work on a later schedule. In this situation, the employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity. The employer, however, must consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future. For example, if this individual can serve the company's sales representatives by regularly working a schedule of 10:00 a.m. to 6:30 p.m., a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10:00 a.m.

37. Is it a reasonable accommodation to make sure that an employee takes medication as prescribed?

No. Medication monitoring is not a reasonable accommodation. Employers have no obligation to monitor medication because doing so does not remove a workplace barrier. Similarly, an employer has no responsibility to monitor an employee's medical treatment or ensure that s/he is receiving appropriate treatment because such treatment does not involve modifying workplace barriers.

It may be a form of reasonable accommodation, however, to give an employee a break in order that s/he may take medication, or to grant leave so that an employee may obtain treatment.

38. Is an employer relieved of its obligation to provide reasonable accommodation for an employee with a disability who fails to take medication, to obtain medical treatment, or to use an assistive device (such as a hearing aid)?

No. The ADA requires an employer to provide reasonable accommodation to remove workplace barriers, regardless of what effect medication, other medical treatment, or assistive devices may have on an employee's ability to perform the job.

However, if an employee with a disability, with or without reasonable accommodation, cannot perform the essential functions of the position or poses a direct threat in the absence of medication, treatment, or an assistive device, then s/he is unqualified.

39. Must an employer provide a reasonable accommodation that is needed because of the side effects of medication or treatment related to the disability, or because of symptoms or other medical conditions resulting from the underlying disability?

Yes. The side effects caused by the medication that an employee must take because of the disability are limitations resulting from the disability. Reasonable accommodation extends to all limitations resulting from a disability.

Example A: An employee with cancer undergoes chemotherapy twice a week, which causes her to be quite ill afterwards. The employee requests a modified schedule—leave for the two days a week of chemotherapy. The treatment will last six weeks. Unless it can show undue hardship, the employer must grant this request.

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Similarly, any symptoms or related medical conditions resulting from the disability that cause limitations may also require reasonable accommodation.

Example B: An employee, as a result of insulin-dependent diabetes, has developed background retinopathy (a vision impairment). The employee, who already has provided documentation showing his diabetes is a disability, requests a device to enlarge the text on his computer screen. The employer can request documentation that the retinopathy is related to the diabetes but the employee does not have to show that the retinopathy is an independent disability under the ADA. Since the retinopathy is a consequence of the diabetes (an ADA disability), the request must be granted unless undue hardship can be shown.

40. Must an employer ask whether a reasonable accommodation is needed when an employee has not asked for one?

Generally, no. As a general rule, the individual with a disability—who has the most knowledge about the need for reasonable accommodation—must inform the employer that an accommodation is needed.

However, an employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. If the individual with a disability states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation.

Example: An employee with mental retardation delivers messages at a law firm. He frequently mixes up messages for “R. Miller” and “T. Miller.” The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that this employee is unable to ask for a reasonable accommodation because of his mental retardation. The employer asks the employee about mixing up the two names and asks if it would be helpful to spell the first name of each person. When the employee says that would be better, the employer, as a reasonable accommodation, instructs the receptionist to write the full first name when messages are left for one of the Messrs. Miller.

41. May an employer ask whether a reasonable accommodation is needed when an employee with a disability has not asked for one?

An employer may ask an employee with a known disability whether s/he needs a reasonable accommodation when it reasonably believes that the employee may need an accommodation. For example, an employer could ask a deaf employee who is being sent on a business trip if s/he needs reasonable accommodation. Or, if an employer is scheduling a luncheon at a restaurant and is uncertain about what questions it should ask to ensure that the restaurant is accessible for an employee who uses a wheelchair, the employer may first ask the employee. An employer also may ask an employee with a disability who is having performance or conduct problems if s/he needs reasonable accommodation.

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42. May an employer tell other employees that an individual is receiving a reasonable accommodation when employees ask questions about a coworker with a disability?

No. An employer may not disclose that an employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. The ADA specifically prohibits the disclosure of medical information except in certain limited situations, which do not include disclosure to coworkers.

An employer may certainly respond to a question from an employee about why a coworker is receiving what is perceived as ‘different’ or ‘special’ treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer’s policy to respect employee privacy. An employer may be able to make this point effectively by reassuring the employee asking the question that his/her privacy would similarly be respected if s/he found it necessary to ask the employer for some kind of workplace change for personal reasons.

Since responding to specific coworker questions may be difficult, employers might find it helpful before such questions are raised to provide all employees with information about various laws that require employers to meet certain employee needs (e.g., the ADA and the *Family and Medical Leave Act*), while also requiring them to protect the privacy of employees. In providing general ADA information to employees, an employer may wish to highlight the obligation to provide reasonable accommodation, including the interactive process and different types of reasonable accommodations, and the statute’s confidentiality protections. Such information could be delivered in orientation materials, employee handbooks, notices accompanying paystubs, and posted flyers. Employers may wish to explore these and other alternatives with unions because they too are bound by the ADA’s confidentiality provisions. Union meetings and bulletin boards may be further avenues for such educational efforts.

As long as there is no coercion by an employer, an employee with a disability may voluntarily choose to disclose to coworkers his/her disability and/or the fact that s/he is receiving a reasonable accommodation.

Undue Hardship Issues

An employer does not have to provide a reasonable accommodation that would cause an “undue hardship” to the employer. Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. A determination of undue hardship should be based on several factors, including:

- the nature and cost of the accommodation needed;

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- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
- the impact of the accommodation on the operation of the facility.

The ADA's legislative history indicates that Congress wanted employers to consider all possible sources of outside funding when assessing whether a particular accommodation would be too costly. Undue hardship is determined based on the net cost to the employer. Thus, an employer should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation. In addition, the employer should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if s/he will pay the difference.

If an employer determines that one particular reasonable accommodation will cause undue hardship, but a second type of reasonable accommodation will be effective and will not cause an undue hardship, then the employer must provide the second accommodation.

An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability. Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees. Employers, however, may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees's ability to work.

Example A: An employee with breast cancer is undergoing chemotherapy. As a consequence of the treatment, the employee is subject to fatigue and finds it difficult to keep up with her regular workload. So that she may focus her reduced energy on performing her essential functions, the employer transfers three of her marginal functions to another employee for the duration of the chemotherapy treatments. The second employee is unhappy at being given extra assignments, but the employer determines that the employee can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner. Since the employer cannot show significant disruption to its operation, there is no undue hardship.

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Example B: A convenience store clerk with multiple sclerosis requests that he be allowed to go from working full-time to part-time as a reasonable accommodation because of his disability. The store assigns two clerks per shift, and if the first clerk's hours are reduced, the second clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. Thus, the employer can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce the employee's hours. The employer, however, should explore whether any other reasonable accommodation will assist the store clerk without causing undue hardship.

43. Must an employer modify the work hours of an employee with a disability if doing so would prevent other employees from performing their jobs?

No. If the result of modifying one employee's work hours (or granting leave) is to prevent other employees from doing their jobs, then the significant disruption to the operations of the employer constitutes an undue hardship.

Example A: A crane operator, due to his disability, requests an adjustment in his work schedule so that he starts work at 8:00 a.m. rather than 7:00 a.m., and finishes one hour later in the evening. The crane operator works with three other employees who cannot perform their jobs without the crane operator. As a result, if the employer grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them to do from 7:00 to 8:00, or have the workers do nothing. The ADA does not require the employer to take any of these actions because they all significantly disrupt the operations of the business. Thus, the employer can deny the requested accommodation, but should discuss with the employee if there are other possible accommodations that would not result in undue hardship.

Example B: A computer programmer works with a group of people to develop new software. There are certain tasks that the entire group must perform together, but each person also has individual assignments. It is through habit, not necessity, that they have often worked together first thing in the morning.

The programmer, due to her disability, requests an adjustment in her work schedule so that she works from 10:00 a.m. - 7:00 p.m. rather than 9:00 a.m. - 6:00 p.m. In this situation, the employer could grant the adjustment in hours because it would not significantly disrupt the operations of the business. The effect of the reasonable accommodation would be to alter when the group worked together and when they performed their individual assignments.

44. Can an employer deny a request for leave when an employee cannot provide a fixed date of return?

Providing leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation. However, if an employer is able to show that the lack of a fixed return date causes an undue hardship, then it can deny the leave. In certain circumstances, undue hardship will

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derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position. If an employee cannot provide a fixed date of return, and an employer determines that it can grant such leave at that time without causing undue hardship, the employer has the right to require, as part of the interactive process, that the employee provide periodic updates on his/her condition and possible date of return. After receiving these updates, employers may reevaluate whether continued leave constitutes an undue hardship.

In certain situations, an employee may be able to provide only an approximate date of return. Treatment and recuperation do not always permit exact timetables. Thus, an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return. In such situations, or in situations in which a return date must be postponed because of unforeseen medical developments, employees should stay in regular communication with their employers to inform them of their progress and discuss, if necessary, the need for continued leave beyond what might have been granted originally.

Example A: An experienced chef at a top restaurant requests leave for treatment of her disability but cannot provide a fixed date of return. The restaurant can show that this request constitutes undue hardship because of the difficulty of replacing, even temporarily, a chef of this caliber. Moreover, it leaves the employer unable to determine how long it must hold open the position or to plan for the chef's absence. Therefore, the restaurant can deny the request for leave as a reasonable accommodation.

Example B: An employee requests eight weeks of leave for surgery for his disability. The employer grants the request. During surgery, serious complications arise that require a lengthier period of recuperation than originally anticipated, as well as additional surgery. The employee contacts the employer after three weeks of leave to ask for an additional ten to fourteen weeks of leave (i.e., a total of 18 to 22 weeks of leave). The employer must assess whether granting additional leave causes an undue hardship.

45. Does a cost-benefit analysis determine whether a reasonable accommodation will cause undue hardship?

No. A cost-benefit analysis assesses the cost of a reasonable accommodation in relation to the perceived benefit to the employer and the employee. Neither the statute nor the legislative history supports a cost-benefit analysis to determine whether a specific accommodation causes an undue hardship. Whether the cost of a reasonable accommodation imposes an undue hardship depends on the employer's resources, not on the individual's salary, position, or status (e.g., full-time versus part-time, salary versus hourly wage, permanent versus temporary).

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46. Can an employer claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else?

No, an employer cannot claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else. In some situations, an employer will have the right under a lease or other contractual relationship with the property owner to make the type of changes that are needed. If this is the case, the employer should make the changes, assuming no other factors exist that would make the changes too difficult or costly. If the contractual relationship between the employer and property owner requires the owner's consent to the kinds of changes that are required, or prohibits them from being made, then the employer must make good faith efforts either to obtain the owner's permission or to negotiate an exception to the terms of the contract. If the owner refuses to allow the employer to make the modifications, the employer may claim undue hardship. Even in this situation, however, the employer must still provide another reasonable accommodation, if one exists, that would not cause undue hardship.

Example A: X Corp., a travel agency, leases space in a building owned by Z Co. One of X Corp.'s employees becomes disabled and needs to use a wheelchair. The employee requests as a reasonable accommodation that several room dividers be moved to make his work space easily accessible. X Corp.'s lease specifically allows it to make these kinds of physical changes, and they are otherwise easy and inexpensive to make. The fact that X Corp. does not own the property does not create an undue hardship and therefore it must make the requested accommodation.

Example B: Same as Example A, except that X Corp.'s lease requires it to seek Z Co.'s permission before making any physical changes that would involve reconfiguring office space. X Corp. requests that Z Co. allow it to make the changes, but Z Co. denies the request. X Corp. can claim that making the physical changes would constitute an undue hardship. However, it must provide any other type of reasonable accommodation that would not involve making physical changes to the facility, such as finding a different location within the office that would be accessible to the employee.

An employer should remember its obligation to make reasonable accommodation when it is negotiating contracts with property owners. Similarly, a property owner should carefully assess a request from an employer to make physical changes that are needed as a reasonable accommodation because failure to permit the modification might constitute "interference" with the rights of an employee with a disability. In addition, other ADA provisions may require the property owner to make the modifications.

Burdens of Proof

In *US Airways, Inc. v. Barnett*, 535 U.S., 122 S. Ct. 1516 (2002), the Supreme Court laid out the burdens of proof for an individual with a disability (plaintiff) and an employer (defendant) in an ADA lawsuit alleging failure to provide reasonable

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accommodation. The “plaintiff/employee (to defeat a defendant/employer’s motion for summary judgment) need only show that an ‘accommodation’ seems reasonable on its face, i.e., ordinarily or in the run of cases.” Once the plaintiff has shown that the accommodation s/he needs is “reasonable,” the burden shifts to the defendant/employer to provide case-specific evidence proving that reasonable accommodation would cause an undue hardship in the particular circumstances.

The Supreme Court’s burden-shifting framework does not affect the interactive process triggered by an individual’s request for accommodation. An employer should still engage in this informal dialogue to obtain relevant information needed to make an informed decision.

Instructions for Investigators

When assessing whether a Respondent has violated the ADA by denying a reasonable accommodation to a Charging Party, investigators should consider the following:

- Is the Charging Party “otherwise qualified” (i.e., is the Charging Party qualified for the job except that, because of disability, s/he needs a reasonable accommodation to perform the position’s essential functions)?
- Did the Charging Party, or a representative, request a reasonable accommodation (i.e., did the Charging Party let the employer know that s/he needed an adjustment or change at work for a reason related to a medical condition)? [see Questions 1-4]
 - Did the Respondent request documentation of the Charging Party’s disability and/or functional limitations? If yes, was the documentation provided? Did the Respondent have a legitimate reason for requesting documentation? [see Questions 6-8]
 - What specific type of reasonable accommodation, if any, did the Charging Party request?
 - Was there a nexus between the reasonable accommodation requested and the functional limitations resulting from the Charging Party’s disability? [see Question 6]
 - Was the need for reasonable accommodation related to the use of medication, side effects from treatment, or symptoms related to a disability? [see Questions 36-38]
- For what purpose did the Charging Party request a reasonable accommodation:
 - for the application process? [see Questions 12-13]
 - in connection with aspects of job performance? [see Questions 16-24, 32-33]
 - in order to enjoy the benefits and privileges of employment? [see Questions 14-15]

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- Should the Respondent have initiated the interactive process, or provided a reasonable accommodation, even if the Charging Party did not ask for an accommodation? [see Questions 11, 39]
- What did the Respondent do in response to the Charging Party's request for reasonable accommodation (i.e., did the Respondent engage in an interactive process with the Charging Party and if so, describe both the Respondent's and the Charging Party's actions/statements during this process)? [see Questions 5-11]
- If the Charging Party asked the Respondent for a particular reasonable accommodation, and the Respondent provided a different accommodation, why did the Respondent provide a different reasonable accommodation than the one requested by the Charging Party? Why does the Respondent believe that the reasonable accommodation it provided was effective in eliminating the workplace barrier at issue, thus providing the Charging Party with an equal employment opportunity? Why does the Charging Party believe that the reasonable accommodation provided by the Respondent was ineffective? [see Question 9]
- What type of accommodation could the Respondent have provided that would have been 'reasonable' and effective in eliminating the workplace barrier at issue, thus providing the Charging Party with an equal employment opportunity?
- Does the charge involve allegations concerning reasonable accommodation and violations of any conduct rules? [see Questions 34-35]
- If the Charging Party alleges that the Respondent failed to provide a reassignment as a reasonable accommodation [see generally Questions 25-30 and accompanying text]:
 - did the Respondent and the Charging Party first discuss other forms of reasonable accommodation that would enable the Charging Party to remain in his/her current position before discussing reassignment?
 - did the Respondent have any vacant positions? [see Question 27]
 - did the Respondent notify the Charging Party about possible vacant positions? [see Question 28]
 - was the Charging Party qualified for a vacant position?
 - if there was more than one vacant position, did the Respondent place the Charging Party in the one that was most closely equivalent to the Charging Party's original position?
 - if the reassignment would conflict with a seniority system, are there 'special circumstances' that would make it 'reasonable' to reassign the Charging Party? [see Question 31]

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- If the Respondent is claiming undue hardship [see generally Questions 42-46 and accompanying text]:
 - what evidence has the Respondent produced showing that providing a specific reasonable accommodation would entail significant difficulty or expense?
 - if a modified schedule or leave is the reasonable accommodation, is undue hardship based on the impact on the ability of other employees to do their jobs? [see Question 42]
 - if leave is the reasonable accommodation, is undue hardship based on the amount of leave requested? [see Question 43]
 - if there are “special circumstances” that would make it “reasonable” to reassign the Charging Party, despite the apparent conflict with a seniority system, would it nonetheless be an undue hardship to make the reassignment? [see Question 31]
 - is undue hardship based on the fact that providing the reasonable accommodation requires changes to property owned by an entity other than the Respondent? [see Question 46]
 - if the Respondent claims that a particular reasonable accommodation would result in undue hardship, is there another reasonable accommodation that Respondent could have provided that would not have resulted in undue hardship?
- Based on the evidence obtained in answers to the questions above, is the Charging Party a qualified individual with a disability (i.e., can the Charging Party perform the essential functions of the position with or without reasonable accommodation)? [Footnotes omitted].

According to the website EmployeeIssues.com concerning the State Disability Insurance Benefits page on EmployeeIssues.com,

State disability insurance benefits are also called temporary disability insurance benefits and short-term disability insurance benefits.

That’s because they provide workers with partial wage replacement for disabling, nonoccupational illnesses and injuries that aren’t expected to last for long.

Did you know? Workers’ compensation insurance typically covers both short- and long-term, disabling, occupational illnesses and injuries. Occupational illnesses and injuries occur in the course of employment.

At this writing, only the five states listed below and the Commonwealth of Puerto Rico provide or require employers to provide short-term disability insurance benefits. The name of each state disability insurance program is included.

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- [California State Disability Insurance \(SDI\)](#)
- [Hawaii Temporary Disability Insurance \(TDI\)](#)
- [New Jersey Temporary Disability Insurance \(TDI\)](#)
- [New York Disability Benefits](#)
- [Rhode Island Temporary Disability Insurance \(TDI\)](#)

Did you know? All of the state disability insurance programs listed above pay maternity disability insurance benefits for pregnancy, childbirth, and related disabling medical conditions. At this writing, only California pays benefits for paternity leave. The *Federal Family and Medical Leave Act* (FMLA) covers paternity leave for eligible fathers, but it doesn't make sick pay mandatory.

A comprehensive listing of state and local programs providing assistance to persons with disabilities would be far too long to include as part of this course. There are programs for the blind and visually impaired, the deaf and hard of hearing, persons with developmental disabilities, persons requiring mental health or mental retardation services, and community living for people with disabilities, to name just a few. Suffice it to say that federal, state, and local governments all play a significant roles in providing programs and services to persons with disabilities.

As Mathis and Jackson report, "The ADA contains a number of specific requirements that deal with the employment of individuals with disabilities. Discrimination is prohibited against individuals with disabilities who can perform the 'essential job functions'—the fundamental job duties—of the employment positions that those individuals hold or desire. These functions do not include the marginal functions of the position. For a qualified person with a disability, an employer must make a 'reasonable accommodation', which is a modification to a job or work environment that gives that individual an equal employment opportunity to perform. EEOC guidelines encourage employers and individuals to work together to determine what are appropriate reasonable accommodations, rather than employers alone making those judgments."

Mathis and Jackson also point out, "The ADA contains restrictions on obtaining and retaining medically related information on applicants and employees. Restrictions include prohibiting employers from rejecting individuals because of a disability and from asking job applicants any questions about current or past medical history until a conditional job offer is made. Also, the ADA prohibits the use of pre-employment medical exams, except for drug tests, until a job has been conditionally offered. Use of personality tests as employment screening means have been ruled in some court cases to violate the ADA because such tests may eliminate individuals with perceived psychological impairments. An additional requirement of the ADA is that all medical information be maintained in files separated from the general personnel files. The medical files must have identified security procedures, and limited access procedures must be identified."

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If there is a question regarding compliance with the requirements of the ADA, we strongly suggest that the organization seek advice and guidance from an attorney who specializes in employment law.

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Part Nine: Monitoring EEO Performance

Depending upon the size of the organization, the responsibility for monitoring EEO performance may be vested in a separate EEO office or assigned to the human resources staff to perform. In instances where the EEO and HR functions are separated, there needs to be a continuing dialogue and interface to address the ongoing monitoring of EEO activities. Most of this activity can be accomplished through the development and production of periodic reports on a wide range of issues that have EEO ramifications, including:

- Workforce composition;
- Recruitment/selection trends;
- Complaints/allegations of discrimination;
- Training sessions planned/conducted; and
- Investigations conducted/summary of remedial actions taken.

The above list is not exhaustive, but it is illustrative of the types of information needed to provide a scorecard for assessing the overall effectiveness of the organization's EEO performance. Gathering information into a report format is only the first step of an ongoing process. Once information/data has been compiled, it is what happens next that will determine the overall success of the organization's EEO efforts. Using the list of issues identified above, typical actions should include:

- **Workforce composition**—Using the EEO's benchmark/rule of thumb definition of adverse impact, are there areas within the organization, either by job classification or work unit, where minority or female representation falls below 4/5ths or 80%? We explained this concept earlier in Part Five of this module. These areas of underutilization then need to be explored with management's input. This discussion should not be us-against-them or an escalation of "What have you done wrong?" accusations, but a dialogue to determine the cause(s) of the underutilization. This discussion should also look at trends and causes, such as whether underutilization increasing or decreasing over the past few years is due to retirements, downsizing, or a reduction in hiring.
- **Recruitment/selection**—In both the recruitment and selection modules, we discussed the need to ensure that recruitment and selection practices, policies, and procedures were nondiscriminatory in their application. These systems need to be critically reevaluated to ensure that they do not discriminate against minority and female applicants. Generally, the courts have supported the use of a selection process that had a discriminatory effect if the selection process was proven to be job-related. It might be advisable to retain a consultant to assist in this evaluation in order to provide an independent assessment.
- **Complaints/allegations of discrimination**—These events need to be compiled and summarized by type of complaint (e.g., race/sex/gender/national origin/

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religion discrimination, workplace violence, harassment). This listing should also be compiled by work unit and job classification to determine any significant trends. As with the recruitment and selection analysis, information should be shared and discussed with management to obtain their input.

- **Training sessions planned/conducted**—This listing should include the topic (e.g., sexual harassment, diversity training) method of delivery (e.g., supervisory sessions, online, classroom), number and names of attendees, and a summary of session evaluations. If possible, feedback should be obtained from supervisors/managers on any noticeable change in employee behavior/conduct following the training.
- **Investigations conducted/summary of remedial actions taken**—These activities need to be compiled by work unit, type of complaint, and type of remedial or corrective action(s) taken by the organization. The assessment of this data may indicate the need for additional training and over a two- or three-year period might document reductions in the number of complaints as a result of prior training interventions.

The keys to successful EEO compliance by an organization are vigilance and willingness to self-evaluate and are coupled with a clearly stated policy by top management that is backed up with action, when necessary, and day-to-day support for a diverse workforce that is representative of the public they serve.

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Part Ten: EEO Reports

Recordkeeping for EEO purposes is extremely important and provides the necessary background information to respond to complaints and document the organization's activities.

Mathis and Jackson describe these reporting requirements in some detail: Employers must comply with a variety of EEO regulations and guidelines. ... Additionally, employers with 15 or more employees may be required to keep certain records that can be requested by the EEOC, the Office of Federal Contract Compliance Programs, (OFCCP), or numerous other state and local enforcement agencies. Under various laws, employers are also required to post an "officially approved notice" in a prominent place for employees. This notice states that the employer is an equal opportunity employer and does not discriminate.

All employment records must be maintained as required by the EEOC. Such records include application forms and documents concerning hiring, promotion, demotion, transfer, layoff, termination, rates of pay or other terms of compensation, and selection for training and apprenticeship. Even application forms or test papers completed by unsuccessful applicants may be requested. The length of time documents must be kept varies, but generally three years is recommended as a minimum. Complete records are necessary to enable an employer to respond should a charge of discrimination be made.

Under EEO laws and regulations, employers may be required to show that they do not discriminate in the recruiting and selection of members of protected classes. Because employers are not allowed to collect such data on application blanks and other pre-employment records, the EEOC allows them to do so with a separate "applicant-flow form" that is not used in the selection process. The applicant-flow form is filled out voluntarily by the applicant, and the data must be maintained separately from other selection-related materials. With many applications being made via the internet, employers must collect this data electronically to comply with regulations on who is an applicant. Analyses of data collected in applicant-flow forms may help show whether an employer has underutilized a protected class because of an inadequate flow of applicants from that class, in spite of special efforts to recruit them. Also, these data are reported as part of affirmative action plans that are filed with the OFCCP.

Mathis and Jackson go on to note the EEOC's filing requirements:

Many private sector employers must file a basic report annually with EEOC. Slightly different reports must be filed biennially by state/local governments, local unions, and school districts. The following private sector employers must file the EEO-1 report annually:

- All employers with 100 or more employees, except state and local governments.

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- Subsidiaries of other companies if the total number of all combined employees equals 100 or more.
- Federal contractors with at least 50 employees and contracts of \$50,000 or more.
- Financial institutions with at least 50 employees, in which government funds are held or savings bonds are issued.

In 2007, changes were made in the EEO-1 data collected. Details on employees must be reported by gender, race/ethnic group, and job levels. The most significant change was adding the phrase “two or more races” in order to reflect the multi-diverse nature of a growing number of employees.

Exercise

Describe how your organization maintains its EEO records. Does this effort involve the use of an HRIS system? If yes, please describe how.

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Part Eleven: Diversity Programs

Throughout all of the Modules we have discussed the need for organizational and HR policies that foster diversity and inclusiveness. We have done this not only because it is a statutory and legal requirement, but also because for public organizations it is a business necessity. Government and public organizations exist to provide services and protection for its citizenry—not just some, but for all, regardless of race, gender preference, religion, national origin, sex, etc. If we are to effectively carry out this mission, the public organization needs to understand and appreciate the diversity of the people whom they serve. The best way to accomplish this is to mirror that diversity within its own workforce, not only at the entry level, but at all levels within the organization. Diversity needs to be an organizational mindset about the way we will treat our employees and the general public.

Organizational diversity is the mosaic of people who bring a variety of backgrounds, styles, perspectives, values, culture, and beliefs to the organization for whom they work. Diversity encompasses far more than race, sex, national origin, etc., as it also includes age, educational attainment, work experiences, marital status, etc. There is a natural, human tendency to feel threatened by those who are different from us. What we need to understand is that these are surface differences only, and that organizations can employ diversity as a strength. This mosaic of people produces different perspectives and ideas that organizations can garner to provide novel solutions to vexing or seemingly intractable problems IF the organization chooses to seek out and utilize this very special resource. As Margaret Mead remarked regarding diversity, “If we are to achieve a richer culture, rich in contrasting values, we must recognize the whole gamut of human potentialities, and to weave a less arbitrary social fabric, one in which each diverse human gift will find a fitting place.”

As Mathis and Jackson note, “For diversity to succeed, the most crucial component is seeing it as a commitment throughout the organization, beginning with top management. Diversity results must be measured, and management accountability for achieving those results must be emphasized and rewarded. Once management accountability for diversity results has been established, then it is important that policies and activities provide organizational justice and fairness in work treatment of employees.” Mathis and Jackson go on to outline a model for an organizational diversity program which includes the following components:

- **Forming a diversity committee**—to oversee and advise on program implementation;
- **Conducting diversity training**—to assure that all employees understand and commit to the program;
- **Establishing monitoring systems**—to measure results and assess program effectiveness;
- **Emphasizing diversity in succession and promotion planning**—the organization needs to ensure that diversity considerations are included as a component of its succession planning and promotion policies;

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- **Establishing multi-cultural work teams**—to place employees of diverse backgrounds into work situations where they have the opportunity to interact with each other.

In regard to training, Mathis and Jackson point out the need to distinguish between the various components that may be included as part of diversity training sessions:

- “*Legal awareness* is the first and most common component. Here, the training focuses on the legal implications of discrimination.” This typically includes the EEO requirements with which organizations must assure compliance.
- “*Cultural awareness* ... to build understanding of differences among people. Cultural awareness training helps all participants to see and accept the differences in people with widely varying cultural backgrounds.”
- “*Sensitivity training*...to ‘sensitize’ people to the difference among them and how their words and behaviors are seen by others.”

Mathis and Jackson also caution against a number of potential negative consequences that might occur as the result of the implementation of diversity programs:

- “individuals in protected groups, such as women and members of racial minorities, sometimes see the diversity efforts as inadequate and nothing but ‘corporate public relations’. Thus it appears that by establishing diversity programs, employers are raising the expectation levels of protected-group individuals, but the programs are not meeting those expectations.”
- “a number of individuals who are not in protected groups, primarily white males, believe that the emphasis on diversity sets them up as scapegoats for the societal problems created by increasing diversity.”
- “diversity training that includes lesbian, gay, and bisexual content has created resistance from employees with certain religious beliefs.”

Mathis and Jackson note that the way to avoid these consequences is “to stress that people can believe whatever they wish, but at work their values are less important than their behaviors. Dealing with diversity is not about what people can and cannot say, it is about being respectful to others.”

Each organization and its internal dynamics are different and the HR staff, partnering with top management, need to assess and determine what is the proper tone and content of their diversity programs and initiatives.

Exercise

Describe the diversity training that your organization provides. How frequently is it provided and to whom? To what extent does the diversity training in your organization include the three components described by Mathis and Jackson?

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Part Twelve: Diversity Strategies

As has been pointed out throughout this module, EEO and diversity are more than just training and policy statements. Diversity is a mind-set about how the public organization will treat and respect all of the various groups that make up its workforce. This mind-set needs to be inculcated into the:

- Conduct of recruitment activities;
- Development and implementation of staff retention strategies;
- Planning, development, and implementation of succession planning initiatives;
- Development and implementation of discipline policies that treat all employees fairly;
- Access to training and staff development opportunities for all employees;
- Access to benefit information and provision of benefits to all staff;
- Assurance that employees' jobs are properly classified, and that differences in compensation are based on job-related factors; and
- Development and application of performance management systems that reflect differences in performance and not nonmerit differences based on ethnicity, sex, gender preference, etc.

As is evidenced above, diversity is an integral part of all HR functions and activities, along with the daily managerial functions performed throughout the organization. Tracking and ensuring compliance with all of the above systems, activities, and functions requires the HR staff to provide constant oversight and guidance. In this regard, the application of information technology may be particularly useful. IT systems could be developed to perform most of the mundane, manual recordkeeping needed to provide the metrics required to assess overall program implementation and integrity. Examples include:

- Excel spreadsheets or Access databases could be used to track and compute adverse impact while using the EEOC's 4/5ths/80% rule of thumb;
- Applicant tracking software could provide valuable information on the recruitment/selection processes;
- HRIS systems, if available, could be used to produce workforce composition profiles;
- Automated systems could be used to:
 - Announce and record training sessions offered, registrations, etc.;
 - Monitor discrimination complaints, disciplinary actions, etc.;

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- Compile workforce planning data such as exit interviews, terminations, accessions, etc.

Effective use of IT could reduce much of the manual work needed to develop and maintain effective metrics evaluating and assessing the continued efficacy of the organization's EEO and diversity initiatives.

Exercise

How does your organization monitor the effectiveness of its diversity program?

Describe your organization's use of IT to monitor EEO and diversity programs and initiatives.

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Addendum

The Existence and Applicability of State Nondiscrimination Laws

State	Sexual orientation	Gender identity	Religious exemption	Nonprofit exemption	Employment sector coverage
Alabama	No	No	N/A	N/A	N/A
Alaska	Yes (2002)	No	N/A	N/A	State employees
Arizona	Yes (2003)	No	N/A	N/A	State employees
Arkansas	No	No	N/A	N/A	N/A
California	Yes (1992)	Yes (2003)	Yes	No	All employees
Colorado	Yes (1990)	Yes (2007)	Yes	No	All employees
Connecticut	Yes (1991)	Yes (2011)	Yes	No	All employees
Delaware	Yes (2009)	Yes (2009)	Yes	No	SO-All employees GI-Executive branch employees
DC	Yes (1997)	Yes (2006)	Yes	No	All employees
Florida	No	No	N/A	N/A	N/A
Georgia	No	No	N/A	N/A	N/A
Hawaii	Yes (1991)	Yes (2011)	Yes	No	All employees
Idaho	No	No	N/A	N/A	N/A
Illinois	Yes (2006)	Yes (2006)	Yes	No	All employees
Indiana	Yes (2005)	Yes (2005)	N/A	N/A	State employees
Iowa	Yes (2007)	Yes (2007)	Yes	No	All employees
Kansas	Yes (2007)	Yes (2007)	N/A	N/A	State employees
Kentucky	Yes (2008)	Yes (2008)	N/A	N/A	State employees
Louisiana	No	No	N/A	N/A	N/A
Maine	Yes (2005)	Yes (2005)	Yes	No	All employees
Maryland	Yes (2001)	No	Yes	No	All employees
Massachusetts	Yes (1989)	Yes (2011)	Yes	Yes	All employees
Michigan	Yes (2003)	Yes (2007)	N/A	N/A	State employees
Minnesota	Yes (1993)	Yes (1993)	Yes	No	All employees
Mississippi	No	No	N/A	N/A	N/A
Missouri	Yes (2010)	No	N/A	N/A	Executive branch
Montana	Yes (2000)	No	N/A	N/A	State employees
Nebraska	No	No	N/A	N/A	N/A
Nevada	Yes (1999)	Yes (2011)	Yes	No	All employees
New Hampshire	Yes (1997)	No	Yes	No	All employees
New Jersey	Yes (1992)	Yes (2006)	Yes	No	All employees
New Mexico	Yes (2003)	Yes (2003)	Yes	No	All employees
New York	Yes (2002)	No	Yes	No	All employees
North Carolina	No	No	N/A	N/A	N/A
North Dakota	No	No	N/A	N/A	N/A

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State	Sexual orientation	Gender identity	Religious exemption	Non-profit exemption	Employment Sector Coverage
Ohio	Yes (2007)	Yes (2007)	N/A	N/A	State employees
Oklahoma	No	No	N/A	N/A	N/A
Oregon	Yes (2007)	Yes (2007)	Yes	No	All employees
Pennsylvania	Yes (1975)	Yes (2003)	N/A	N/A	State employees
Rhode Island	Yes (1995)	Yes (2001)	Yes	No	All employees
South Carolina	No	No	N/A	N/A	N/A
South Dakota	No	No	N/A	N/A	N/A
Tennessee	No	No	N/A	N/A	N/A
Texas	NoNo	N/A	N/A	N/A	
Utah	No	No	N/A	N/A	N/A
Vermont	Yes (1992)	Yes (2007)	Yes	No	All employees
Virginia	No	No	N/A	N/A	N/A
Washington	Yes (2006)	Yes (2006)	Yes	No	All employees
West Virginia	No	No	N/A	N/A	N/A
Wisconsin	Yes (1982)	No	Yes	No	All employees
Wyoming	No	No	N/A	N/A	N/A

N/A = Not Applicable

Data from the Center for American Progress Action Fund's "A State-by-State Examination of Nondiscrimination Laws and Policies," June 2012.

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Reading Assignment for Organizational Development Module

Chapters Eight, Nine, and Ten, *Human Resource Management*, Fifteenth Edition, by Robert L. Mathis, John H. Jackson, Sean R. Valentine, and Patricia A. Meglich

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Part One: Employee Development

The primary assets of most organizations are the talent and productivity of its employees. This has been made even more so as we move from a service economy into the information age and as we experience the effects of a reduced labor pool. Retention strategies are now as important as funding strategies, and the creation and maintenance of an organizational structure and culture that value employees is a key organizational priority.

The IPMA-HR's 2016 [Cross-Generational Benchmarking Report](#) presents findings from a survey that asked respondents to indicate their wants, needs, and preferences regarding five predominant factors related to working in the public sector: appeal of working for government, recruitment, retention, attitudes about work in general, and career advancement. As to retention, "The top reasons government employees gave for staying at or leaving their job were career advancement and development opportunities, their relationship with their supervisor, and compensation."

Employee retention strategies often begin with onboarding and the new employee orientation because how a new employee is welcomed into the organization is key to whether the organization will be able to retain that employee. Unfortunately, too many organizations view new employee orientation as the responsibility of their benefits unit, and the emphasis is placed on a checklist of forms to be signed and policies to be reviewed. Then the new employee is pushed along to a supervisor who hands the employee three feet of manuals, assigns the employee to a cubicle, and disappears because the last thing the supervisor has time for is training a new staff member.

What should the supervisor be doing? A critical responsibility is assisting the individual in understanding the organization and how he/she supports that organization. The first discussion is reviewing the mission and values of the organization. Although this information might be available externally, this discussion grounds the new employee on what's important and guides the person on acceptable behaviors during his/her career with the organization. After discussing the goals of the organization, the new employee needs to hear the strategies the organization has chosen to achieve those goals. What plans have been or are being developed to enable the organization to get where it desires to be? Closely tied to that is the expectation of the organization for the new employee. What is it that the organization expects him or her to contribute? Why was he or she chosen, and what roles need this employee's capabilities?

Orientation is the time for the supervisor to learn more about the employee than he/she might have learned during the employment interview. In her book *The Seven Hidden Reasons Employees Leave*, Leigh Branham suggests that supervisors conduct entrance interviews with new hires and ask similar questions as may have been asked during the employment interview but are now focused to enable the supervisor to learn much more about the talents and expectations being brought by the new hire. Entrance interview questions often focus on how the individual's talents might best be used, what challenges the employee is looking for, what career or development goals the employee has, and how frequently and in what manner the new hire desires feedback from the supervisor. This discussion communicates the value placed upon the new employee by the organization.

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A second critical priority for orientation is to assist the individual in establishing and building relationships with other colleagues and managers. Introductions help to reduce new employee anxieties that can impede someone's ability to learn or perform on the new job. The supervisor should share with other staff and managers information about the new employee's education, experience, or assigned responsibilities that will encourage and assist identification of commonalities and kick-start collegial conversations. Many organizations designate mentors to answer questions, give guidance, and assist with relationship building.

Human resource staff can assist both new employees and their supervisors by ensuring that organizational charts, contact lists, organizational FAQs, and easily referenced policies are available to new employees. Human resource professionals should also follow up with a new employee to monitor his or her transition, evaluate the effectiveness of the orientation process, and coach supervisors on effective orientation techniques.

Malcolm Knowles, the father of andragogy, or the study of how to help adults learn, identified 5 basic differences between how adults learn and how children under age 18 learn. The knowledge of these concepts guides trainers and facilitators in understanding what motivates adults to learn, what design principles must be included during development, and what leads to successful training delivery. Knowles' theory includes the following:

- Adults become motivated to learn when they identify a need to change a behavior, skill, performance, or even a personal aspect of their lives. Training is viewed as a means to successfully adapt, accept, or cope with this change. Since adults are problem-centered consumers of learning, they want to learn this new ability and apply it immediately to respond to the stimulus or need in their lives. Training with vague developmental goals will not attract or retain the interest of adult learners.
- Adults bring life experiences to training and expect their experience to be valued by the training and the trainer. They need to digest new information through the processes of analysis and critical reflection. Time and opportunities must be built into training design to enable learners to reassess their previous experiences and assumptions and reflect how this new learning will impact their understanding and responsibility. Training design should, therefore, include instructional tools such as case studies, group discussions, individual assessments, and time for reflection.
- Adult learners demand to know the why behind the content or the change. While children are expected to absorb what they are taught in school or college, adult learners want to know the reason and relevance behind the content of the course. They want to know how this training will benefit them with skills, awareness, and capabilities. Course designers need to identify and clarify participant expectations at the beginning of the course because adults expect training to be targeted to a specific need and course duration to be minimized as much as possible. Presenters will need to refer back to training objectives throughout the training to link training content to learning goals.

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- Adults prefer more control and direction with their learning, and often can be more hesitant in trying new skills. As more self-directed learners, they want to assume more responsibility for their own learning but may need more assistance in selecting the learning styles that work most effectively for them. The desire for self-directed learning has greatly expanded the popularity of computer-based training, which allows learners to choose content areas and skip levels already accomplished. One example of self-directed learning is Rosetta Stone, which is a successful series of foreign language training courses that offer these learner choices and the ability to choose the type of learning that best fits one's own learning style. Visual learners can choose the option of seeing the words on the screen, auditory learners can choose to hear words spoken several times, and integrated learners can choose both. Learners can focus strictly on learning pronunciation and vocabulary, or they can learn via association and practice. Facilitation, interaction, practice, and feedback are critical to keep adult learners' attention.
- Adults are motivated to learn to satisfy individual needs. They may want to increase job satisfaction, enhance marketability of skills, update knowledge, or improve personal communication and relationships. Self-esteem is increased through successful completion of training programs. This is particularly true when adults have involvement and experience ownership in the direction and presentation of the training. This further validates the need for effective training needs and participant needs assessments.

Too often, supervisors and trainers want an immediate fix to a self-diagnosed illness and request staff training as the quickest, cheapest, and easiest remedy. All too often, the patient was experiencing a different malady, and the medicine not only wasted time, money, and effort, but also increased the extent of the problem and decreased employee morale and commitment.

The Association for Talent Development, or ATD and known as ASTD, indicated that "in 2013, organizations on average spent \$1,208 per employee on training and development. This is a small one percent increase over last year (an additional \$13 more per employee). The number of learning hours used per employee also slightly increased to 31.5 hours from 30.3 hours."

In its article "2015 Training Industry Report," *Training* magazine concluded: "Total 2015 U.S. training expenditures—including payroll and spending on external products and services—took an upward trajectory, soaring 14.2 percent to \$70.6 billion. Spending on outside products and services skyrocketed 29 percent from \$6.1 billion to \$8 billion, while other training expenditures (i.e., travel, facilities, equipment) more than doubled to \$28.7 billion. Meanwhile, training payroll plummeted 20 percent to 2011-2012 levels at \$33.9 billion."

With such a huge human resource investment and expense, organizations and managers must realize that training is only one type of intervention to resolve performance problems and is generally only effective when employees need to learn or improve a skill.

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In his classic book *Why Employees Don't Do What They're Supposed to Do and What to Do about It*, Ferdinand Fournies states that there are 16 reasons why employees do not perform to the expected level. Fifteen of these 16 reasons are within the direct control of the manager, yet managers continue to believe that if their staff just had more training, they would be able to perform to standard. Instead, Fournies found that managers need to give employees the information they need to do their jobs well, constructive and timely feedback, appropriate incentives and consequences, faith that the manager knows what they're doing, and a workplace where obstacles are eliminated or minimized. It is estimated that up to 80% of performance deficiencies are caused by lack of adequate information, feedback, and consequences—all of which are within a manager's control. Performance analysis is the process that can enable organizations to identify the cause and resolution of performance issues.

Performance analysis is a type of gap analysis that is used to contrast the difference between the performance or behavior managers expect and what they observe. The goal is to identify the cause of the discrepancy between optimal and actual performance. The process has 6 primary steps:

- **Step 1: Describe the desired performance**—Instead of jumping to a possible cause, the human resource professional should meet with management to identify what specific behaviors, objectives, or standards they expect from their staff. While managers may want to focus on possible causes and solutions, it is important to specify needed performance behaviors and levels. In addition to discussions, look for information sources such as organizational goals, regulations, requirements, policies, and contractual requirements. Also determine if new or upcoming services, systems, or procedures will require a change in expected performance.
- **Step 2: Describe the actual performance**—During this step the human resource professional must obtain specific data about productivity, customer satisfaction, work backlogs, and quality. Data can be obtained by direct observation or through surveys, interviews, or focus groups. Performance data is kept to varying degrees, which means it may be voluminous or scarce. Although it is said that organizations measure what they treasure, some organizations measure only what is easy to gather and may not provide data on important performance criteria.
- **Step 3: Identify the gap between desired and actual performance**—This requires analyzing the extent of the gap, whether the gap is localized or widespread, the cost of the gap to the organization (in terms of money, time, and customer satisfaction), the urgency for resolution, and the potential impact and consequences if the gap is not resolved.

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- **Step 4: Determine the cause of the gap**—Tom Gilbert’s Six Boxes model is an effective tool to help identify the cause of the gap between expected and actual performance. The 6 boxes, or factors, impacting performance are:

<p>Information (expectations, standards, and feedback)</p>	<p>Resources (tools, equipment, procedures, and systems)</p>	<p>Incentives/Consequences (intended and unintended; positive and negative; financial and non-financial)</p>
<p>Knowledge/Skills (training, developmental opportunities, on-the-job assignments)</p>	<p>Capacity (physical, mental, and emotional limitations or personal constraints)</p>	<p>Motivation (value employee places on job, level of confidence in performing job, and impact of work environment on mood)</p>

During this step the human resource professional analyzes the organization’s and the individual’s effectiveness in each of these areas. Do employees know what is expected of them and how they are meeting those expectations? Do employees have the resources they need to perform their jobs? Has the organization designed and implemented a program that will reward employees for high performance and provide discipline for poor performance? Has the organization provided needed training and practice? Do existing employees have the ability to perform well and does the organization select employees wisely? Do employees value their jobs and believe they can perform well? And does the organization provide a work environment that is supportive and conducive to high performance?

- **Step 5. Propose intervention(s)**—After determining the cause of the performance gap, the human resource professional proposes interventions that, if implemented effectively, will reduce or eliminate the gap between desired and actual performance. These interventions might include setting performance expectations and standards, providing specific and timely feedback, creating job aids, eliminating workplace barriers to performance, adopting more effective recruitment and selection practices, redesigning jobs, developing more appropriate rewards and consequences for performance, reengineering processes or systems, providing needed tools and resources, or providing effective training and developmental opportunities.
- **Step 6: Implement and measure effectiveness**—An intervention will not be successful without the support and cooperation of management. Change management practices may be needed to assist in introducing and enforcing required changes in performance, policies, or procedures. The human resource professional works with management and staff to measure changes in performance, evaluate success of the intervention, and modify as needed.

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When performance analysis determines that the solution to a performance problem is a lack of training, a training needs analysis should be conducted to gather more information about the audience and the specific skill or knowledge needed. Organizations conduct training for one of four main reasons:

- **Required or regular training** which is frequently mandated by regulations or organizational policies
- **Job/technical training** which provides the knowledge or skills employees must have to be able to perform job-related processes or procedures
- **Interpersonal and problem-solving training** to improve organizational and individual effectiveness, and
- **Developmental and career training** to prepare the organization and employees for future opportunities and advancement.

There are three levels of training needs analyses that can be conducted to identify specific learning needs of groups or individuals. An organizational assessment looks at training needs from the macro level and assesses what organizational results should be occurring but are not, how the organization's priorities and culture may be contributing to these inadequacies, and what training initiatives might assist in achieving organizational goals.

Sources of data may include a review of key performance indicators or balanced scorecard for the organization, strategic planning documents, critical incidents, focus groups, customer complaints, questionnaires, and interviews. A job or task analysis identifies what steps must occur in what order, what resources are required, and what level of performance must be achieved. Job/task analyses are primarily conducted when a new system, process, or job has been created or when a performance analysis indicates the cause of poor performance to be lack of adequate training. Traditional analysis tools include direct observation, storyboarding, interviews, performance standards, and meetings with subject matter experts or high performers. Individual training needs assessments determine which employees need specific training to accomplish assigned job tasks. The analysis can involve self-assessments, supervisory reviews, focus group discussions, testing results, quality monitoring, assessment centers, interviews, or data obtained from performance reports.

According to Gallup's summary of 2015 U.S. employee engagement surveys, "The percentage of U.S. workers in 2015 who Gallup considered engaged in their jobs averaged 32%. The majority (50.8%) of employees were 'not engaged,' while another 17.2% were 'actively disengaged.' The 2015 averages are largely on par with the 2014 averages and reflect little improvement in employee engagement over the past year." From its survey, Gallup concluded:

Engaged employees are involved in, enthusiastic about, and committed to their work. Gallup's extensive research shows that employee engagement is strongly connected to business outcomes essential to an organization's financial success, such as productivity, profitability, and customer engagement. Engaged employees support the innovation, growth, and revenue that their companies need.

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Yet, most U.S. workers continue to fall into the not engaged category. These employees are not hostile or disruptive. They show up and kill time, doing the minimum required with little extra effort to go out of their way for customers. They are less vigilant, more likely to miss work and change jobs when new opportunities arise. They are thinking about lunch or their next break. Not engaged employees are either 'checked out' or attempting to get their job done with little or no management support.

There are two different schools of thought on how to increase employee satisfaction and motivation. Need, or content, theories explain that humans have individual needs that drive their behaviors as they try to satisfy those needs. The other school of thought proposes several theories which are referred to as cognitive, or process, theories. This second set of theories contends that employee behavior results from the conscious decisions that people make and that those decisions can be influenced and guided to promote and maintain internal motivation. We will examine all of these in more detail.

Need/Content theories include the following:

- Abraham Maslow developed a hierarchy of needs theory to explain that humans have five levels of needs that they attempt to satisfy. Running from most basic to most advanced, they are:
 - Physiological;
 - Security;
 - Belongingness
 - Esteem;
 - Self-actualization.

Maslow theorized that people will not be able to focus upon higher level needs such as esteem and achievement until after their more basic needs for survival, safety, and affection have been met. Needs for adequate pay, safe working conditions, job security, and positive co-worker relationships will need to be met before staff will be able to focus on opportunities for increased job responsibilities, job enrichment, or career development.

- Frederick Herzberg's motivator-hygiene theory states that satisfying lower-level needs, which Herzberg referred to as "hygiene factors," will prevent employees from becoming dissatisfied and demotivated, but they will not be able to motivate them to perform such as higher-level needs called "motivators." Attempts by managers to only motivate employees to excel through equitable salaries and benefits, safety, and teamwork will fail unless accompanied by opportunities for job enrichment and challenge.

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- In Clayton Alderfer's ERG theory, Maslow's five needs are reduced to three:

- Existence (physiological and safety needs);
- Relatedness (belongingness and esteem needs);
- Growth (esteem and self-actualization needs).

Another difference is that the ERG Theory does not postulate that the lower-level needs must be satisfied before an individual can be interested in higher-level ones. ERG theory does state, however, that individuals who attempt but are not able to fulfill their upper-level needs will revert back to motivation only through lower-level ones. It is important, therefore, that managers focus on designing jobs to be challenging and fulfilling in addition to providing for the security and safety for employees.

- According to David McClelland's learned needs theory, individuals have three primary needs: affiliation which is the need for secure relationships with others, power which is the need for control over one's environment and others, and achievement which is the need to be challenged and to succeed. McClelland's theory proposes that one of these needs will be dominant within an individual and will motivate that person's performance and behavior. Wise managers continue to assess which of the three needs is strongest within each subordinate and to work with those individuals to structure the job and the managing relationship to best satisfy the individuals' needs.

Cognitive/Process theories include:

- Victor Vroom developed the expectancy theory which states that three factors motivate employees to perform:
 - Expectancy which is the degree to which it is believed that increased effort will lead to enhanced performance;
 - Instrumentality which is the degree to which it is believed that enhanced performance will lead to rewards and other benefits;
 - Valence which is the degree to which the consequences are viewed as desirable.

All three factors must be present in a job for an employee to be highly motivated. According to expectancy theory, managers must work with employees to demonstrate that their efforts will lead to their higher performance and that their enhanced performance will lead to their desired rewards.

- The equity theory states that employees continually compare the rewards they are receiving for the efforts they make against the rewards and efforts received by others. Equity exists when they see that others receive the same level of reward as they do for similar performance and effort. Inequity occurs in an employee's mind when the employee either perceives someone else is

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receiving the same reward for less effort or perceives that someone else is only receiving the same reward despite making more effort. Managers and human resource professionals must ensure that levels of consequences exist and correspond to different levels of effort and performance. Otherwise high performers may lose motivation and decrease their performance or look for a position that offers higher rewards.

- The goal-setting theory developed by Edwin Locke and Gary Latham states that individuals become more motivated when they have set goals for themselves. To be effective, self-determined goals must be specific, challenging, and have measurable milestones. The more committed an individual becomes to a goal, the more motivated he/she will be to achieve it if it is believed to be possible to attain. Goals must be challenging but attainable; they must be specific rather than vague; they must have specific targets or milestones that can be measured; and the employee must believe that he/she will be able to succeed in meeting the goals. This is why effective managers and human resource professionals set realistic but challenging performance expectations that both the employee and the manager can measure.
- B.F. Skinner's reinforcement theory focuses upon consequences. Consequences of a behavior drive an individual to continue or avoid the behavior in the future. If a behavior is reinforced with positive consequences, the person will repeat the behavior. If the behavior is not rewarded or if punishment results, the behavior will not be repeated or will be repeated less frequently. It is critical for managers to observe and reflect on the consequences they provide for positive and negative behaviors. Too often, managers allow or reward negative behaviors while punishing positive behaviors. Work assignments are a classic example of how managers reward poor performers by assigning less work to them while overloading high performers. Effective performance management results when managers and human resource professionals use reinforcement and goal-setting theories in concert with each other to provide goals, feedback, and consequences.
- On the other hand, Julian Rotter, with an expansion by Albert Bandura, developed a social learning theory that states that reinforcement alone cannot motivate behavior or learning. According to social learning theory, self-pride internal satisfaction, and a sense of accomplishment are all powerful intrinsic motivators that shape behavior in conjunction with stimulus from the individual's environment. There are three requirements for people to learn and model behaviors that they have observed from others:
 - Ability to retain and remember what was observed;
 - Ability to repeat the behavior observed; and
 - Motivation to want to adopt the behavior.

This theory serves as an effective transition to training because it reiterates the importance of managers modeling desired behaviors, giving frequent feedback to staff, encouraging staff to perform, and providing positive consequences when staff perform.

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Instructional methods are techniques that are selected during design or presentation to best aid learning and retention. Selection of instructional methods and strategies depends upon:

- Objectives of training
- Available time
- Level of knowledge or experience of participants
- Type of instructional content
- Learner expectations
- Organizational expectations
- Budget
- Trainer knowledge, experience, and comfort
- Other techniques within same program
- Learning styles
- Need for interaction

Some of the most common instructional techniques include:

- **On the job training (OJT)** is conducted entirely at an employer's site and is used specifically to broaden, practice, and improve employee's skills. It is particularly beneficial for jobs requiring unique skills or use of specific equipment. An OJT plan should be provided to the employee that identifies the specific content, expected performance, number of hours, estimated completion date, and the methods and techniques that will be used for the training.
- **Apprenticeships** began as a training technique during the Middle Ages when guilds of craftsmen selected young apprentices to learn a craft. The goal of apprenticeship is to build someone's skills to a satisfactory level while providing both training and wages. It is a proven talent management strategy that helps organizations avoid skill shortages while providing real work experience.
- **Simulations** are used in training when it would be too dangerous, lengthy, or expensive to allow employees to learn with real equipment or situations. Computer or virtual simulations enable a trainee to respond to hypothetical situations posed by the program and safely experience the results of decisions and actions. Simulations are also used in management and interpersonal skills training to enable experimentation in a risk-free environment.

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- **Case studies** focus upon stories about individuals, organizations, processes, projects, or events and the consequence of decisions or actions that were taken. They enable participants to review, evaluate, and apply lessons learned by others to a potential problem or opportunity they might face in the future. Case studies are frequently used in management and thinking skills courses and are a particularly successful training strategy when they relate directly to the training objectives, are relevant and applicable to participants, and provide an appropriate level of detail.
- **Games and activities** are forms of experiential learning and are used during training programs to provide hands-on and learner-focused learning, promote involvement, improve retention, energize participants, and enable building of trust and relationships among participants. They range from simple pen and paper exercises to extreme adventure learning events. Facilitators must ensure that the games or activities are directly related to the training objectives, fit the organizational culture, and are adequately processed at the conclusion so that participants reflect and discuss what was learned from the exercise and how it can be applied to their jobs. In Jeanne Meister's May 21, 2012, article entitled "Gamification: Three Ways to Use Gaming for Recruiting, Training, and Health and Wellness" on Forbes.com, she states:

Gartner Group defines gamification as the concept of employing game mechanics to non-game activities, such as recruitment, training and health and wellness...

In a recent Pew internet/Elon University report entitled, *The Future of Gamification*, 1,021 internet experts were interviewed with some university researchers suggesting that the principles of gamification could actually improve creativity, learning participation and motivation. In fact, 53 percent of this sample of internet experts predicts there will be significant advances in the usage and adoption of gamification in the workplace by 2020 with uses ranging from education, to wellness, marketing and communications.

- **Role play** opportunities are valued by trainers but often despised by participants. If designed and facilitated well, they enable the practice of new skills in a safe environment, open communication among participants, mandate active involvement, build individual and group confidence, develop camaraderie among participants, and enable the correcting of errors while still in the classroom. Role play sessions are most frequently used in the practice of interpersonal communication skills but can be effectively used in teambuilding, critical thinking, and customer service training.
- **Behavior modeling** has been used since the 1970s when it was first introduced as a technique for management and interpersonal skills training. It is a fast, inexpensive, and effective way to teach new behaviors or skills. In behavior modeling, employees observe a live or recorded demonstration of behaviors or skills, review what they observed, practice the new behaviors, and discuss how they will use what they learned back on the job. Research has shown that retention and transfer are both improved when key learning points are provided to participants in the form of training aids that can be used in the actual work environment.

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- **Computer-based training (CBT)** is self-paced training that can be provided from a PC through the use of a CD-ROM. Web-based training is delivered via the internet. Course designers include media such as videos or animations to enhance delivery of content and true and false or multiple choice quizzes that can be scored and reported by computer. Many organizations have used blended learning to combine the use and benefits of CBT/WBT and classroom training. e-Learning combines the use of web-based training with blogs, wikis, podcasts, and virtual worlds so that participants can discuss assignments with instructors and other participants in a live or recorded mode. Emails are used to communicate and deliver assignments and feedback so that this training can be conducted with participants located in wide-spread geographic locations.

In an online November 23, 2015, *Entrepreneur* article titled “4 Ways to Train Employees Effectively,” Heather R. Huhman wrote:

Here are four better ways to train employees and the benefits that each technique provides:

1. Blend in-person training and online training.

Both in-person and online training have inherent benefits. The aforementioned InterCall survey found that 50 percent of employers believed in-person training helped them retain information. This makes sense considering that the trainer would be able to answer employee questions while presenting the material.

But once the trainer leaves the office and employees try to apply their new skills, who’s going to clear up any confusion? This is probably why 48 percent of respondents said they still want to be able to review content at a later time.

By incorporating both in-person and online resources, employees are able to get a fuller understanding of the information during training and have a reference to turn to if issues arise in the future.

2. Provide hands-on training.

In a 2013 Skillsoft survey of over 1,000 office workers, 33 percent said they prefer to learn by feeling or experiencing what they’re learning about. Hands-on training affords employees the opportunity to apply what they’re learning before they have to translate the skills to their day-to-day tasks.

Whenever possible, let employees try out and experiment with their new skills in a controlled environment. This will help them build confidence without risking the chance that inexperience will lead to harmful mistakes.

3. Incorporate mobile training apps.

More and more positions now come with some location flexibility. Data from Global Workplace Analytics in September found that as much as 25 percent of American employees work remotely to some degree.

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Given the importance of training, it's surprising that in a 2014 Brandon Hall survey of over 500 companies, only 10 percent reported a high level of mobile learning module usage.

Mobile training applications not only ensure teleworkers are up-to-date on all the latest information, but also give every employee the option to learn in an environment in which they feel comfortable and free of distractions. If even a small percentage of the office decides to complete training at home, it also means less work time spent on training.

4. Allow employees to learn at their own pace.

Everybody learns at their own speed, but most companies aren't considering that fact when designing training programs. The 2014 Association for Talent Development survey of 340 organizations found that only 16 percent of responding companies use online training methods that allow employees to set their own pace.

By not being able to review training information how they'd like, employees are forced to rush through complicated topics. It also denies employees time to take a moment and process what they've learned, which is an important part of the learning process.

A 2015 study from the Harvard Business School found that participants who were asked to stop and reflect on a task they'd just performed improved at greater rates than participants who just practiced a task. So by giving, and encouraging, employees time to think about what they're doing, learning will be quicker and more reinforced.

Additionally, training platforms like Tasytt make it easy for employees to add their own contributions to training material and rewards them for doing so. For example, after completing a training unit, an employee can reflect and share their input with others. This not only makes training more engaging, but also ensures each employee is properly processing what they're learning.

If the organization is to achieve higher retention and transfer of learning, managers, trainers, and learners must partner with each other before, during, and after training. Before training managers must explain to staff the reason and value of the training, encourage participation, allow staff time to complete any precourse work, assist in the design and development of the training, and serve as subject matter experts. Trainers must work with managers to ensure the training is relevant and accurate, promote the training, research potential transfer barriers, and apply adult learning theories to design and conduct. During actual training, managers should demonstrate support by visiting the class, ensuring staff are not pulled from training for operational concerns, and ensuring staff are not overwhelmed by work backlogs when they return from training. Trainers should provide reinforcement and feedback during training, model new behaviors, discuss training transfer issues with participants, use relevant and realistic activities and examples, and build action plans into application. After training, managers should ask staff what they learned and how they will apply this learning, monitor ongoing performance, provide feedback, and acknowledge employee success. Trainers should follow up on participant action

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plans, share ideas and suggestions from sessions with managers, offer ongoing support to participants, and share further reading or practice materials.

Donald Kirkpatrick's model for training evaluation from the 1950s continues to be the model most followed by training organizations. He states that there are four levels at which an organization can assess training effectiveness:

- **Learner reaction** measures how satisfied participants were with the training class. Reaction sheets only measure how happy or unhappy participants were with the training, but poor ratings will be communicated with others and will impact future attendance.
- Trainers can evaluate training by **measuring the gain in knowledge or skill** during the training session through the use of tests, role-plays, and case studies. This measurement tells the trainer how much individuals learned in training, but, as discussed earlier, retention and transfer are not automatic.
- The third level is more difficult and involves **measuring increased performance back in the workplace**. At this level trainers must work with managers to review reports on changes in productivity, quality, absenteeism, grievances, customer complaints, and other potential valuable data.
- The fourth and most difficult metric to measure is the **impact on the organization itself**. This number is often estimated by management, focus groups, experts, or human resource professionals. Few organizations conduct this level of evaluation due to the difficulty isolating the impact of training on organizational performance.

Career development opportunities are critical to staff retention, but the availability of data and strategies that encourage individual career management is even more important. The more an employee believes there are future opportunities for career growth and promotion within the organization and to a clearly defined career path, the higher the potential for retention and employee satisfaction. As important as career paths are to employees, equally important are the tools and resources needed to prepare for future opportunities within the organization. Concerning the factor of career advancement in IPMA-HR's 2016 [Cross-Generational Benchmarking Report](#), respondents indicated their preference for a career path: "The greatest proportions selected the response options of career laddering (35%) and job redesign (30%)."

When designing career management assistance for employees, the organization must first decide the level of its involvement and support for individual career management. The following questions should be considered:

- Which classifications will be eligible to participate?
- What longevity is required before an employee become eligible?
- Can employees work on career management activities during work time?

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- How is compensation related to job transfers, reassignments, and promotions?
- Are any costs to be borne by employees?
- What will be the role or knowledge of supervisors in subordinates' career management activities?
- What career management and promotional information will be accessible and provided to employees?
- Will human resources be responsible for career management?
- How will the organization publicize career management assistance?
- How do employees indicate interest in career management?
- How can the organization maintain confidentiality?

Career ladders and lattices are valuable tools for employees to understand the career paths available to them. Organizations first need to identify the primary classification families and then provide clear but concise descriptions of the classification's major functions, responsibilities, and minimum experience and training requirements. The information should be taken from existing class specifications and job descriptions, and it should be shared graphically as ladders that move up along promotional lines. As they review the career ladders, employees will gain an understanding of career opportunities open to them in a vertical direction, especially within organizational units and job classification families. For example, an employee will be able to see the differences in skills and knowledge required to move from entry level to journeyman to a higher level position within a job family.

While career ladders are a great source of information for employees on how to prepare for promotional opportunities within their own job families, they do not provide information about the potential opportunities for lateral movement within the organization. One of the failures of many organizations is a lack of flexibility to allow employees to demonstrate competencies or be considered for opportunities outside their specific job families.

Comprehensive talent management programs incorporate both individual career management and succession planning components. While organizations search for high-potential employees and developmental programs for them, they must also provide opportunities for employees to access career data and tools that will enable them to plan and implement their own career futures.

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Part Two: Performance Management

Public and private organizations worldwide are looking for ways to improve and enhance organizational performance. Performance management systems must meet high expectations:

- Align and support the organization's mission, goals, and objectives;
- Link pay-for-performance systems, where they exist, with individual and organizational success;
- Provide a logical means to link employee or team work functions with the appraisal system while also maintaining a level of simplicity in application and fostering employee understanding;
- Provide a means to identify superior and poor performers for potential promotional opportunities and remedial action, respectively; and
- Invite and promote a meaningful dialogue between an employee and his/her supervisor on work expectations and accomplishments.

We need to begin by defining terms to ensure that we all understand exactly what constitutes performance management. Mathis and Jackson provide a general description of performance management: "A series of activities designed to ensure that the organization gets the performance it needs from its employees." IPMA-HR's course *Managing Employee Performance as a Human Resource Business Partner* provides a similar, yet more specific definition: "Performance management is the term for all organizational activities for managing people on the job. These activities link organizational, team, and individual goals to accomplish the organization's mission." Aligning the performance management system with organizational goals appears to be a problem for a sizeable number of public organizations.

For many managers, the terms performance management and performance appraisal are the same; however, performance appraisal is but one component of an organization's performance management system. A performance management system is actually composed of several subsystems:

- Performance appraisal process;
- Personal development and self-learning;
- Coaching and counseling;
- Progressive discipline.

In this part of the module, we will discuss the first three subsystems, and progressive discipline will be covered in Part Three of this module.

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As Mathis and Jackson point out, a performance management system should accomplish several organizational objectives:

- Make clear what the organization expects.
- Provide performance information to employees.
- Identify areas of success and needed development.
- Document performance for personnel records.

How these objectives are accomplished and the degree of success achieved vary greatly from one organization to another regardless of whether they are in the public or private sector. There are many reasons for this, and we will discuss the major aspects of these later in this portion of the course.

Let's begin with the performance appraisal process. As part of this discussion, we will review the eight major types of performance systems used in public and private organizations. They are:

- **Behaviorally-Anchored Rating Scales**—Also known as BARS, this system typically defines the dimensions to be evaluated and uses critical incidents or specific examples to describe different performance levels. Performance standards are usually established for critical job tasks/elements. For this reason, as pointed out by Mathis and Jackson, rating scales must be custom-designed for each specific type of job in the organization.
- **Behavior-Based**—Behavior-based systems focus on what an employee does by evaluating factors deemed critical to success such as customer service, teamwork, problem-solving, initiative, etc. Examples are provided for each rating category/level to illustrate the quality of performance.
- **Competency-Based**—Competency-based performance appraisal systems link competencies with specific job tasks, results, and successful completion of job duties. Competencies are derived from the knowledge, skills, and performance factors that identify the important attributes employees will need to achieve expected results in their jobs.
- **Forced Distribution**—This system was described extensively by Mathis and Jackson, along with its advantages and recent problems involving lawsuits against a number of prominent private firms. It is a comparative system, ranking employees in a work unit/department against each other based upon a predetermined percentage by category. The most common distribution is high (top 20% of employees), middle (70% of employees), and bottom (10% of employees). The formula is generally rigid, and supervisors are expected to adhere to the percentages in each category/level regardless of the perceived quality of the workforce they supervise.
- **Multirater Assessment**—Also known as 360-degree feedback, this system relies on self-assessments and feedback from peers, subordinates, supervisors, and

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internal/external customers. The intent is to provide an all-around perspective of an employee's performance from a number of people who have regular, routine contact and interaction with the employee.

- **Results-Based**—Also known as management by objectives (MBO), this system requires realistic objectives and mutually agreed-upon goals between the supervisor and the employee. Typically this system has a requirement for periodic interim progress reviews, and the final appraisal is based upon a comparison between actual and expected accomplishments at the end of the rating period.
- **Personal Trait-Based**—Personal trait-based systems require supervisors to make judgments on the extent to which their subordinates possess personal characteristics considered to be important to their job performance. Factors typically include characteristics such as honesty, dependability, etc.
- **Job Trait-Based**—These systems typically identify traits, behaviors, and competencies required for successful job performance. These factors are often referred to as performance criteria, and include factors such as job knowledge, productivity, initiative, etc.

Regardless of where you go in the world or whether the organization is public, private, or nonprofit, they are using at least one of these systems. Typically, many organizations use some combination of the above systems, as they have determined that a blended system provides a more-rounded picture of employee performance. Any of the above systems can be effective if the organization properly implements and monitors the system. Some of the organizational elements that are essential to a properly functioning performance management system include:

- **Training**—The extent to which supervisors and managers have been trained to use the system and to effectively, and in a timely manner, coach and counsel employees regarding performance-related issues.
- **HR Oversight**—The extent to which the human resources function oversees, monitors, and provides feedback to top management on how well the system is functioning organizationwide.
- **Top Management Support**—The extent to which senior managers support and encourage the proper use of the system and take action to correct misuse. This factor is perhaps the most frequent reason that performance management systems fail. Senior managers must assure that supervisors and mid-level managers use the system properly.
- **Employee Onboarding and Orientation**—Employees need to be informed regarding the use of the performance management system and to understand how it is linked to the organization's mission. Additionally, if the system is to be used as a basis for determining pay increases, employees need to understand how performance relates to pay.

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- **Employee Involvement**—Employees should participate in discussions regarding the establishment of the performance standards they will be expected to meet during the rating period. Lack of employee involvement is a major contributing cause for employees' negative perception of performance appraisals.
- **Written Standards**—It is surprising how many organizations devote enormous resources to developing a performance system, designing forms, instituting policies and procedures, etc., but never develop written standards that explain and clarify for each employee his/her specific performance outputs and expectations.

A very common practice in the private sector is to tie the results of the performance appraisal system to compensation, typically in the form of bonuses or incentive raises. Pay-for-performance in the public sector, however, is less common. Pay-for-performance in the public sector is a sensitive issue, as giving bonuses of any sort to public employees is usually opposed by the general public. There are also differing opinions among experts regarding the value of pay-for-performance systems, generally. Supporters of pay-for-performance argue that:

- Pay incentives are a powerful motivator;
- Giving all employees the same increase (a common practice in public sector organizations) is unfair and discourages good employees from performing at a higher level for their organizations;
- Pay-for-performance is compatible with team relationships and enhances cooperation among team members.

Opponents of pay-for-performance respond that:

- Other motivators such as satisfaction for achievement, interest in work, and nonmonetary rewards are more effective and avoid the potential for destructive competition;
- Pay-for-performance encourages the establishment of setting easily attainable goals;
- Organizations have difficulty identifying top performers, particularly when quantifiable measures of success are absent;
- In the public sector, financial rewards typically linked to performance are too small to be meaningful.

Given the lack of public support for incentive systems for public employees and the potential long-term financial costs and commitments needed to make such a system viable, it is unlikely there will be any significant increase in pay-for-performance systems in public sector organizations in the short term.

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Evaluating employee performance is a year-round job, but many managers and organizations treat it as a once-a-year project. Many managers and supervisors shy away from coaching and counseling employees because they have never been trained, do not feel comfortable discussing performance issues with employees, or do not understand the difference between coaching and counseling:

- The elements of **coaching** typically include:
 - Discussion is usually initiated by the supervisor/manager;
 - Done on a regular, recurring basis;
 - Involves exploration of job-related performance and/or problems;
 - Involves giving positive, corrective direction to the employee while emphasizing training and teaching;
 - Provides specific advice on what to do and how to do it; and
 - Aims at improving the employee's overall performance.
- The elements of **counseling** typically include:
 - Discussion usually initiated by the employee;
 - Intervention when a specific problem arises, or the employee feels he/she needs assistance;
 - Problems that can be personal or job-related;
 - Emphasis on listening techniques by the supervisor;
 - Avoiding offering specific guidance;
 - Encouraging the employee to utilize self-resolution techniques;
 - Reducing stress; and
 - Resolving a specific problem.

Coaching and counseling are absolutely essential to an effective performance management system, and HR plays a central role in assuring that training is provided, periodically reinforced, and continuously monitored to ensure that managers/supervisors are appropriately applying these strategies in their discussions and interactions with employees.

Regardless of the type of system used, there is a typical performance appraisal process that is used in most organizations:

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- **Job Description**—Reviewing of the job description is an essential component of the performance appraisal process. The supervisor should be reviewing the job description to ensure it properly depicts the major work activities/tasks of the employee. It is advisable to have the employee participate in this review process.
- **Written Standards**—Information obtained from the job descriptions should be combined with the individual rating factors to develop written standards for evaluating the employee's performance.
- **Employee Involvement**—The written standards should be reviewed and discussed with the employee to obtain his/her feedback and modified based on his/her input and comments, as appropriate.
- **Progress Discussions**—Some systems, such as MBO, have requirements for periodic (usually quarterly) supervisor/employee meetings. Most organizations typically require at least one progress discussion, usually halfway through the evaluation cycle, for a supervisor/employee discussion. These discussions are typically oral, with only brief supervisory notes taken regarding substantive issues discussed in the meeting. This is perhaps the first opportunity where the supervisor may need to coach/counsel the employee.
- **Supervisor/Employee Interaction**—These are typically brief interactions that may occur at any time during the rating period as the supervisor becomes aware of performance issues. These issues could be positive, meaning the employee has exceeded the supervisor's expectations, has exhibited exemplary performance, or where the supervisor has become aware of unacceptable performance/behavior. These interactions should be documented by the supervisor with a brief note for later reference when preparing the final rating and for conducting a planned progress discussion with the employee. Coaching and counseling may be needed as part of these interactions.
- **Employee Self-Evaluation**—Some organizations require the employee to complete a self-evaluation of his/her performance as part of the final evaluation discussion. Self-evaluations can be an effective promoting two-way dialogue regarding the employee's performance. The danger is that the employee may believe that the final evaluation discussion is essentially a negotiation session between the employee and the supervisor, with the final evaluation to be the end result of their negotiations. If organizations wish to use self-evaluations as part of their performance appraisal process, supervisors and managers need to be trained on properly using and responding to self-evaluations, and employees need to be made aware of the specific use to be made of self-evaluations.
- **Final Discussion**—This is when the employee has an opportunity to discuss the supervisor's evaluation of his/her performance. It is also the time of greatest stress for both parties and the most likely time for supervisory coaching and counseling to occur. Stress on both parties decreases when an ongoing dialogue on employee performance has occurred throughout the rating period.

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- **Appeal Process**—Many organizations have an appeal process for an employee to seek redress for what he/she considers to be an inappropriate evaluation. Typically the first step of the appeal process is speaking with the manager conducting the review but the employee may need to go to HR and/or the agency head.
- **Goal-Setting Discussion**—This is a meeting to review the employee’s job description and modify it as necessary to reflect changes in work tasks/ assignments, as well as to review and discuss the written performance standards to be used as a basis for the next rating cycle. This meeting is sometimes combined with the final discussion described above. This is another opportunity for the supervisor to use his/her coaching/counseling skills.

Whenever one individual evaluates the performance of another, there is the possibility that subjectivity may influence the process and result. As human beings, we all have opinions, likes, dislikes, and perceptions that could affect our ability to accurately evaluate the performance of subordinates. Mathis and Jackson provide a rather exhaustive listing of the most common rating errors which occur with performance appraisal systems:

- **Varying Standards**—According to Mathis and Jackson, “a manager should avoid applying different standards and expectations to employees performing the same or similar jobs. Such problems often result from the use of ambiguous criteria and subjective weightings by supervisors.” Use of written standards that are mutually agreed-upon can reduce the effect of this rating error.
- **Recency and Primacy Effects**—The recency effect may occur “when a rater gives greater weight to recent events when appraising an individual’s performance.” The primacy effect is the opposite of the recency error. It “occurs when a rater gives greater weight to information received first when appraising an individual’s performance.” If supervisors are trained to keep brief notes on positive and negative aspects of an employee’s performance over the course of the rating period, the effects of these types of errors can be substantially reduced, if not eliminated.
- **Central Tendency, Leniency, and Strictness Errors**—Elimination of these types of errors is one of the alleged major advantages of the forced distribution and BARS systems. Errors of central tendency are the result of supervisors giving “all employees a score within a narrow range in the middle of the scale (i.e., rate everyone as ‘average’).” According to Mathis and Jackson, “The leniency error occurs when ratings of all employees fall at the high end of the scale.” These first two errors are typically the result of managers attempting to avoid conflicts with employees. The opposite of the leniency error is the strictness error, which occurs “when a manager uses only the lower end of the scale to rate employees.”
- **Rater Bias**—This rating error occurs “when a rater’s values or prejudices distort the rating. Such bias may be unconscious or quite intentional.” This is the type of rating error that will most frequently result in appeals or claims of discrimination. If it is not dealt with properly rater bias can quickly destroy the viability of any performance management system.

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- **Halo Effect and Horns Effect**—These two effects are exact opposites of each other. As described by Mathis and Jackson, “The halo effect occurs when a rater scores an employee high on all job criteria because of performance in one area the of assigned work responsibilities.” Conversely, the horns effect “occurs when a low rating on one characteristic leads to an overall low rating.” Properly prepared written performance standards can assist in negating both effects.
- **Contrast Error**—This type of error is the one that negates many of the positives identified with forced rating systems. A contrast error occurs when the supervisor rates “people relative to others rather than against performance standards”. As Mathis and Jackson point out, “If everyone else performs at a mediocre level, then a person performing only better may be rated as ‘excellent’ because of the contrast effect. But in a group where many employees are performing well, the same person might receive a lower rating.” Relying on written performance standards, rather than comparisons between employees, is the best method for reducing the impact of this type of error.
- **Similar-to-Me/Different-from-Me Error**—This type of error is the result of perceptions of similarity or differences between the employee and the rater. Such perceptions may concern personal values, educational background, prior work experiences, etc. As Mathis and Jackson point out: “The error reflects measuring an individual against another person (the rater) rather than measuring how well the individual fulfills the expectations of the job.”
- **Sampling Error**—This error typically results from inattention on the part of the supervisor due, perhaps, to too much work, insufficient oversight of work activities, or, in the extreme, laziness. Whatever the reason, the supervisor has seen only a very small portion of the employee’s work output and makes determinations regarding the employee’s overall performance based on that insufficient sample. As Mathis and Jackson point out: “Ideally, the work being rated should be a broad and representative sample of all the work completed by the employee.”

The effect of many of the above errors can be easily corrected if supervisors are trained to properly document positive and negative deviations from expected performance. Brief supervisory notes collected over the rating period can actually reduce the amount of time that supervisors need to devote to creating employees’ performance appraisals, particularly if written standards clearly define each employee’s performance expectations.

In the event that an employee’s performance is less than acceptable, action will need to be taken by the supervisor. Many organizations have adopted the Personal Improvement Plan (PIP) as a vehicle to document corrective actions that need to be taken to improve performance. Typically a PIP will outline the activities for self-improvement that the employee is expected to make and actions or activities that the supervisor will take to assist the employee in meeting performance expectations. PIPs are usually date-sensitive, with the activities to be completed within a specified time period—usually 3 to 6 months. If a PIP is utilized, the supervisor must carefully document his/her assistance activities and increased oversight of the employee’s performance. If the employee’s performance is largely unchanged at the end of the

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PIP then disciplinary action may be warranted. Information on disciplinary practices and procedures is contained in Part Three of this module. For those of us in HR, this is an issue that requires our time, effort, and attention.

Another potential area of concern for human resource professionals is the need to monitor and critically assess the overall effectiveness of the organization's performance management system.

Performance appraisals are not without their critics. Susan M. Heathfield, in an article dated August 12, 2016, and entitled "Performance Appraisals Don't Work" wrote:

Second only to firing an employee, managers cite performance appraisal as the task they dislike the most. This is understandable given that the process of performance appraisal, as traditionally practiced, is fundamentally flawed.

It is incongruent with the values-based, vision-driven, mission-oriented, participative work environments favored by forward thinking organizations today. It smacks of an old fashioned, paternalistic, top down, autocratic mode of management which treats employees as possessions of the company.

Heathfield further wrote:

A performance management system, which I would propose to replace the old approach, is a completely different discussion. And, I don't mean renaming performance appraisal as "performance management" because the words are currently in vogue. Performance management starts with how a position is defined and ends when you have determined why an excellent employee left your organization for another opportunity.

Within such a system, feedback to each staff member occurs regularly. Individual performance objectives are measurable and based on prioritized goals that support the accomplishment of the overall goals of the total organization. The vibrancy and performance of your organization is ensured because you focus on developmental plans and opportunities for each staff member.

Similar criticism is found in the 2000 book entitled *Abolishing Performance Appraisals: Why They Backfire and What to Do Instead* by Tom Coens and Mary Jenkins.

Increasingly, senior management will be looking for and perhaps expecting, the HR function to be able and willing to play a key role in assuring that the performance management system supports and engenders employee commitment to and action on the organization's goals and objectives. When staffing is limited and financial resources are declining, doing more with less places a premium on maximizing the performance potential of the existing workforce, which is a key performance indicator for the HR function.

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Exercise

1. Describe the performance appraisal system(s) used by your organization. Is this system considered to be effective?
2. Describe the effectiveness of managers and supervisors in using your organization's performance appraisal system? In your opinion, what actions could be taken to make the system more effective?
3. Does your organization use a pay-for-performance system? If so, describe how it works and the nature of the increases that are given?
4. How do you think employees in your organization perceive the performance appraisal system?

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Part Three: Progressive Discipline

To begin our discussion of progressive discipline, we need to review a few common terms and concepts that are typically associated with discipline:

- **Employment at will** is a doctrine of American law that defines an employment relationship in which either party can break the relationship with no liability provided there was no express contract for a definite term governing the employment relationship and that the employee does not belong to a certified collective bargaining unit or organization. Under this doctrine, any hiring is presumed to be at will; that is, the employer is free to discharge individuals for good cause, bad cause, or no cause at all, and the employee is equally free to quit or otherwise cease work.
- **Implied contract** is an exception to the employment at will doctrine. Most U.S. states and the District of Columbia recognize an implied contract as an exception to at-will employment. Under the implied contract exception, an employer may not terminate an employee “when an implied contract is formed between an employer and employee, even though no express, written instrument regarding the employment relationship exists.” Proving the terms of an implied contract is often difficult, and the burden of proof is on the terminated employee. Implied employment contracts are most often found when an employer’s personnel policies or handbooks indicate that an employee will not be terminated except for good cause or specify a process for firing. As Mathis and Jackson point out, “Numerous federal and state court decisions have held that such implied promises, especially when contained in an employee handbook, constitute a contract between an employer and its employees, even without a signed contract document.” When the employer fails to follow up on implied promises, the employee may pursue remedies in court.
- **Constructive discharge** is defined by Mathis and Jackson as the “process of deliberately making conditions intolerable to get an employee to quit.” Working conditions may be considered intolerable if, for example, the employee is discriminated against or harassed or if he/she suffers a negative change in pay, benefits, or workload for reasons that are not performance-related. In most cases, an employee who voluntarily leaves an organization—as opposed to one whose employment is terminated against his/her will—is not entitled to unemployment benefits and loses the right to sue for wrongful termination. But the law recognizes constructive discharge as an exception to this rule. Alison Doyle in an online article dated December 1, 2015, and entitled “What Is Constructive Discharge?” wrote:

What is constructive discharge? Constructive discharge occurs when an employee is forced to quit because the employer has made working conditions unbearable. Unbearable conditions include discrimination or harassment, mistreatment, or receiving a negative change in pay or work for reasons that are not work related. An employer who harasses an employee in order to get them to resign as opposed to firing them is one attempting a constructive discharge.

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Employees can resign because of constructive discharge over one situation or a collection of incidents. It helps the employee's case if he or she resigns soon after the infraction, as the statute of limitations on pursuing compensation vary by country and state.

The results of inaction or the employer's failure to adhere to established rules and regulations or published employee handbook discipline policy may prove to be evidence of improper discipline or termination. Therefore, it is critical that the organization, managers, and supervisors be familiar with employee policies, rules, and regulations and that they work to ensure that the corresponding practices conform to the stated policies.

It is also important that the language in established rules and regulations or published employee handbook policies be flexible enough to allow the employer to alter and adjust such policies as needed. Consequently, organizations need to invest effort and care in drafting their established rules and regulations or employee handbook policies to reflect the organization's business needs.

The online Legal Dictionary defines an employee handbook as "a handbook or manual provided to employees by their employers, which outlines important company information, policies, procedures, and job descriptions." It further states:

Most companies hire employees on an "at-will" basis. This means that any at-will employee may be laid off or fired for a valid reason, or for no reason at all. Every company's employee handbook should state the terms of employment, whether at-will or contract, conspicuously at the front of the manual. It is a good idea to include a specific statement that the employee handbook is not to be considered an employment contract.

For example:

William was hired by ABC Corporation's research department. While William seemed to learn his job duties quickly, he had trouble getting along with his co-workers and his supervisor. Nine months after William started work at the company, he is fired. William is angry and claims ABC Corp had no reason to fire him, and so he is being discriminated against.

ABC Corp is protected, however, as the law allows them to employ people on an at-will basis, which legally allows them to fire anyone without cause. The company further protected its rights by clearly stating in its employee handbook that all employees are at-will.

The Legal Dictionary adds: "While an employee handbook should include specific items, there are certain things that should not be included in any employee handbook. For instance, no employer should place any unconditional promises in the manual, as these may lead to civil lawsuits in the future, should a disgruntled employee attempt to enforce one of those promises. Another concern is any promise of continued employment, or indefinite employment, even in the face of future change."

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Common disciplinary problems reported by Mathis and Jackson include absenteeism, tardiness, productivity deficiencies, alcoholism, and insubordination. Organizations have struggled to find a judicious way to establish and enforce fair rules of employee conduct. The objectives are vital and noncontroversial:

- Promote the health and safety of all employees;
- Protect company property;
- Ensure steady production;
- Conform to legal requirements; and
- Create a pleasant working environment.

Employment law experts usually advise their clients to detail disciplinary matters and associated punishments on paper. Their argument is twofold:

- First, with a written copy of the rules, employees can determine if they are receiving fair and impartial treatment; and
- Second, organizations can protect themselves from doling out hefty settlements in court.

Most disciplinary cases are lost when there are no written policies or documentation of policy infringements to support the organization's action.

Managers who condone a relaxed approach to discipline are setting themselves up for legal disasters. This type of manager may argue that employees constantly barraged by dos and don'ts will feel as if they are being treated like children and, therefore, have less incentive to act like adults. Mathis and Jackson provide a cogent summary of the reasons why discipline may not be used:

- **Organizational culture of avoiding discipline**—If the organizational “norm” is to avoid penalizing problem employees, then managers are less likely to use discipline or to dismiss problem employees.
- **Lack of support**—Some managers do not want to use discipline because they fear that their decisions will not be supported by higher management. Reversing front line supervisors' decisions can seriously undermine their authority and harm their effectiveness.
- **Guilt**—Managers realize that before they became managers, they may have committed the same violations as their employees, and therefore they do not discipline others for similar actions because of their previous conduct.
- **Fear of loss of friendship**—Managers may fear losing friendships or damaging personal relationships if they discipline employees.

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- **Avoidance of time loss**—Discipline often requires considerable time and effort. Sometimes, it is easier for managers to avoid taking the time required for proper discipline, particularly if their actions may be overturned on review by higher management.
- **Fear of lawsuits**—Managers are sometimes concerned about being sued for disciplining an employee, particularly if the discipline leads to termination.

Relaxing rules and formal punishments usually has proven to be the wrong prescription for positively influencing a workforce. Evidence has shown that when management fails to apply progressive disciplinary measures, its behavior is interpreted by employees as a sign of weakness. Furthermore, the absence of written statements covering various violations and their respective punishments conveys the message to workers that management and supervision might overlook irresponsible acts. Functioning as a Business Partner, HR needs to work with managers through training and daily interactions to prepare them to confront employees regarding performance issues and to reinforce the organizational performance goals and objectives.

In “What Is Progressive Discipline?” Heathfield wrote:

Progressive discipline is a process for dealing with job-related behavior that does not meet expected and communicated performance standards. The primary purpose of progressive discipline is to assist the employee to understand that a performance problem or opportunity for improvement exists.

The process features increasingly formal efforts to provide feedback to the employee so he or she can correct the problem.

The goal of progressive discipline is to improve employee performance.

The process of progressive discipline is not intended as a punishment for an employee, but to assist the employee to overcome performance problems and satisfy job expectations. Progressive discipline is most successful when it assists an individual to become an effectively performing member of the organization.

Failing that, progressive discipline enables the organization to fairly, and with substantial documentation, terminate the employment of employees who are ineffective and unwilling to improve.

In an online article entitled “Magical Employee Discipline” dated December 8, 2016, David Drennan described what he calls the OK Box: “Making clear to staff what is OK, and what is NOT OK, and being consistent about it. The vast majority of people actually prefer to do a good job, but you have to spell out what that good job is, in practical terms, so that everyone will know—without having to ask you—when they are doing a good job.” He then wrote:

When all is said and done, there will always be some who will push the boundaries too far, either by lack of effort, repetitive default, or just simple defiance. If you are not to see your standards degenerate to a point of

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unmanageability, you have to take prompt and consistent action to bring any recalcitrants back within your OK BOX. That doesn't automatically mean by applying punishment or sanctions (although these can work, of course), but much more by persuading the individual that staying within the OK BOX is actually a much better option for them than not.

In this context, it is fundamental that the manager does not position him- or herself as the "Enforcer" of discipline, the all-seeing critical eyes. That takes us back to the 100 Years' War scenario which makes life fraught for everyone on a daily basis. We need to make the individual responsible for their own behaviour, not the manager. The manager can be there to help the individual improve, but not to act as their ever-present overseer. The individual has to manage themselves to meet the standards and stay comfortably within the OK BOX.

To reinforce that position, we don't do any shouting or telling. On the contrary, when there is a behaviour problem to be solved, we only ask questions. The process is called "Questions-Only Discipline," or QOD. There are only four questions involved, they are easy to remember, but they press the individual into taking responsibility for their own behaviour, and to making clear commitments about their future conduct. And, most important, they really work.

Initially, tell the individual involved that you would like a word with them privately. In doing this, your quiet but deliberate demeanour should convey the message that it is about something serious, so it is important not to be smiling at this point. Take them to a neutral location away from their normal work environment (your own office will do), and make sure you will be undisturbed by telephone or visitors.

Throughout this whole procedure, stay in adult mode the whole time. That means speaking calmly and firmly, and never raising your voice. Shouting is out. Losing your temper is out. Do not wag your finger and act like a sergeant-major, implying "I could make your life a misery, if you don't do as your told, mate." That means you are taking back the responsibility for that person's behaviour, and that's not the idea at all. Just accept that by going through this process, you will get a commitment from the individual that will be far more powerful and lasting, and give you a far more pleasant working atmosphere, than you would get by shouting and threatening.

Now, here are the questions.

1. Ask: Do you understand what the required standard is?

Get your respondent to tell you precisely. Just saying "yes" is not enough. They have to tell you in their own words, specifically. They might hesitate, but press them into it. You have to hear the words coming out of their own mouth, then there is no doubt that they do understand. Explain calmly why the standard is necessary.

2. Ask: Do you have a problem meeting the standard?

They clearly do, otherwise you wouldn't be there together. If they prevaricate, don't be put off. Insist on hearing what the problems are. Often they find this embarrassing as their excuses are often woefully weak. But don't spare their

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embarrassment, as their discomfort will be a powerful incentive for them not to want to have such a meeting with you again.

Show you are listening intently to what they say. Indeed, it often helps to have a pad in front of you, and to be seen taking down everything they say (yes, it is serious). Don't start criticizing or showing your irritation at this stage, otherwise they will clam up to avoid your further disapproval. Just keep asking questions if you need further clarification.

When you think you have all the problems listed, then say "All right, let's take each one of these, and see what we can do about them." Note we are using the word "we" now, implying that although the responsibility remains theirs, you are now on their side if they are ready to make the effort to resolve them. The task then is to end up with simple solutions to each of the problems they listed, which you think they will be able to carry through. When you are satisfied about that, then move on to question three.

3. Ask: What can I expect in the future then?

This is an important question. This is when your respondent articulates aloud their personal commitment to different behaviour, and that is fundamental. Do not say what you want. They must tell you what they are going to do in the future. When you finally endorse what they say, it must sound like that they have now "made a contract" with you, and you should act like that is what it is.

If the vibes in the session make you feel that your respondent has made a true mental commitment to change, then you can end your meeting at this point. Only ask question four if you feel there is a danger they might default on their commitment, or they have failed to honour previous undertakings.

4. Ask: What will we do if you don't?

Do not be fobbed off with throwaway answers. For example, if they say : "No, it's all right, I'm going to do it," you should reply to the effect : "Yes, I'm pleased about that, but I'm still asking the same question: "What will we do IF you don't? Where do you think that could lead?" The best outcome to that question is that they themselves articulate the undesirable consequences they will bring upon themselves if they don't put things right now.

At the end they need to feel that the discomfort of this type of meeting is something they don't want to repeat. On the contrary, conformance seems a much easier option all around. At this point you can allow yourself a smile, indicating that you're pleased that the individual has chosen to work with you, and do the positive, sensible thing.

Effective discipline in any organization is not about penalizing and punishing the behavior you don't want to see; it is much more about encouraging the behavior you do want to see. That means making clear what a good job looks like in the first place. Since most people actually prefer to do a good job, just making that clear will lead to the vast majority of your employees conforming to your reasonable standards without a problem.

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However, when behavior deteriorates to an unacceptable level, then asking the right questions, and placing the responsibility where it truly belongs, will be much more effective than any amounts of blustering and criticizing. After all, external discipline exercised occasionally by you will never work as well as self-discipline exercised by the individual every hour of the day.

Brent Gleeson in an online *Forbes* article dated June 27, 2014, and entitled “6 Big Reasons Employees Sue and How to Protect Yourself” wrote:

According to the Equal Employment Opportunity Commission, since 2005 the amount of wrongful termination lawsuits has increased significantly every year, with the most significant peak in 2008 when the economy crashed. Desperate times call for desperate measures, right? Typically these claims are groundless but there are many reasons that an employee can fall back on to put together a lawsuit, such as discrimination, harassment, wage and hour violations, unsafe work conditions, worker’s compensation claims and so on. That is why proper performance management and regular documentation is so vital.

Here are six big reasons employees will sue you when terminated.

- 1. Not giving a reason for firing.** If you’re an at-will employer, you can fire at will, right? Wrong. Most employees think they’re wonderful workers, and if they get fired for a mysterious reason, they’ll make up their own reason—or their lawyer will. The reason for termination needs to be clear.
- 2. Firing an employee for bad performance when the employee has good performance reviews.** This is the cousin to ‘not giving a reason for firing.’ Supervisors need to understand that they’ll need a poor-performance paper trail if they want to fire someone. Or else a judge will smell something fishy.
- 3. Poor timing.** For example, let’s say an employee files an internal complaint about the employer or a supervisor, and then shortly after is disciplined for a supposedly unrelated event. It won’t be hard for a lawyer to connect the dots in court between these two actions. Employees who file complaints can be disciplined, but the supervisor better have the documentation in order before making the move.
- 4. Delayed internal investigations.** When employees file complaints, they want them thoroughly investigated and they want it done now. If you can’t investigate immediately (because, for instance, a key player is on vacation), let the complaining employee know why and when the investigation is likely to begin.
- 5. Improper response to an EEOC charge.** If you’re contacted by the Equal Employment Opportunity Commission regarding an employee complaint, respond promptly and courteously—and treat the complaining employee courteously, too. If you’re tardy in your response or treat the employee like a leper, expect to hear about it in court.

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6. Failing to follow your own policies. You can have the best policies and training in the world—and indeed some companies have used that as a defense against a complaint. But you better be able to show that your supervisors followed those policies and applied the training.

Make sure your HR and legal teams are providing the proper protection and training for management. Sometimes these things can happen simply because management didn't take the proper steps, thereby leaving the company exposed. Don't allow that to happen. Being prepared won't stop someone from attempting to sue you, but it can definitely mitigate time and costs involved in defending against it.

Investigating and documenting instances of employee misconduct must be done properly and completely. There are fundamental steps and essential practices that should be followed for an effective workplace investigation.

In "Top 10 Workplace Investigation Mistakes: Part I," dated October 14, 2015, Patti C. Perez of the Ogletree Deakins law firm wrote:

Resolving conflict in the workplace is a key issue for employers. Legal requirements have continued to expand in terms of what courts expect employers to do in order to prevent and correct wrongful behavior. In response, employers have increased mechanisms through which employees can lodge complaints related to their work environments. Employees have embraced their ability to provide information to their employers about problems they are experiencing, which has exponentially increased the importance of conflict resolution.

HR and other professionals are now expected to be experts at conducting investigations and resolving conflict in the workplace. In 20 years of resolving workplace conflicts, I have seen employers do many things well and have also seen employers make key mistakes. In this two-part series, I summarize 10 of the most common mistakes that employers make while conducting workplace investigations—which, in many cases, also prove to be the costliest mistakes employers make. Here are the top five:

1. Failure to Develop and Disseminate Effective Complaint Mechanisms

Despite companies' obligation to perform investigations, company representatives still fail to look into issues raised by employees. Sometimes, the failure occurs at the outset, for example when a company fails to provide employees with a reliable complaint mechanism that makes them feel comfortable and safe. Perhaps the company policy does not offer employees an alternative to complaining directly to a supervisor, which may be a problem if the offending party is the supervisor or closely linked to the supervisor. A good complaint mechanism should:

- provide multiple complaint avenues;
- make it clear that once received, complaints of misconduct will be reported to the proper department so that the company can undertake a fair, timely, and thorough investigation;

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- indicate that the company will keep information confidential to the extent possible;
- state that if misconduct is found, appropriate remedial steps will be taken; and
- make it clear that employees will not be exposed to retaliation because they lodged a complaint or participated in an investigation about an employee complaint.

2. Ignoring Complaints

Assuming a company has established an effective complaint mechanism, how do companies then tend to err? The first mistake a company can make is to simply ignore a complaint.

One reason this might happen is because an employee has told his or her boss to keep the information confidential. Of course, there is some information that warrants confidentiality, but in most cases, if an employee lodges a complaint, the company is under a strict obligation to look into the matter. Another common scenario occurs when an employee raises an issue, but wishes to handle the matter on his or her own. Again, there are certainly circumstances when it is appropriate for matters to be handled by the employee, but too often business representatives fail to look into matters simply because they assume that they are required to honor employees' requests to either keep issues confidential or resolve issues on their own.

As I'll discuss below, there is certainly such a thing as overzealousness, but one good rule of thumb might be to consider what your response would be if someone asked (perhaps on the witness stand) six months or one year from now whether you looked into an issue appropriately. If an employee has said he or she feels "harassed," "retaliated against," "discriminated against," or has used some other buzzword, you should carefully analyze a decision to let the employee solve the issue on his or her own. While most of these decisions (like many decisions related to workplace investigations) will require that you use your common sense and good judgment, be mindful of the strict legal obligations that require prevention and correction of wrongful workplace conduct. Just as importantly, remember that preventing and resolving issues in the workplace is a good business practice.

3. Failure to Plan

Beginning a journey having no idea where you're headed is dangerous in any situation. In the context of workplace investigations, this happens more often than you would think. Beginning a workplace investigation with an idea of the scope of the investigation—such as which questions to explore and answer—as well as a roadmap for how the investigation will proceed, is critical. The plan may change—you might decide not to interview a witness or you might decide to add a witness to your list, you might realize that you need to review and analyze a document you didn't know existed, or you might need to add an issue to the scope of your investigation. Planning requires staying several steps ahead by identifying witnesses and documents; anticipating issues, such as whether you need to make any immediate

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changes in the workplace (e.g., putting someone on administrative leave, suspending an employee, or changing someone's shift temporarily); notifying the appropriate departments and managers about the allegations and the investigation; and possibly limiting the parties' ability to delete computer records. Keep track of these decisions, making note of the reasons for any change in your planning.

4. Lack of Objectivity

Investigator objectivity is a principal component of a fair investigation. We all may be influenced by our unconscious biases. All investigators should take stock of what those biases might be and make sure that he or she does not allow those biases to influence his or her credibility analysis or influence ultimate conclusions.

What are some ways investigators fail to be objective? One is by reaching conclusions before even beginning the investigation. A common scenario involves a high-level executive who is accused of wrongdoing and an investigator who understands drastic steps (including discharge) will have an immediate negative impact on the business. In that scenario, there is a high likelihood that the entire investigation will be conducted in a manner that justifies a decision that has already been made—that the executive will not be harshly disciplined or fired under any circumstance.

As an impartial investigator, you should seek to uncover all facts that will help you judge credibility and reach a fair conclusion. In an investigation, there is no such thing as a 'bad fact.' All information you collect—whether it supports or contradicts the allegations—will help you to reach a fair and reasonable conclusion.

5. Allowing the Investigation to Become a Witch Hunt

This mistake is similar to the bias issue, but usually becomes apparent once the investigation is underway rather than at the outset of the investigation. During the initial phases of the investigation, the investigator may become convinced that one party's version of events is true and he or she may then steer the investigation in that direction. To perform a legally compliant and effective workplace investigation, you must be sure that the investigation does not transform into a witch hunt.

For example, in a sexual harassment case, the investigator might determine that the allegations are not credible before finishing all of his or her work. As a result, the investigator might begin to focus attention on the complainant's behavior exclusively to see if the complainant's story can be challenged or contradicted. One investigation that I had reviewed involved allegations of egregious physical contact and extremely offensive statements that the complainant found to be sexually-charged and offensive. The investigator heard from a few witnesses that the complainant had herself engaged in inappropriate behavior, though the behavior was completely unrelated to the allegations. Although the details might have been relevant, the investigator in that case veered off track—he failed to perform additional work to examine the validity of the complainant's concern and instead spent the rest of his time trying to prove that the complainant had been the bad actor.

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In Part II of that article dated October 15, 2015, Ms. Perez wrote:

In part two, we will review five additional common—and costly—mistakes.

1. Failure to Conduct Additional Investigative Work

Anyone who has conducted a few workplace investigations quickly learns that in addition to conducting interviews, you should, at a minimum, request, review, and analyze personnel documents and policies. However, depending on the nature of the allegations, there is often a need to do more. This part of the investigation often requires resourcefulness on the part of the investigator.

In many instances, the investigator may find it helpful to visit the work site or another key location. I once worked on an investigation that involved allegations of sexual harassment that had allegedly occurred in the manager's office at a fast food restaurant. The complainant described a typical office with a desk and door where the manager performed all of his paperwork. She described behavior that would have occurred in a typical office with the door closed. I visited the site to find that the manager's "office" was nothing more than a broom closet that had been converted to a small workspace; the door had been removed, and a shelf had been installed so hold a computer and some files. Although this information would have come out during interviews, the fact that I saw the work area myself made my conclusions that much stronger in terms of my ability to explain them in my report.

2. Failure to Reach a Conclusion

Perhaps the most common mistake investigators make when conducting investigations is that they fail to reach well-reasoned conclusions. Often, investigators rely on conflicting accounts to justify their inability to determine whether the allegations have been substantiated. In the vast majority of cases, an investigator should be able to review and analyze all evidence, make credibility determinations, determine parties' motives, and reach finding and conclusions.

To reach a decision, investigators will need to rely on the evidence itself and ask: Does the evidence (including information obtained from witnesses or documents, especially those written in real time) corroborate or contradict the facts presented by the complainant? Does this information in some way bolster or refute the claims made?

In a claim involving a relationship between two parties where both parties deny the relationship, you might want to check emails, cell phone records (showing calls and text messages), calendars, or expense reports, among other documents. I have been involved in numerous investigations in which both parties denied being in a romantic relationship, but the records indicated that they had communicated with each other much more often than would be expected between a boss and a subordinate, that their communications took place during unusual hours (for example, at 2:00 a.m., on weekends, etc.), and that their calendars indicated overlapping non-business events. In that scenario, clear credibility issues existed. Perhaps more importantly, their story did not make sense and was not inherently

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believable. Although the investigation did not involve eyewitness testimony related to the allegations, the circumstantial evidence was very strong and justified reaching a clear-cut conclusion.

3. Reaching Legal Conclusions

A workplace investigation calls for factual conclusions. The question an investigator is attempting to answer during the course of an investigation is whether sufficient evidence has been presented to substantiate the allegations (a “more probable than not” standard of proof). Sometimes, investigators may also opine on whether the evidence indicates that there has been a policy violation. The level of wrongdoing (if wrongdoing is found) will dictate the severity of discipline or other remedial measures that need to be taken.

What an investigator should avoid is reaching legal conclusions. Even if an employee has alleged “sexual harassment” or “discrimination,” for example, the job of the investigator is to determine whether there are facts that support the behavior alleged. Whether the facts rise to a level of unlawful behavior proscribed by law is an inaccurate standard for a few reasons.

First, an employer might decide not to take remedial action because the behavior is not illegal. But if an employer waits for the behavior to rise to this level, it is missing the point, both from a legal and business perspective. The goal of a workplace investigation should be to resolve behavioral issues before they become unlawful.

Another reason that coming to a legal conclusion can be problematic is that an investigation does not usually involve many of the elements present in more drawn-out litigation, in which there is typically information collected to determine whether the behavior is unlawful.

Finally, this type of conclusion (that the facts indicate lawful or unlawful behavior) could be presented to a decision-maker later. For example, a jury that reads an investigation report that concludes or indicates that the behavior was unlawful is more likely to find in the plaintiff’s favor.

4. Failure to Draft a Detailed Report

In many instances, an investigator will perform a fair and thorough investigation but will fail to put his or her analysis and conclusions into a formal report. The type of report needed will be case-specific. Sometimes a short executive summary will suffice. At other times the investigator will opt for a brief report and attach summaries of interviews. In many instances, however, it is necessary to draft a full and detailed report.

A full, detailed report should summarize the relevant facts based on the information obtained from interviews and documents (or other investigatory work) and should include a detailed analysis and conclusion section. This section should include credibility determinations, should outline the reasons for reaching a particular decision, and should clearly state the investigator’s conclusion or finding with regard to each allegation.

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The most common misstep I see is the failure to draft a report when the disciplinary action taken is severe. If an employee is going to be discharged for wrongful behavior or for violating a company policy, the most fair and appropriate action is to provide a report outlining the details of the investigation, as well as the reasons for the findings.

5. Failure to Close out an Investigation

A mistake I see over and over is a failure to close out an investigation. Anyone who has been involved in a workplace investigation—as a complainant or accused, as a witness, as a supervisor, or as the investigator—knows that they are extremely disruptive to the workplace. After doing reaching findings, the investigator will want, at a minimum, to speak with the complainant and the accused. Be careful with how much information is revealed; at the same time, privacy and confidentiality concerns should not keep an investigator from providing the involved parties with enough information to let them know that the investigation is complete and from providing them with at least a general description of what will happen next.

Keep in mind that this communication should be done in a fair and compassionate way. State your conclusions clearly, but not coldly. And be precise. For example, if your finding was that the evidence simply did not support the specific allegation, but the investigation uncovered learning lessons, relate this information to the complainant. I've observed numerous situations in which the investigator simply said, "Your allegations were unsubstantiated." Period. No nuance, no compassion. The impression left on the complainant, not surprisingly, was "I didn't believe a word you said."

Conclusion

The big lessons here are that when you put on your investigator hat (which is different from your other HR hats), you need to think like an investigator. Approach your work with a problem-solving mindset. Be thorough, be fair, be detailed, be precise, and be empathetic in your investigations. That way, you'll be sure to stay off my "top mistakes" list!

In discussing disciplinary actions, we need to also keep in mind two concepts we discussed in Module Six: Labor and Employee Relations. While our earlier discussion focused on these concepts in a collective bargaining environment, they have been adopted and applied in virtually all instances involving discipline, regardless of the presence or absence of union agreements. These concepts are:

- **Due Process**—According to Mathis and Jackson, due process "occurs when an employer is determining if there has been employee wrongdoing and using a fair process to give the employee a chance to explain and defend his or her actions." Due process is about fairness. Whether employees perceive fairness or justice in their treatment depends on at least two factors.
 - Were outcomes distributed fairly? Fairness would not include disciplinary action based on favoritism when some are punished and some are not. Fairness often is dependent on employee perceptions.

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- The second factor is called procedural justice, and it deals with the question of whether the decision-making process was fair. Due process is a key part of procedural justice when making promotions, pay determinations, discipline, and other HR decisions. Complaint procedures are provided by employers to resolve employee complaints. Complaint procedures used to provide due process to unionized employees differ from those for nonunion employees. Usually, unionized employees can avail themselves of a grievance procedure that is specified in the labor contract.

Due process may involve including specific steps in the grievance process, imposing time limits, following arbitration procedures, and providing knowledge of disciplinary penalties. Due process procedures for at-will employees, such as an open door policy, are more varied and may address a broader range of issues. Nonunion organizations generally benefit from having formal complaint procedures that provide due process for their employees. Just the presence of such a formal complaint mechanism provides one indicator that an employee has been given due process.

Procedural due process has been broadly construed by the courts to protect individuals by guaranteeing that statutes, regulations, and administrative actions must ensure that no one is deprived of life, liberty, or property without a fair opportunity to affect the judgment or result. As mentioned previously, due process is essentially based on the concept of fundamental fairness. In the courts, ensuring fundamental fairness requires protecting an individual's right to be adequately notified of charges or proceedings, giving the individual the opportunity to be heard at hearings, and guaranteeing that the person making the final decision in the matter is impartial. Put simply, where an individual is facing a deprivation of life, liberty, or property, procedural due process mandates that he/she be entitled to adequate notice, a hearing, and a neutral judge.

- **Just Cause**—According to Mathis and Jackson, just cause is “reasonable justification for taking employment-related action.” As defined by The Free Dictionary: “A reasonable and lawful ground for action. Appearing in statutes, contracts, and court decisions, the term just cause refers to a standard of reasonableness used to evaluate a person's actions in a given set of circumstances. If a person acts with just cause, her or his actions are based on reasonable grounds and committed in Good Faith.” The online dictionary further states: “The term just cause frequently appears in Employment Law. Employment disputes often involve the issue of whether an employee's actions constituted just cause for discipline or termination. If the employer was required to have just cause for its action and punished the worker without just cause, a court may order the employer to compensate the worker. Labor unions typically negotiate for a contract provision stating that an employee cannot be fired absent just cause.”

Even though definitions of just cause vary, the overall concern is fairness. The elements of just cause derive from the following:

- Notice;
- Reasonable rule or order;

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- Investigation;
- Fair investigation;
- Proof;
- Equal treatment; and
- Appropriate discipline/penalty.

To be viewed by others as just, any disciplinary action must be based on the facts emanating from the individual case. The basic underlying principle in disciplinary cases is that the employer must have just cause for imposing the disciplinary action. A common test for determining whether just cause existed was developed by arbitrator Carroll Daugherty in the celebrated *Enterprise Wire* case (46 LA 359, 1966 and 50 LA 83).

In 1966, Daugherty expanded the basic underlying principles into seven tests for just cause. The concepts encompassed within his seven tests are still frequently used by arbitrators, merit systems, and the courts when deciding discipline cases.

Daugherty's seven tests are as follows:

- Did management adequately warn the employee of the consequences of his conduct?
- Was management's rule or order reasonably related to efficient and safe operations?
- Did management investigate before administering the discipline?
- Was the investigation fair and objective?
- Did the investigation produce substantial evidence or proof of guilt?
- Were the rules, orders, and penalties applied evenhandedly and without discrimination to all employees?
- Was the penalty reasonably related to the seriousness of the offense and the past record?

The last test, the degree of discipline, is important because of the need to ensure that the punishment fits the crime. An organization's use of progressive discipline often provides an advantage in any legal proceedings resulting from disciplinary action.

For our purposes in this course, we define progressive discipline as a positive process intended to bring about a modification in an employee's performance or behavior. Progressive discipline imposes disciplinary actions in an escalating

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manner when an employee commits and repeats the same or similar bad behavior or rule violation. The typical stages of progressive discipline in the workplace are:

- **First offense**—Counseling or an oral warning;
- **Second offense**—Written warning;
- **Third offense**—Suspension or demotion; and
- **Fourth offense**—Discharge from employment.

The system of responses to undesirable behavior that becomes more severe after each repeat offense will depend on a variety of factors that include the severity and potential consequences of the action, the previous work record of the employee, and the time between infractions.

There is a clear process that is typically followed as part of progressive discipline:

- **Counseling**—The goal of this phase of progressive discipline is to heighten employee awareness of organizational policies and rules. Often, people simply need to be made aware of rules, and knowledge of possible disciplinary actions may prevent violations.
- **Oral warning**—An oral warning is the first formal step in applying progressive discipline. Its primary intent is to restate to the employee that the specified conduct or behavior is unacceptable and that there must be improvement; otherwise, more severe disciplinary action may result. An oral warning may be documented in writing, depending upon individual circumstances. Many collective bargaining agreements, for example, require that a written record of an oral warning be given to the employee and a copy be placed in the employee's official personnel file. It is important that the employee understand that he/she has been issued an oral warning. Using that term specifically when speaking with the employee, especially if there is no form of written documentation will help make sure this understanding occurs.
- **Written warning**—A written warning is used when an oral warning fails to produce improved behavior or when the misconduct was of a serious nature and an oral warning would be too lenient. Its primary intent is to put the employee on formal notice that there must be improvement in his/her behavior and that repeated misconduct may result in more severe disciplinary action.
- **Suspension**—The next level of discipline is a suspension, which is a severe form of discipline involving loss of pay and seniority. Procedures vary, but timely action is very important in every case. The content of a letter of suspension would be similar to what is included in a written warning, except that it would also include the number of days and the actual dates the employee is being suspended.

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- **Termination**—Termination is sometimes known as capital punishment in the employment setting. In some states, they may use the term dismissal, but for the most part you are more likely to hear the words termination or discharge. This action is taken when the employee continues to repeat the misconduct for which he/she was previously disciplined or possibly when there is an extremely serious first offense. Under normal circumstances, discharge is justified when the employee's conduct record has been poor and evidence shows that other forms of progressive discipline—counseling, oral warning, written warning, and suspension—as well as additional efforts by management to help the employee, such as referrals to services, leaves of absence, or other interventions, have failed. Generally the appointing authority—the agency head—or his or her designee are the persons who have the authority to discharge an employee. Termination was also discussed in Module six: Labor and Employee Relations.

The term progressive discipline typically implies movement from a lesser to a more severe penalty for continued nonperformance by the employee as outlined in the preceding steps. It should be noted, however, that some infractions and behavior may, by themselves, require a more severe penalty than might normally be called for. A simple example is employee theft, which frequently results in termination regardless of the presence or absence of prior discipline.

Alternative dispute resolution (ADR) is a process that is becoming more popular, as pointed out by Mathis and Jackson: “Disputes between management and employees about work issues are normal and inevitable, but how the parties resolve their disputes is important. Open door policies, formal grievance procedures and lawsuits provide several resolution methods. However, companies are looking to alternative means of settlement.” In this regard, alternative dispute resolution has, despite historic resistance by both parties and their advocates, gained widespread acceptance among both the general public and the legal profession in recent years. For a more in-depth discussion of ADR, refer to Module Six: Employee and Labor Relations.

There are other means for dealing with potential disciplinary actions that take a more positive, less punitive approach. Implementing a corrective action plan to correct an identified performance problem has been done effectively by many organizations. A corrective action plan is a tool to that lets a manager monitor and measure deficient work products, processes, or behaviors of a particular employee in order to improve performance or modify behavior. In “Performance Improvement Plan: Contents and Sample Form,” dated October 29, 2016, Susan M. Heathfield wrote:

The Performance Improvement Plan (PIP) is designed to facilitate constructive discussion between a staff member and his or her supervisor and to clarify the work performance to be improved.

It is implemented, at the discretion of the supervisor, when it becomes necessary to help a staff member improve his or her performance. The supervisor, with input from the affected employee, develops an improvement plan; the purpose of the activities outlined is to help the employee to attain the desired level of performance.

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The PIP differs from the Performance Development Planning (PDP) process in the amount and quantity of the detail. Assuming an employee is already participating in the company-wide PDP process, the format and the expectation of the PIP should enable the supervisor and staff member to communicate with a higher degree of clarity about specific expectations.

In general, people who are performing their jobs effectively, and meeting the expectations of the PDP process, will not need to participate in a PIP.

In all cases, it is recommended that the supervisor's supervisor and the Human Resources department review the plan. This will ensure consistent and fair treatment of employees across the company.

The supervisor will monitor and provide feedback to the employee regarding his or her performance on the PIP and may take additional disciplinary action, if warranted, through the organization's Progressive Discipline Process, if necessary.

The supervisor should review the following six items with the employee when using the document.

1. State performance to be improved; be specific and cite examples.
2. State the level of work performance expectation and that it must be performed on a consistent basis.
3. Identify and specify the support and resources you will provide to assist the employee.
4. Communicate your plan for providing feedback to the employee. Specify meeting times, with whom and how often. Specify the measurements you will consider in evaluating progress.
5. Specify possible consequences if performance standards are not met.
6. Provide sources of additional information such as the Employee Handbook.

As distasteful and stressful as it may be, and when all other efforts have failed, terminating an employee may be the best course of action for an organization. Terminating the services of an employee, for whatever cause, is an unpleasant task. It is not only a distressing emotional experience for the employee being terminated, but it is also a stressful task for the person who must deliver the message.

Unfortunately, termination is an essential managerial responsibility. It is important to conduct the termination interview in the most professional, humane, and respectful manner possible. In her article entitled "What Should Happen at a Termination Meeting?" dated August 29th, 2014, Bridget Miller wrote:

Handling an employee termination meeting is dreaded from both sides—they're no fun for anyone involved. But with ample preparation you can take steps to help the meeting go as smoothly as possible.

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Start with being fully prepared. Be sure to:

- **Plan the location.** Ensure the meeting is held somewhere with complete privacy.
- **Plan the attendees.** Besides the employee, be sure you've thought through who should attend. Be sure there is an HR representative there. Be sure the employee's direct manager is there as well. Ideally, have at least one neutral witness present, and include a member of security if there are any concerns.
- **Have outplacement services (and their representatives) ready.** If you are providing outplacement services, have the representative on hand for the employee to meet with immediately after the termination meeting.
- **Prepare a list of items to be returned** by the employee so nothing is missed.
- **Prepare the final paycheck.** If you're in a state where the final paycheck must be given to the employee on his or her last day, this must be prepared in advance. If not, you should still take steps to ensure it is completed in compliance with local laws.
- **Prepare any other checklists and documentation** for the employee, depending on the situation at hand.

What Should Happen at the Termination Meeting?

Termination meetings may not be pleasant, but here are some tips to ensure they go as smoothly as possible:

- **Get straight to the point: The employee termination.** Be sure there is no room for misinterpretation. Give the employee the reasons for the termination, and be specific. Don't lie in an attempt to spare the employee—lying can lead to trouble later. If there was no reason within the employee's control, such as during a reduction in force, explain the organization's rationale behind the firing choices.
- **Be prepared to deal with the emotions that will result** from delivering this news. The employee may be visibly upset, confused, or angry. This is to be expected. The employer needs to stay calm and reiterate the facts. Refrain from the temptation to comfort the employee by agreeing with their frustrations—this action could make the employee think that you agree the decision was not the correct one. If the employee has questions, answer them in good faith but be careful not to backtrack on any points or engage in any argumentative issues. If there are questions about why the employee was fired, stick with your talking points—repeat them as needed so that you do not inadvertently say something you should not. If the employee has reasonable requests, consider them thoughtfully.
- **Talk about benefits and rights** For example, you may want to explain the employee's option for continuation of insurance through COBRA. Give the employee information about all resources you've prepared, such as

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outplacement assistance. Any benefits should be in writing. If there is a severance package, go over the details and obligations. If the severance includes signing a waiver, mention that as well.

- **Reconfirm the employee understands his or her obligations** in terms of confidentiality of trade secrets or other employer intellectual property. Also reiterate the terms of any noncompete agreement, if applicable.
- **Outline the next steps**, including things like:
 - The practical items like his or her last day and how the employee should proceed with removing personal items from the workstation and returning work items such as keys, electronics, phones, etc.
 - The next steps for any benefit continuation or outplacement services.
 - How and when the last check and any severance will be paid.
 - Your policy (if any) on giving references to former employees.
- **Formally end the meeting.** This may seem like a lot to cover, but the actual meeting should be fast—around 10 minutes (or less) in total. Do not prolong it.
- **Ensure the employee can get home safely.** If he or she is unable to drive, help make alternate arrangements.

Don't forget to document the outcome of the meeting after you're done, capturing all relevant parts of the conversation for future reference.

Mathis and Jackson provide additional guidance to this process:

- Terminating an employee should be done face to face. Using email or voicemail to terminate an employee is too impersonal but may be necessary when dealing with remote workers.
- The standard advice of from legal experts is to physically remove the employee as quickly as possible. Ex-employees are often escorted out of the building.
- In all cases involving employee termination, treating the employee with dignity and respect is a better ethical approach that may lead to fewer lawsuits and better perceptions of the company by employees.

There are many aspects to discipline, and all require the active involvement of managers and supervisors who understand that this is not an HR function but a people management activity for which they have primary responsibility. The HR staff is there to provide training, clarify rules, regulations, and policies, guide the investigative process, and ensure fairness and equity in treatment.

It is no coincidence that much of the material on progressive discipline presented above ties directly into our discussion on performance management. The goal of

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progressive discipline and performance management is the same: to assist the employees with their performance or behavior so they can effectively perform their job duties.

Exercise

Of the six reasons why discipline might not be imposed that are listed by Mathis and Jackson which do you feel may apply to your organization? Why?

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Part Four: Development and Application of Organizational Development Tools to Assist in the Succession Planning Process

Mathis and Jackson define succession planning as the “process of identifying a plan for the orderly replacement of key employees.” Much of the organizational development activities can be effectively utilized as part of the “long-term plan for the orderly replacement of key employees.”

In Part One of this module, we reviewed the leading motivational and learning theories, as well as the typical training methods, used by public and private organizations. Many public organizations do not use all of these methods, electing instead to concentrate on one or two specific types—most often on-the-job training and work simulations. A more recent addition is the use of computer-based training, which is gaining in popularity because of its cost and productivity considerations.

Mathis and Jackson discuss the concept of learning organizations and point out that “these organizations encourage development through shared information, culture, and leadership that stresses the importance of individual learning. This approach focuses on employees who want to develop new capabilities. A learning mindset is probably difficult to introduce into an organization where it does not exist. But where it does exist, it represents a significant potential for development.” The authors go on to describe the means by which learning organizations develop employees. These include:

- Formal training;
- Team sharing;
- Coaching and mentoring;
- Observation;
- University programs;
- Individual development plans; and
- Job rotation.

The result of employing these developmental efforts is “individual learning and development.” Clearly, this is where modern organizations need to be headed, but the trip may be particularly arduous for public organizations or the reasons outlined in Module One (e.g., periodic changes in leadership and organizational priorities, funding/budgetary constraints). Despite hindrances, there are no reasons not to try. Many of the means included on Mathis and Jackson’s list are already in use in most public organizations or require little in the way of additional expense and effort.

- **Formal training**—Most public organizations already provide formal classroom and online training.

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- **Team sharing**—If the organization has team/work groups, this activity is probably already in place. If it is absent, the HR staff may be able to introduce the concept of teams into the organization in operations where it is most advantageous.
- **Coaching and mentoring**—Coaching activities should be an everyday supervisory event. Mentoring is defined by BusinessDictionary.com as an “employee training system under which a senior or more experienced individual (the mentor) is assigned to act as an advisor, counselor, or guide to a junior or trainee. The mentor is responsible for providing support to, and feedback on, the individual in his or her charge.” The costs associated with these activities are generally minimal. In a September 11, 2014, *Forbes* article titled “The Modern Mentor in a Millennial Workplace,” Karl Moore wrote: “The principles of mentorship are reasonably simple. The relationship should be mutually beneficial, in that both parties should participate and contribute to one another’s goals and expectations. An openness to change and a willingness to learn are essential. Secondly, corporations should encourage their older employees to reach out to their younger counterparts by highlighting the benefits of this unique partnership. The definition of reverse mentorship should be clearly explained, highlighting the fact that both parties benefit. You won’t only be giving, but receiving as well. Finally, the mentor and mentee should think beyond technology. Both individuals have an exclusive opportunity to better understand their generational differences. It is possible to discuss other topics aside from skill gaps.”
- **Observation**—Supervisory observation and oversight should be a recurring activity and part of the performance management system’s requirements.
- **Individual development plans**—This could be a natural outgrowth of the performance management discussions between employees and supervisors. Done with the assistance and oversight of the HR staff, these activities would dovetail nicely with mentoring strategies discussed earlier.
- **Rotational job assignments**—Mathis and Jackson define rotational assignments as the “process of moving a person from job to job.” The authors feel these assignments can be effective: “When properly handled, such job rotation fosters a greater understanding of the organization and improves employee retention by making individuals more versatile, strengthening their skills, and reducing boredom.” They caution, however, that “a disadvantage of job rotation is that it can be expensive because a substantial amount of time is required to acquaint trainees with the different people and techniques in each new work assignment.” However, using rotational assignments on a limited basis as part of a targeted succession planning process may be far more cost-effective given the potential time and effort that may be needed to recruit replacements for key employees with unique or specialized skills.

Succession planning is linked to strategic HR planning and requires the interaction of the HR staff with senior management. Mathis and Jackson describe the succession planning process as a series of consecutive activities:

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- **Integrate with Strategy**—This involves reviewing the workforce planning data on “which competencies will be needed, which jobs will be critical, and how critical positions will be filled.”
- **Involve Top Management**—This involves determining what is “the CEO’s role in succession planning, are senior managers involved, are top managers mentoring/coaching others, and is there authority and accountability for succession planning?”
- **Assess Key Talent**—Simply stated, this involves assessing skills gaps and matching the available employees and their interests and capabilities with the organization’s long term replacement needs.
- **Follow Development Practices**—This is the step at which the seven means used by learning organizations to develop employees (e.g., formal training, team sharing, coaching and mentoring) utilized to accomplish the elements of the succession plan. This involves determining “how key competencies can be developed, the creation of talent pools for critical jobs, and the incentives for individual development.”
- **Monitor and Evaluate**—This is an essential part of the process, and one that many organizations tend to overlook. Organizations change as mission and objectives are modified, refined, replaced, or discarded. As a result, employees’ job skills and competencies need to be revised. This process will result in modifications to the organization’s succession plans. Key elements include “whether successors are effective after placement, the use of metrics to evaluate success, and is the process viewed favorably.”

Applying organizational development strategies to succession planning requires integrating many of the HR functions and disciplines we have discussed throughout this course. That integration also requires HR to effectively partner with employees, supervisors, and managers throughout the organization. Forming and maintaining this integrated partnership requires skill, focus, communication, and awareness of where the organization is now and where it wants to go in the future.

Exercise

Describe the extent to which your organization uses the seven means by which learning organizations develop employees.

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Part Five: Use of Information Technology to Enhance Service Delivery

Perhaps somewhat surprisingly, there is a clear need and opportunity to apply information technology to organizational development operations and activities. Some of these include:

- **Computer-based training**—As discussed earlier in this module, many organizations are moving toward online, web-based training as a replacement for or addition to formal, classroom-style training. Online training has a number of advantages for most organizations:
 - Time away from work and lost productivity are minimized;
 - Employees are able to take the training sessions at times convenient for their work schedule, and even complete assignments from home;
 - Expenses for travel to/from the training site are eliminated;
 - Staff at remote locations can easily participate;
 - Trainers are able to reach more employees in a shorter timeframe than would be possible with a traditional, classroom training format.

There are some downsides to computer-based training that must be taken into consideration:

- Some types of training which require group interaction as part of the learning process may not be amenable to online presentations;
- Computer/website glitches can affect the overall impact of the learning experience;
- Older workers who may be less computer-savvy may feel intimidated by the technology and be less likely to participate actively in the training.

With careful advanced planning these disadvantages can be minimized. Clearly there will be a continuing need for classroom training, but online applications may present clear advantages for most organizations, especially for ongoing and more-routine types of training.

- **Automated performance management systems**—A huge opportunity is being missed by most public organizations to streamline procedures, reduce the administrative work associated with the completion and storage of performance appraisals, and monitor the appraisal process organizationwide. For example, appraisal forms could be set up as electronic files that could be accessed and completed by supervisors online. If an electronic signature capability was possible, the form could be routed by email to the reviewing officer for comment and, following the appraisal discussion between the supervisor and the employee, sent electronically to HR, where the form would

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be stored separately in an electronic file or incorporated into the employee's electronic file. Results of each employee's appraisal could be maintained in a database by the HR staff to evaluate trends by job classification, work unit/department, supervisor, etc. to provide information to senior management on the efficacy of the performance management system.

- **Electronic databases** may have a variety of uses to monitor other types of organizationwide and developmental activities:
 - Training records for all staff;
 - Talent management inventories that outline employee educational and work experiences for use as part of succession planning activities;
 - Grievance/discipline activities to assess and resolve potential areas of employee concern or to address supervisory training needs.

Our ability to create our HR future while assisting in driving the organization to reach its goals and achieve its mission is limited only by our foresight, diligence, and ability to partner with others. In this regard, one of the partners HR must embrace wholeheartedly if we truly want to secure a seat at the table is information technology.

Exercise

Describe your organization's uses of information technology that are connected to organizational development activities.

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