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## Professional in Human Resources



Third Edition



CATHY PANTANO WINTERFIELD

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### **PHR Exam Prep, Third Edition**

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# About the Author

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# Dedication

*“Aunt Barbara” (Barbara Flynn)*

*Having been in my life for nearly 50 years, Aunt Barbara has known me longer than—and better than—anyone on this earth. While I do not remember the moment I first met her (as I was only 3 years old), I remember clearly so many moments that we have shared since then.*

*Together, we have journeyed into birth...into death...and through nearly a half century of life. She has given me love, laughter, and the gift of family. Her daughter is my sister...her grandchildren are my nephews...her house is my home.*

*Aunt Barbara, you are a gift and an inspiration—to me and to countless others. You have earned the respect and admiration of friends and even of strangers who bear your remarkable story of living with multiple sclerosis. You have chosen to live fully despite the challenges and losses you have faced. You have chosen to embrace each moment and to see the gift that each offers.*

*In short, you have chosen “yes,” and you have inspired me beyond all measure.*

*For the gift of “you,” I am forever grateful.*

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I’ve learned many things from writing this book—one of which is that I’ll never again skip past the “Acknowledgments” section of a book that I’m reading. I’ve come to realize that an author (at least this author) is a person fortunate enough to be surrounded by a team of talented and committed individuals without whom there would be no book—and therefore without whom there would be no authorship.

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P&L: “I’ll still be loving you.” - Restless Heart

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# Introduction

Welcome to *PHR Exam Prep*, Third Edition. Whether this is the first Exam Prep book you've ever picked up or you've used Pearson's prep resources before, this book will provide valuable information, unique perspectives, and perceptive insights—as well as helpful suggestions—as you prepare to take the Professional in Human Resources (PHR) examination. We'll even include a bit of moral support!

This introduction will explain the PHR exam in a general sense and explore ways in which this Exam Prep product can help you as you prepare to take the exam. It will begin to give you an idea of the various topics you'll be exploring in greater detail in this book as well as important information about how the book is structured. Then it will get into some specific study tips. (These are not as complete as the ones you'll find in Pearson's coaching video titled *HRCI Certification Exams: A Coach's Approach to Preparing and Passing the Exams*, but they will give you a good start.)

## About the PHR Credential

Performing HR-related transactions well is important, but by itself it's not enough. Those of us who truly want to succeed in the ever-evolving HR profession must thoroughly understand the HR body of knowledge and be well equipped and well prepared to apply that knowledge in effective, meaningful, impactful, and appropriate ways. Passing the PHR exam is one way that HR professionals can demonstrate to themselves, to their employers, and to their potential employers that they do, in fact, possess fluency and knowledge in the HR profession. Passing the PHR also serves to establish a foundation of credibility with other HR colleagues—in a sense, even before one is personally acquainted with them. Separate and apart from how others might perceive this accomplishment, earning the PHR certification also represents a level of professionalism and will inspire a measure of self-confidence that is uniquely attainable through this achievement.

The PHR exam is administered by the Human Resource Certification Institute (HRCI). Since 1976, more than 135,000 HR professionals in over 100 countries have earned certification. By maintaining this rigorous and integrity-driven standard that is relevant as well as appropriately challenging, HRCI has contributed immeasurably to the advancement of the profession.

The HRCI certification exams constitute an important part of what makes our profession *a true profession*. HRCI offers the opportunity for qualified HR professionals to earn well-recognized, well-respected credentials that have “stood the test of time.” As such, these exams are also a near-universal indicator of achievement. So, by purchasing this book, you have taken an important first step toward earning the distinction that accompanies the PHR designation.

## Composition of PHR Exam

The PHR exam assesses certificants' knowledge and application of the HR body of knowledge. Questions are drawn from each of the six functional areas in accordance with the following percentages:

- ▶ Business Management and Strategy—11%
- ▶ Workforce Planning and Employment—24%
- ▶ Human Resource Development—18%
- ▶ Compensation and Benefits—19%
- ▶ Employee and Labor Relations—20%
- ▶ Risk Management—8%

## About This Book

Most of the exam preparation materials on the market today don't distinguish exam prep for the PHR exam from exam prep for the Senior Professional in Human Resources (SPHR) exam. We do. Why? Because the exams are different. And it's our belief that because the PHR and SPHR exams are different, your preparation should be a bit different as well. Thus, by tailoring your preparation to more closely reflect what will be covered on the PHR exam, you are positioning yourself to focus on those areas that matter most to you and that are most likely to ensure that you will pass the exam.

Like so many other things in life (and in HR), this isn't necessarily as clear cut as it sounds. Certain questions that you'll encounter on the PHR exam will seem quite senior or strategic in nature—almost more like what you would expect to see on the SPHR exam instead of on the PHR exam. As such, we're not going to limit our questions in this book to those that represent what the PHR exam is “supposed to” contain because this exam—like our profession—can be anything but typical at times.

For this reason, we've taken the following approach in this book: although it's true that the PHR exam contains more fact-based questions than scenario-based questions, the reality is that it's impossible to know exactly which topics will be covered in terms of “just the facts” and which will be placed in the context of a workplace scenario. We're committed to helping you prepare for whatever you might encounter on the PHR exam, which is why we've included more scenario-based questions than you might encounter on the actual exam.

We believe that if you can answer a scenario-based question correctly, it's almost certain that you understand the raw knowledge behind it (assuming you haven't guessed at the answer, that is). Answering a strictly fact-based question successfully, however, doesn't necessarily mean that you could answer a scenario-based question that has been built around those same facts. And on the PHR exam, you might be called upon to do exactly that.

In short, we hope to test your limits (if you will pardon the expression). We are committed to helping you prepare as thoroughly as possible, even if that means that some people might find the exam prep to be a bit more challenging than the actual PHR exam. In a way, in fact, we would consider that to be very good news.

## Chapters

We've devoted one full chapter to each of the six functional areas covered on the PHR exam. Please note that we've taken a different (and we believe more straightforward) approach in structuring the third edition of the book:

Chapter 1: Business Management and Strategy (BM & S) (formerly Chapter 3)

Chapter 2: Workforce Planning and Employment (formerly Chapter 4)

Chapter 3: Human Resource Development (formerly Chapter 5)

Chapter 4: Compensation and Benefits (formerly Chapter 6)

Chapter 5: Employee and Labor Relations (formerly Chapter 7)

Chapter 6: Risk Management (formerly Chapter 8)

Please note an important change to the third edition of the book: There is no longer a separate chapter addressing the HRCI-identified areas of Core Knowledge. Instead, these areas of Core Knowledge have been woven into the book.

Why did we make this change? For the same reason that we restructured this book: to better reflect the actual PHR exam.

Consider this: If you look at the HRCI website, you'll see "PHR EXAM WEIGHTING BY FUNCTIONAL AREA." This includes the breakdown of the way the test is built, with the percentage of test questions drawn from each functional area. No questions are drawn specifically from the Core Knowledge section—even though questions do cover those topics. As such, we have incorporated each area of Core Knowledge into the functional area with which it is most commonly associated, and through which it is most likely to be applied.

Please note, however, that—as with all areas of this test (and, of “real life HR”)—there can be crossover. As such, think of each area of Core Knowledge creatively, and with an openness to where it might “show up” on the exam.

And just to confirm that we're all on the same page, we're talking about the following:

- ▶ 76: Needs assessment and analysis
- ▶ 77: Third-party or vendor selection, contract negotiation, and management, including development of requests for proposals (RFPs)
- ▶ 78: Communication skills and strategies (for example: presentation, collaboration, sensitivity)
- ▶ 79: Organizational documentation requirements to meet federal and state guidelines
- ▶ 80: Adult learning processes
- ▶ 81: Motivation concepts and applications
- ▶ 82: Training techniques (for example: virtual, classroom, on-the-job)
- ▶ 83: Leadership concepts and applications
- ▶ 84: Project management concepts and applications
- ▶ 85: Diversity concepts and applications (for example: generational, cultural competency, learning styles)
- ▶ 86: Human relations concepts and applications (for example: emotional intelligence, organizational behavior)
- ▶ 87: Ethical and professional standards
- ▶ 88: Technology to support HR activities (for example: HR Information Systems, employee self-service, e-learning, applicant tracking systems)
- ▶ 89: Qualitative and quantitative methods and tools for analysis, interpretation, and decision-making purposes (for example: metrics and measurements, cost/benefit analysis, financial statement analysis)
- ▶ 90: Change management theory, methods, and application
- ▶ 91: Job analysis and job description methods
- ▶ 92: Employee records management (for example: electronic/paper, retention, disposal)
- ▶ 93: Techniques for forecasting, planning, and predicting the impact of HR activities and programs across functional areas
- ▶ 94: Types of organizational structures (for example: matrix, hierarchy)
- ▶ 95: Environmental scanning concepts and applications (for example: Strengths, Weaknesses, Opportunities, and Threats [SWOT], and Political, Economic, Social, and Technological [PEST])

- ▶ 96: Methods for assessing employee attitudes, opinions, and satisfaction (for example: surveys, focus groups/panels)
- ▶ 97: Budgeting, accounting, and financial concepts
- ▶ 98: Risk-management techniques

At the end of the book, there is a practice PHR exam, as well as an answer key and explanations about why each choice was—or wasn't—the best answer. Use these tests as a way to test your knowledge and understanding and to map out areas in which you want to invest additional study time.

But let us be clear about one very important point: *This book is neither designed nor intended to cover everything you need to know to pass the PHR exam.* Instead, we've brought together as much information as possible to help you prepare for the PHR exam—as well as lists of resources where you can get more information about particular topics. We'll also give you more practice—lots of it.

You can also use this book to brush up on particular areas in which you want a bit more review or practice. To do this, use the index or the table of contents to go straight to the specific topics, sections, and questions you want to reexamine. We've structured the book according to headings and subheadings to facilitate the process of providing straightforward, outlined, easy-to-reference information about each specific topic. In fact, after you've taken the PHR exam, you can use this book as a tightly focused reference tool that will serve you well as a day-to-day resource for HR-related information.

## **Chapter Formats**

The third edition of this book has been completely restructured and redesigned to more closely reflect the HR body of knowledge. As such, as you move through each chapter, you'll be able to review content within the overarching context of the most relevant competencies and areas of knowledge around which the test is built.

Within this overarching framework, each content-driven Exam Prep chapter follows a regular structure. Please note that we'll cluster related competencies and areas of knowledge together to make it easier to make sense of related concepts, facts, laws, and cases.

### **Notes**

We've also included several Notes in each chapter that serve as “reflective inserts” to challenge you to look more deeply into the topic that is being discussed—perhaps from a different perspective that encourages you to consider and weigh the “voice of experience.”

### **Chapter Summaries**

At the end of each chapter, you'll find a comprehensive summary of the material covered in that chapter.

### **Key Terms**

A list of key terms appears at the end of each chapter. As part of your review, make sure you understand and can recognize, define, or explain each of those terms and that you are prepared to apply each of them within the context of a specific scenario if you're called on to do so.

### **Exercises**

Located at the end of each chapter in the “Apply Your Knowledge” section, the exercises include additional tutorial material and more chances to apply the knowledge and practice the skills that were presented earlier in the chapter.

**Study Tips**

Each chapter will offer study tips that are particularly relevant to that functional area. Feel free to be creative, however, and apply tips from each chapter to other chapters.

**Review Questions**

These open-ended, short answer/essay-type questions will elicit your explanation of important chapter concepts.

**Exam Questions**

This section presents a short list of exam questions based on a sampling of the content that was covered in the chapter.

**Review and Exam Question Answers and Explanations**

The next two sections will include the Review Questions and Exam Questions answers and explanations.

**Suggested Readings and Resources**

Each chapter concludes with a listing of suggested books, websites, or other resources through which you can explore the topics covered in that particular chapter in greater detail.

## Information About the PHR Exam

You can find the best, most complete, and most up-to-date source of information about the HRCI suite of exams at [HRCI.org](http://HRCI.org). Check out this website for firsthand information about the different HRCI tests available, test eligibility, testing dates, prices—*everything* you need ever wanted to know (and then some) about HR certification.

## Accreditation

Not all certification tests are created equal, and not all hold the same value (and, potentially, worth). It's important to ensure that the test in which you invest your time, money, and efforts is accredited.

According to HRCI:

“The HR Certification Institute was accredited by the National Commission for Certifying Agencies (NCCA) in 2008. NCCA is an independent, third-party organization that accredits more than 300 programs from 120 organizations in a variety of industries. Certification programs must demonstrate compliance with rigorous standards that represent the best practices in the professional certification industry to earn and maintain accreditation status. For more information on NCCA accreditation, visit [www.credentialingexcellence.org](http://www.credentialingexcellence.org).”

—2014 Certification Policies and Procedures Handbook, p. 5

## PHR Exam Structure

According to HRCI:

“All exam questions are multiple choice, which means they contain a stem (or premise) and four (4) answer choices including only one (1) correct answer.

“The premise states the problem or the question to be answered. You can expect two (2) main types of premise statement, including a statement posing a question (example: “Which type of psychological test measures a person’s overall ability to learn?”) and an incomplete statement (example: “A person’s overall ability to learn is best measured by a[n]...”).

“The correct answer is one (1) of the four (4) options representing the correct response **or** the best correct response. In this case, **best means** that a panel of experts would agree to this judgment. Some answer choices are written to look correct, but they are not the **best** answer. This is done to assess your ability to make the right decision and apply knowledge in an actual work experience.

“Some of the multiple-choice questions are formatted as scenarios. Scenario questions present typical HR situations, followed by questions based upon them. These scenarios require you to integrate facts from different areas of the HR body of knowledge. They are particularly well suited for SPHR candidates because the scenarios often present typical situations encountered by senior-level HR practitioners.

“All questions are classified according to the following levels:

- ▶ knowledge/comprehension: recalling factual material, translation or interpretation of a concept
- ▶ application/problem solving: applying familiar principles or generalizations to solve real-life problems
- ▶ synthesis/evaluation: combining distantly related elements by making critical judgments that require accuracy or consistent logic

“After the exam, the performance data of the exam overall and each question is carefully evaluated. A number of statistical measures are routinely calculated and reviewed for each question. Questions that do not perform to established standards are discarded or revised. This continuous review of questions ensures that exams are valid and reliable.”

## PHR Exam Format

In addition to studying the actual content within each of the six functional areas, you need to be familiar with the format of the PHR exam.

The PHR exam is a computerized test consisting of 175 multiple-choice questions. You’ll have three hours to complete the exam, which is administered by a computer at a testing center.

Of the 175 test questions, only 150 will count toward your overall score. The other 25 questions, called “pre-test questions,” are being piloted for possible use in future exams, and your answers to these questions will not count toward your overall score. The catch, however, is that you won’t know which questions will count toward your overall score and which won’t—so you would be wise to assume that every question is a scored question and to approach every question with focus and attention.

As described earlier, each question has four possible answers. Often, more than one answer will make some degree of sense or may initially seem correct. You must, however, choose the best answer.

## NOTE

It has been said that “close only counts in horseshoes and hand grenades.” Close doesn’t count on the PHR exam either. Take your time and evaluate all four options before selecting the best answer.

## NOTE

Be particularly careful not to automatically default to the response that most closely approximates how your employer would handle a particular situation or how you’ve handled a similar situation in the past. Every organization has its own way of handling HR-related situations; however, your employer’s way of handling a situation isn’t necessarily the best way or the way that HRCI has deemed the best.

Examples of multiple-choice questions appear at the end of each chapter in this book.

## Study and Exam Prep Tips

Now that you’ve got a sense of how this book is designed, how the PHR is designed, and how this book will support you in your efforts to pass the PHR, close your eyes and imagine yourself in this situation. (Well, first read this paragraph, and then close your eyes.)

It’s the day before you’re scheduled to take the PHR exam. Your legs, arms, and fingertips tingle as you experience a rush of adrenaline. Beads of sweat dot your forehead. If you’ve scheduled the exam on a workday or on a day that follows a workday, you may find yourself dreading the tasks you normally enjoy because, in the back of your mind, you’re wishing you could read just a few more pages, review your notes one more time, or complete a couple more practice questions. You cram in a few more pages of reading—perhaps along with a few more French fries from the to-go dinner you picked up on the run.

Now let’s imagine a different scenario. Please read this, and then close your eyes and visualize this image instead:

It’s the day before you’re scheduled to take the PHR exam. You’re going about your daily routine—either at work or at home—calmly and confidently looking forward to (yes, we said *looking forward to*) taking the PHR exam the next day. You’re confident in your knowledge that you did everything you set out to do when you made your PHR study plan months earlier. You’ve eaten a favorite meal for dinner—something healthy and delicious. You’re going to have a relaxing evening and get a good night’s rest. As you drift off to sleep, a slight smile plays about your lips as you relax in the knowledge that you are well prepared to take—and pass—the PHR exam.

If you like the second scenario more than the first, you’re not alone. And it doesn’t have to be just a dream. In fact, you have already taken one of the first steps toward creating that reality, and you’re holding it in your hands right now.

With this book, along with your other prep materials, you can develop an evenly paced study plan that will help you avoid most of these pretest jitters. Although no one book or product (*including this one*) should ever serve as your only preparation tool, know that your commitment to buying this book—and, especially, to using it to prepare for the PHR exam—brings you one step closer to attaining your objective of passing the PHR exam.

This section of the book provides you with some general guidelines for preparing for any certification exam and for the PHR exam in particular. It’s organized into three sections. The first section addresses



learning styles and how they affect you as you prepare for an exam. The second section covers exam-preparation activities as well as general study and test-taking tips. This is followed by a closer look at the PHR certification exam, including PHR-specific study and test-taking tips.

## Learning Styles

To better understand the nature of test preparation, it is important to understand the learning process. You're probably already aware of how you best learn new material; if you're not, right now would be a great time to figure it out.

There are three primary learning styles: visual, kinesthetic, and auditory. If you're more of a visual learner, you might need to see things for them to sink in. If so, you might find that creating outlines works well for you. If you're a kinesthetic learner, a hands-on approach will likely serve you well, so you might prefer to work with homemade flash cards. Auditory learners may want to create their own audio recordings of key facts and information they can listen to on a cassette or digital voice recorder.

Whatever your preferred learning style, test preparation is always more effective when it takes place over a period of time. It goes without saying (well, perhaps it does need to be said) that it's not a good idea to study for a certification exam by pulling an all-nighter the night before the exam. It's also not advisable to postpone your study until the week before the exam. Solid preparation means more than that. It requires consistent preparation—at a steady pace over a period of months, not days or even weeks. As you begin your preparation, it's important to keep in mind that learning is a developmental, evolving process. Taking a planned, deliberate approach to studying and learning material that will be on the exam will help you recognize what you already know well, what you need to know better, and what you still need to learn—in other words, what you don't know very well at all—at least not yet.

Learning takes place when you incorporate new information into your existing knowledge base. And remember—even if this book is the first PHR study tool you've looked at so far, you already do have an existing knowledge base. How can you (and, for that matter, how can we) be so certain of that? Because you're required to have at least one year (and, in many cases, two or more) of professional-level experience to sit for the PHR exam. That represents at least one year of knowledge, skills, and experience—which means you're already on your way to passing the PHR.

### NOTE

Again, don't rely on any single resource—even this book—to prepare for the PHR exam. No matter how good a resource might be, it provides only one perspective, and it can provide only a limited amount of material. *PHR Exam Prep*, Third Edition should serve as a supplement to your other study resources, not as a replacement for them. There is more knowledge and information required to pass the PHR exam than could ever be included in this book or any other single resource. So, in short, don't put all your eggs in one basket—even this one.

As you prepare for the PHR exam, this book, along with many of the other study materials you'll use, will serve three purposes:

- ▶ It will add incrementally to your existing knowledge base.
- ▶ It will facilitate the process of drawing meaningful connections between the test content and your own professional experience.
- ▶ It will enable you to restructure and translate your existing knowledge and experience into a format that's consistent with the PHR exam.

Perhaps without even realizing it, you'll be adding new information to your existing knowledge base—all of which will then be organized within the framework of the six functional areas of HR around

which the PHR exam is designed. This process will lead you to a more comprehensive understanding of important concepts, relevant techniques, and the human resources profession in general. Again, all this will happen only as a result of a repetitive and self-reinforcing process of study and learning, not as the product of a single study session.

Keep this model of learning in the forefront of your mind as you prepare for the PHR exam. It will help you make better decisions about what to study and about how much more studying you need to do.

## General Study Tips

There's no one "best" way to study for any exam. There are, however, some general test-preparation strategies and guidelines that have worked well for many test takers and that might work well for you, too.

Before we get into that, however, one important principle to keep in mind is that learning can be broken into various depths:

- ▶ Recognition (of terms, for example) represents a somewhat superficial or surface level of learning in which you rely on a prompt of some sort to elicit recall.
- ▶ Comprehension or understanding (of the concepts behind the terms, for example) represents a deeper level of learning than recognition does.
- ▶ Analysis of a concept, along with the ability to apply your newly expanded understanding of that concept, represents an even deeper level of learning.

This is not to say that recognition isn't important. It is—particularly for multiple-choice exams, and particularly for the PHR exam.

### NOTE

This is in significant part a function of the level of knowledge that PHR candidates are expected to have mastered, which is not as advanced or complex as what is expected of SPHR candidates. As such, recognition (by itself) is a somewhat less relevant level of learning on the SPHR exam because the SPHR exam focuses on more complex and strategic applications of the same body of knowledge.

In addition to ensuring that you are able to recognize terms, you should build a study strategy through which you will develop the ability to process, digest, and absorb the material at a level or two deeper than that. In this way, you'll know the material so thoroughly that you'll be able to perform well on a variety of types of questions—for instance, on questions that require you to apply your knowledge to specific problems, as well as on questions that only require you to be able to recognize and identify the correct (meaning, the best) answer from among a series of possible answers. The PHR contains questions of both types, along with a variety of other types of questions.

## Macro and Micro Study Strategies

One strategy that can enhance and support learning at multiple levels is outlining (especially for visual learners, as we mentioned earlier). Creating your own study outline that incorporates concepts covered on the PHR will support your efforts to absorb and understand the content more fully, to make connections between related topics, and to map together information that you have gleaned from a variety of study sources. For instance, it will help you make connections between the six functional areas, the core areas of knowledge, and the HR-related responsibilities associated with each of those six functional areas. Your outline will also help you dig a bit deeper into the material if you choose to include a level or two of detail beyond what you might find on most generic, summary-style study tools. You can add more value to your

outline, for instance, by expanding it to include information such as definitions, details, analyses, examples, related laws, related cases, key historical events, key thinkers, and the like.

An outline such as this can support your study efforts in a variety of ways. For instance, as you build the points and subpoints of your outline, you'll be able to better appreciate how they relate to one another. You'll also gain a better understanding of how each of the main objective areas outlined in this book is similar to—and different from—the other main objective areas. If you do the same thing with the subobjectives, you'll also gain a fuller understanding of how each subobjective relates to its objective and how those subobjectives relate to one another. It's also important to understand how each of the HR-related responsibilities is similar to—or different from—other HR-related responsibilities, which an outline can help you clarify. The same holds true for the areas of knowledge that span the six functional areas and for the HR-related knowledge required for each of the functional areas—each of which is identified within each chapter.

Next, work through your completed outline. Focus on learning the details. Take time to refamiliarize yourself with—and, in some cases, memorize—and understand terms, definitions, facts, laws, cases, and so forth. In this pass-through of the outline, you should attempt to focus on learning detail rather than on just an overview of the big picture (on which you already focused your attention as you built your outline).

It's not a good idea to try to accomplish both of these strategies at once. Research has shown that attempting to assimilate both types of information (macro and micro) at the same time interferes with the overall learning process. If you consciously separate your studying into these two approaches, you are likely to perform better on the exam.

## **Active Study Strategies**

The process of writing down and defining objectives, subobjectives, terms, facts, and definitions promotes a more active learning strategy than you'd experience by just reading study materials. In human information-processing terms, writing forces you to engage in more active encoding of the information. Conversely, simply reading the information results in more passive processing. Using this study strategy, focus on writing down (or typing out) the items that are highlighted throughout this book.

You might want to consider doing the same for your other study sources. Try to merge your notes whenever possible to take an integrated approach to your test prep. (But always keep track of your sources. Color coding or shading might help with staying organized.)

Another active study strategy involves applying the information you have learned by creating your own examples and scenarios. Think about how or where you could apply the concepts you're learning. You could even try your hand at writing your own questions, which you could share with a study partner or group. Again, write everything down to help you process the facts and concepts in an active fashion.

The multiple review and exam questions at the end of each chapter provide additional opportunities to actively reinforce the concepts you are learning, so don't skip them.

## **Common Sense Strategies**

As you study your test prep materials, use good common sense. (Most of us have learned the hard way that common sense can be all too uncommon.) For instance, study when you are alert. Reduce or eliminate distractions. (Put that smartphone away, and log out of your social media accounts.) Eat when you are hungry, reward yourself when you reach a milestone, and take breaks when you get tired. Pushing through when your body really needs a break can sometimes result in frustration, anxiety, and physical exhaustion—none of which will enhance your performance on the exam.

## Design Your Own Personal Study Plan

And do it now. There is no single best way to prepare for any exam. Different people learn in different ways, so it's important to develop a personal study plan that's right for you. As you do so, establish long-term and short-term goals for yourself. Know exactly what you will accomplish and by what date. You'll experience a sense of accomplishment each time you reach a milestone, so allow yourself the opportunity to celebrate. You will have earned the right to revel a bit—plus, taking a little celebratory break will help you feel more refreshed as you move into the next stage of your prep.

And, as you develop this plan, you might want to build in some cushion of time. As we've all experienced from time to time, "things happen." Life happens. And, sometimes, those "things" can throw our calendars, our emotions, even our physical bodies off track. Plan for those unexpected events so that they don't derail you.

### Questions to Ask Yourself

As you develop your personal study plan, ask yourself the following questions:

- ▶ How much time do I have to invest in preparing for the exam?
- ▶ How much money do I have to invest in preparing for the exam?
- ▶ Do I learn better on my own or when I have the chance to interact with others? Or, does some combination of both work best for me?
- ▶ Am I comfortable with an online study environment, or do I prefer a traditional classroom setting?
- ▶ Does my schedule afford me the opportunity to attend regularly scheduled classroom-based exam prep workshops?
- ▶ What is my preferred learning style?
- ▶ If I've taken this test before and didn't pass, what have I learned? What was effective about my original study plan? What was ineffective? What could I have done differently?

### NOTE

And for those readers who didn't pass the PHR exam the first time around, let the experience go. Take the lessons that you learned and put them to good use now. It's your time to shine.

## Assessment Testing

One of the most important aspects of learning is what has been called meta-learning. Meta-learning has to do with realizing when you know something well or realizing when you need to study some more. In other words, you assess and recognize the degree to which you have learned the material you've been studying.

For most people, this can be a difficult assessment to make independently in the absence of study tools. Pretesting is one tool that can help you in this way by establishing a baseline of what you already know before you start your study regime and as you proceed through different phases of your study plan. Pretesting tools can include review questions, practice questions, practice tests, and the like.

You can then use the insights you obtain from these pretesting assessment tools to guide and direct your studying because developmental learning takes place as you cycle (and recycle) through your study plan. So begin by assessing how well you already know or have learned a particular topic. Use that assessment to decide what you need to continue studying. Then conduct another assessment, followed by more review. Repeat this process until you feel confident in your knowledge and understanding of the topic.

You might have already noticed that there are two practice exams included with this book: one in the book and one online. We strongly suggest that you consider incorporating these into your study plan.

### **General Test-Taking Tips**

Taking exams can be stressful. This is especially true if it's been a while since you've been in school or taken tests. There are, however, steps you can take to reduce the level of stress you are experiencing as you prepare for—and take—the exam. As you prepare and answer lots of practice questions, your comfort level with test taking will likely increase. Be patient with yourself; your rustiness *will* fade away. In addition, consider other stress-reducing techniques, such as visualization. Just as Olympic athletes visualize themselves performing in their events as part of their preparation, visualize yourself progressing comfortably and confidently through the questions on the PHR exam.

The structure, format, and style of the exam may be unfamiliar to you. Test taking is a skill all its own—separate and apart from the material that the test covers—and every test is different. This is why so many individuals and organizations offer test-preparation services. You've probably seen the advertisements for test-prep services for the SAT, LSAT, GRE, GMAT—the alphabet soup of test taking goes on and on. The specific attributes of each exam, however, are unique, as are the quality and value of various test prep services and resources. Collect as much information as possible, and choose wisely before availing yourself of test-prep services.

## **PHR-Specific Information, Study, and Test-Taking Tips**

We've all heard of “the fear of the unknown.” Well, knowledge dispels fear (or at least it helps to do so). Knowing as much as you can about how the PHR exam is designed, formatted, administered, and delivered will help you as you prepare to take the exam.

### **PHR Preparation Options**

You can choose from many options as you prepare for the PHR exam. Please visit the HRCI website for current information on exam preparation providers.

Here are some considerations to keep in mind when choosing from among the many available providers and delivery modalities:

#### **Online Programs**

Check out online college/university programs carefully before signing up to ensure that you choose a format that's right for you. Be particularly alert to real-time (“synchronous”) participation requirements if you have limited time availability or if you are available to study only during nontraditional classroom hours (in which case you might find “asynchronous” participation to be a better option).

#### **Self-Study**

If being part of a cohort group isn't the best choice for you, you might want to consider a self-study option. SHRM offers a self-study learning system, which has preparation materials and tools on each functional area and on the entire HR body of knowledge.

The self-study format allows you maximum flexibility to prepare for the PHR at a time and a place that's most convenient for you. It also contains an online component that offers lots of additional questions in a computerized format, thereby more closely replicating what you will experience during the actual PHR exam.

### **Study Partners and Teams**

Whether you're preparing for the PHR using a classroom, online, or self-study format, you may find it helpful to find another test taker with whom you can partner as you prepare for the test. Ideally, you'll want to find someone whose schedule is similar to—and whose learning style is compatible with—your own. Even more important, look for a buddy who has strengths in those functional areas in which you need the most development and who would benefit from the assistance of someone who is well versed in those functional areas in which you are strongest. You may want to look for a buddy with whom you'll study in person or someone with whom you can confer online. Study partners and teams can be found through colleagues at work, through a prep course, or through other reputable sources.

### **Online Study Groups**

Be open to the idea of forming an online study group. Multiple online study groups, for instance, are registered with [www.groups.yahoo.com](http://www.groups.yahoo.com). (As always, of course, be prudent and cautious when creating online relationships.)

### **PHR-Specific Test Preparation Tips**

Make no mistake: the PHR exam challenges your knowledge, your HR skills, and your test-taking abilities. Here are some tips to help you as you prepare for the PHR exam:

- ▶ Be prepared to combine your skill sets with your experience and to identify solutions using that combined insight because the PHR exam tests your knowledge as well as your skill. You will be called on to resolve problems that may draw on different dimensions of the material covered. For example, you could be presented with a realistic workplace scenario about a layoff that requires you to understand when—and how—the Age Discrimination in Employment Act (ADEA) needs to be taken into consideration. Why is this type of question likely to appear? In this particular example, it's one thing to know the provisions of the ADEA, but it's something else entirely to understand its application and relevance to a layoff situation. More broadly, these types of scenario-based questions are reflective of real life. And, to be an effective HR professional, you'll need to be able to successfully make these kinds of connections and applications.
- ▶ Get used to delving into minute details. Each exam question can incorporate a multitude of details. Try thinking of each detail as a potential clue. Some of these details will prove to be ancillary. Some of them will help you rule out possible answers but not necessarily enable you to identify the best answer. Other details will provide you with a more complete picture of the situation being described. The reality is that you may be called on to combine this information with what you know and what you have experienced to identify the best answer. If you don't pay attention to how the information that you're given helps you eliminate certain responses, the best answer might elude you.
- ▶ Hold yourself to time limits when taking practice tests. You must complete the PHR exam within three hours. To get used to this time constraint, use a timer when you take practice tests. Learn to pace yourself.
- ▶ Peruse the HRCI ([www.hrci.org](http://www.hrci.org)) website—early and often.
- ▶ Talk with others who have already taken the PHR exam—whether or not they passed. Although PHR test takers are prohibited from divulging specific types of information about the exam, they can tell you about their overall test-taking experience. You may find that their insights, ideas, and suggestions hold great value for you as you prepare to take the test. Be careful, however, not to let yourself feel anxious on the basis of anything that you might hear. Just use it as a way to make better choices relative to developing your own exam-prep plan and relative to taking the actual exam.

## Strategies and Tips for PHR Exam Day

Your studying is done, you've familiarized yourself with the test center (online virtual tours are available), you're wearing comfortable clothing, and you've arrived at least 30 minutes early with ID in hand. Now what? First, breathe. Remember that you have thoroughly prepared yourself for the PHR exam.

You are ready for this.

Now prepare yourself mentally. Focus on your feelings of confidence. There's no one "right" way to do this. Some people, however, find it helpful to consider one (or perhaps both) of the following two mindsets:

1. **"If you can see it, you can be it."** As discussed earlier, continue to visualize yourself confidently answering test questions—just as you did during your test preparation. Start by writing your name with the letters "PHR" after it on the mini whiteboard you've been given to use as a scratch pad. You're self-assured, relaxed, and ready to demonstrate what you know. Then see yourself leaving the test center, a smile on your face, having just learned that you have passed the exam.
2. **"What's the worst that can happen?"** Remind yourself that the worst thing that could possibly happen is that you do not pass the PHR exam. If that does happen, many choices are available to you, the most obvious of which is retaking the test. So, even if the worst possible thing happens, you'll get through it, and you will have learned valuable lessons along the way—lessons you can use to help you pass the test the next time.

Here are some additional suggestions to consider as you sit down to take the PHR exam:

- ▶ **Take your time:** Determine how much time you can spend on each question while still allowing yourself time to check your responses afterward. Most importantly, read every question—and every answer—deliberately and completely. Don't skip over even one word. Remember that you will need to identify the best answer, not just a good answer.
- ▶ **Collect yourself:** When you actually sit down at the computer terminal, take a few moments to collect yourself before you jump right into the test. Again, breathe. Set aside any internal distractions and focus on the exam. You're ready for this, so take a moment or two to remind yourself of that.
- ▶ **Take a break if you need one:** You have three hours to complete the exam, so give yourself some time to get some air, stretch your legs, and reenergize yourself.
- ▶ **Remember that you might be audiotaped or videotaped:** Don't allow this to distract you; instead, remember that taping test takers is "business as usual" for Prometric testing facilities. Don't take it personally; just let it go. You have more important things to focus on than a camera or microphone.
- ▶ **Don't rush, but don't linger too long on difficult questions, either:** The questions will vary in their degree of difficulty and complexity. Don't let yourself be flustered by one particularly difficult, wordy, or (seemingly) tricky question.
- ▶ **Read every word of every question:** Just like in real life, one word or one minute detail can make all the difference in selecting the best answer.
- ▶ **Don't look for patterns in answer selections:** There aren't any.
- ▶ **Don't assume the longest answer is the best answer:** Don't assume the shortest answer is the best answer either.

- ▶ **Answer every question:** Unanswered questions are 100% likely to be wrong. If you make a wild guess, you have a 25% chance of getting it right. If, however, you can narrow down your choices to two or three possible responses, you can double or triple your chances of answering the question correctly.
- ▶ **Take advantage of the fact that you can “mark,” return to, and review skipped or previously answered questions:** When you reach the end of the exam, return to the more difficult questions. You may even want to deliberately skip some of the more difficult questions along the way, knowing that you can return to them after you have successfully answered many, many other exam questions.
- ▶ **Try to build in time to review your answers after you have answered all the questions:** Pay particular attention to questions that contain a lot of detail or those that seemed particularly straightforward the first time around. (It’s possible you might have initially overlooked something important.)
- ▶ **When rechecking your responses, you may be tempted to question every answer you’ve made, but be careful not to fall into the trap of second-guessing yourself too much:** If you read the question carefully and completely the first time through, and you felt like you knew the right answer, you probably did. If, however, as you check your answers, a response clearly stands out as incorrect, change it. You also might want to consider changing a response if you missed, misread, or misinterpreted details in the questions the first time around or if you jumped to a clearly incorrect conclusion. If you are left feeling completely unsure whether you should change your original response, however, it’s usually a good idea to go with your first impression.

And, last—but perhaps most important—believe in yourself: now, when you study, and when you sit down to take the test. It’s your turn. So roll up your sleeves. You’re about to begin the process of earning your PHR designation.

## Contacting the Author

On a somewhat more personal note, please know that the highly talented team of Exam Prep editors and I have worked diligently to create a real-world tool that you can integrate into your overall personalized PHR study strategy. We take this responsibility seriously and would greatly appreciate hearing back from you about your experiences with this book, along with any feedback you have—positive as well as constructive. For instance, let us know the degree to which you found this book to be helpful in your preparation efforts. And, for those of you who have purchased an earlier edition of this book, we’d be curious to hear your thoughts on the new design.

We also recognize that—despite our best efforts—there’s always room for improvement. In that spirit, each of us is keenly interested in hearing your suggestions for changes or additions that could enhance the value of this book for future PHR candidates. We’ll consider everything you say carefully and respond to all reasonable suggestions and comments.

And, of course, we love good news. So, even if you just want to tell us that you passed your PHR exam and share the story of your success, let us know. We’ll celebrate with you!

Whatever the nature of your comment, I invite you to reach out to me at [Cathy@CathyWinterfield.com](mailto:Cathy@CathyWinterfield.com). Thank you in advance for doing so.

### NOTE

Please note that I wrote the first and second editions of this book under the name Cathy Lee Gibson. (My name has changed, but the author remains the same.)



Last, let me offer a word of thanks for including us in your exam prep strategy. Enjoy the book and your experiences with it. We would wish you luck on the exam, but we don't think you really need it. Using this book as part of a larger test-prep plan, we know you'll do well on the strength of your knowledge, skills, and ability to apply those skills to real-life workplace situations. With all that going for you, there's no need for luck.

## Frequently Asked Questions

As you prepare for the test, you might have some general questions. To support you, we've pulled together some of the questions that we've been asked before by HR professionals who are studying for the PHR and that you might have as well:

**Question:** What I'm reading about here, in this book, is called something different where I work. Which words are right?

**Answer:** Keep in mind that you are studying to pass a test that is predicated on HRCI's definition of the HR body of knowledge. So, regardless of how a particular program might be labeled (or handled) at your current/prior organization(s), it's important to think about it within the context of HRCI's HR body of knowledge. Don't worry too much if your organization uses different terminology. Instead, focus on understanding the ideas and how they play out in your own experience.

**Question:** I'm supposed to apply my own experience, right? But my own experience doesn't line up with what is in these books.

**Answer:** This can happen. In fact, it happens to a lot of people who are studying for the PHR/SPHR exam. And it can be frustrating when it does.

Try keeping two things in mind. First, if there is a gap between what you've experienced and the HRCI body of knowledge, go with what is in the HRCI body of knowledge. You can reconcile the differences later on. For now, understand what HRCI considers the recommended approach and follow that.

Second, keep in mind that you will be asked to choose the best possible response when you take the test—not the response that is most familiar to you. As such, going with your initial answer might not be the best approach for this particular test because your initial response might be more of a measure of what you are familiar with rather than what HRCI would consider the best answer to be.

Lastly, please keep in mind—this doesn't mean that your employer is necessarily wrong. For a variety of reasons, the best approach for one organization might be different from the best approach overall. However, you are studying not only to learn; you are studying to pass a test. Know what HRCI is looking for and choose accordingly.

**Question:** Why are some things in more than one place in this book?

**Answer:** Many of the concepts and ideas in this book relate to more than one functional area. That's not only okay, it's actually good because it reflects the interrelatedness of the HR profession. It's not a profession in which we can put things into neat boxes. The "messiness" of our work help keeps it vibrant, interesting, and ever-evolving.

Having said that, some concepts and laws pertain to functional areas in very different ways. Some of those areas of overlap are not clear. And, in some cases, leaving out a particular law or concept might constitute a misleading or incomplete omission. As such, they warrant dual inclusion.

**Question:** Why are some concepts in just one place if they can apply to more than one functional area?

**Answer:** That's a good question. Ultimately, part of what you are called upon as a certificant—and as an HR professional—is to do some of this mapping yourself, as you prepare for this test and in the workplace. We've started this process for you, and encourage you to keep moving forward with it as you do your test prep, either on your own or with your study partners.

**Question:** Do I have to know the functional area that a particular topic or law aligns with?

**Answer:** Often, as you come to understand the focus of each functional area, these connections will become easier to make. It might not seem that way at first, but keep the faith. This 1,000-piece puzzle will fall into place, more and more, as you move through your study plan.

Having said that, don't box yourself in. There are many possible applications and ways to map this. We'll get into this more in the full-length books, as mentioned earlier.

**Question:** I used a different test prep resource, and it put ideas in different functional areas. Who is right, and who is wrong?

**Answer:** There are different ways to look at the HRBOK. And, although we can't comment on the relative value or worth of different test prep tools, we do suggest that you apply your own logic and analysis to this. What makes sense? And, more importantly, why?

No test prep resource has all the answers. And any valuable test prep resource should encourage you to think more, rather than less. Use your own reasoning ability to think through what makes sense to you.

**Question:** Where does this HRBOK come from? Does SHRM endorse it?

**Answer:** HRCI publishes the HR body of knowledge. Although HRCI and SHRM once had a close and collaborative relationship, SHRM is now wholly separate from HRCI. Said differently, HRCI is a certifying organization that offers an accredited credential that has met the National Commission for Certifying Agencies' (NCAA's) rigorous standards. SHRM is a professional membership association that began offering newly created HR certifications in 2015.

**Question:** There's a lot of legal content in this book. Does that mean I don't need to hire a lawyer? (Whew—that would be a relief.)

**Answer:** No! This author is not a lawyer and does not play one on TV, in the classroom, or when she writes. Nothing in this book should be considered legal advice. Qualified legal counsel should always be contacted with any questions of legal relevance. (Yes, this is the fine print. And it's really important. Pay close and careful attention to it.)

**Question:** There are so many laws, so many cases. I can't keep them all straight in my mind. Can't I just learn everything but the laws?

**Answer:** Part of being an HR professional—especially in the United States—involves knowing the laws, the cases, and the implications of both. Excluding these will likely result in your failing the exam (I've seen this before. Trust me—this strategy just doesn't work.) More importantly, doing so may result in your being a far less effective HR professional than you otherwise could have been.

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# 2

## CHAPTER TWO

# Workforce Planning and Employment

Workforce planning and employment (WPE) speaks to HR's responsibility to ensure integrated, seamless, and effective recruitment, hiring, orientation, and exit processes that support the short-term, long-term, emerging, and strategic objectives of the organization.

An organization's overall success will be determined to a significant degree by its ability to have the right people, with the right skills, in the right places, at the right times. Although this statement sounds somewhat straightforward, let's take a closer look at what it actually means.

"To have" in this context can refer to hiring employees to work a traditional work arrangement, hiring employees to work some sort of nontraditional work arrangement, or retaining nonemployees to perform services on an as-needed basis (consultants). Although most organizations secure their "people resources" through traditional employment relationships, many organizations are also augmenting this approach with nontraditional arrangements, such as consulting services.

"The right people, with the right skills" refers to employing or contracting with individuals who possess and demonstrate the knowledge, skills, abilities, and behavioral characteristics needed to support the organization's mission and to attain the organization's objectives. Employing individuals who don't have the necessary knowledge, skills, abilities, and behavioral characteristics can be problematic (or, at the very least, challenging). Employing—and retaining—individuals who possess skills that they want to put to use but that aren't needed can be equally—and sometimes even more—problematic.

"In the right places, at the right times" speaks to the importance of analyzing short-term and long-term organizational needs to ensure that the organization is neither overstaffed nor understaffed at any given moment. In this context, the terms "overstaffing" and "understaffing" can refer to the number of people employed, as well as the skills that those individuals bring to the organization.

Achieving this delicate balance requires a considerable amount of planning. It also requires that HR professionals continually maintain awareness of the organization's mission, as well as its short-term, long-term, and emerging goals. In this way, HR professionals—in close collaboration with the leaders and managers of the organization—can determine how to strategically support the organization's goals.

Effective workforce planning ensures that the organization has the "people resources" in place that will enable it—through those very same people—to fulfill its mission and achieve its objectives. Workforce planning encompasses myriad activities relating to how employees enter into—and exit from—the organization. It looks at these functions primarily from the perspective of meeting the organization's needs and ideally takes a long-term (more tactical, or perhaps transformational, in nature)—and a short-term (more transactional in nature)—approach.

By effectively performing responsibilities relating to workforce planning and development, HR professionals can seize another opportunity to forge a business partnership with their internal clients. For this to happen, HR professionals must take a deliberate and consistent approach to workforce planning that starts with the organization's strategic plan and with how HR can align its efforts and work product with that plan.

Determining “what” and “who” the organization needs to achieve its goals is more involved than it might appear. Accurate forecasting requires selecting from among numerous nonmathematical (qualitative) and mathematical (quantitative) analyses.

**RESPONSIBILITY**

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**WPE Responsibility 01**

Ensure that workforce planning and employment activities are compliant with applicable federal laws and regulations.

**KNOWLEDGE**

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**Knowledge 11**

Applicable federal laws and regulations related to workforce planning and employment activities (for example: Title VII, ADA, EEOC Uniform Guidelines on Employee Selection Procedures, Immigration Reform and Control Act).

To formulate and execute these plans, HR professionals must be well versed in those laws that impact our profession and that affect the ways in which we source, hire, promote, and separate/terminate employees. Equal employment opportunity is the foundation on which these laws have been built and constitutes one critical element of every HR professional's knowledge base.

Laws, however, are not static. Rather, they are continually interpreted and reinterpreted—by the courts and even by administrative agencies. As such, HR professionals have a professional and ethical mandate to familiarize themselves with important cases from the past and to monitor new cases, proposals, and regulations. In this way, we will be better equipped to understand and appreciate new interpretations of these laws and thus maintain currency with respect to how they will affect the workplace and the ways in which we choose to carry out our strategic, tactical, and transactional roles.

**NOTE**

The “best answer” to all questions on the PHR exam that relate to laws and cases will be determined by laws and regulations that are in effect at the start of each exam period. Be sure that you keep updated on new laws, new cases, and changed regulations. Also note that proposals are not “official” until they are officially adopted.

Congress has passed numerous pieces of federal legislation specifically designed to eradicate discrimination on the basis of a variety of factors. This legislation—while diverse in terms of the areas that are spanned—shares one thing in common: none of the characteristics or traits addressed by these laws has any affect on a person's ability to do the job. Each piece of legislation has brought the workplace one step closer to ensuring that hiring, promotional, and all other employment-related decisions are based solely on job-related factors.

**EXAM ALERT**

When it comes to employment law, HR professionals must tread carefully. To function effectively, we need a solid understanding of the laws that affect our profession, our clients, and our organizations. We must maintain currency with respect to the way the courts interpret—and reinterpret—existing laws, and we must understand the impact of new laws and cases. There is, however, a line over which we cannot cross under penalty of law. Ultimately, a person who is not an attorney cannot practice law or dispense legal advice. We must be cautious that our efforts do not unintentionally overstep this line.

## Relevant Laws and Executive Orders

As you move into this section, keep in mind that it includes relevant laws, case law, and executive orders (EOs). Unlike laws, which are passed by Congress, EOs are enacted by the president. They do carry, however, the same weight as law. EOs provide guidance and assistance to federal agencies relative to the execution of their duties and to employers relative to what they must do to be in compliance with the executive order. HR professionals need to be fluent with respect to EOs pertaining to employment issues.

### Title VII of the Civil Rights Act, 1964

Although it wasn't the first antidiscrimination law, Title VII of the Civil Rights Act of 1964 was a landmark piece of legislation prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin. It was the most inclusive piece of antidiscrimination legislation up to that time (and, some might argue, perhaps even up to *this* time). In short, Title VII radically changed the workplace.

Title VII applies to private employers with 15 or more employees. Title VII, as amended, also specifically applies to federal, state, and local governments, as well as to employment agencies and labor organizations, education institutions that employ 15 or more individuals, private and public employment agencies, labor organizations, and joint labor management committees controlling apprenticeship and training.

According to the EEOC:

“This law makes it illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably accommodate applicants' and employees' sincerely held religious practices, unless doing so would impose an undue hardship on the operation of the employer's business” ([www.eeoc.gov](http://www.eeoc.gov)).

The Civil Rights Act of 1964 established the first “protected classes” and created the Equal Employment Opportunity Commission (EEOC). As published on its website, the EEOC's mission is “to promote equal opportunity in employment through administrative and judicial enforcement of the federal civil rights laws and through education and technical assistance” ([www.eeoc.gov](http://www.eeoc.gov)).

Title VII of the Civil Rights Act of 1964 prohibits discrimination in all aspects of the employment relationship, including

- ▶ Hiring and firing
- ▶ Compensation, assignment, or classification of employees
- ▶ Transfer, promotion, layoff, or recall
- ▶ Job advertisements
- ▶ Recruitment
- ▶ Testing
- ▶ Use of company facilities
- ▶ Training and apprenticeship programs
- ▶ Fringe benefits
- ▶ Pay, retirement plans, and disability leave
- ▶ Other terms and conditions of employment

Title VII also prohibits retaliation against an employee who files a charge of discrimination, who participates in an investigation, or who opposes discriminatory practices.

Under rare circumstances, exceptions can be made to Title VII requirements. Table 2.1 includes some of these exceptions.

**TABLE 2.1 Exceptions to Title VII**

Type of Exception	Definition	Example
Bona fide occupational qualification (BFOQ)	Certain job requirements that are mandated by business necessity may have an unintended discriminatory (disparate) impact upon applicants or employees on the basis of gender, religion, or national origin.	Hiring females to be bathroom attendants in a women's restroom. Hiring a person of a particular religious denomination to be a minister to members of that faith.
Professionally developed test of abilities	Job-related tests that ascertain skill or ability may have an unintended discriminatory (disparate) impact upon people on the basis of gender, religion, or national origin.	Strength or physical skills or agility tests if those tests assess skills that have been shown to be necessary for successful performance of a particular position—as determined by the actual performance of current or former employees.
Seniority systems	Bona fide seniority or merit-based systems that are not intended or designed to discriminate unlawfully.	Bona fide collective bargaining agreements.
Piece-rate systems	Compensation programs under which individuals are paid according to their production volume.	Certain assembly line or factory assignments.

## Executive Order 11246, 1965

EO 11246, the first employment-related EO, is administered by the Office of Federal Contract Compliance Programs (OFCCP). It established two key requirements for federal contractors and subcontractors that have contracts in excess of \$10,000 during any one-year period:



- ▶ These employers are prohibited from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. This requirement reconfirmed the nondiscrimination requirements established by Title VII of the Civil Rights Act of 1964. “Contractors and subcontractors who hold a single federal contract or subcontract in excess of \$10,000 or who hold contracts or subcontracts with the federal government in any 12-month period that have a total value of more than \$10,000 are required to post the EEO notice, Equal Employment Opportunity is the Law (PDF). Federal contractors and subcontractors who (1) hold government bills of lading; (2) serve as a depository of federal funds in any amount; or (3) act as issuing and paying agents for U.S. savings bonds and notes must also post the EEO notice” ([www.dol.gov](http://www.dol.gov)).
- ▶ These employers must take affirmative steps—or actions—in advertising open positions, recruiting, employment, training, promotion, compensation, and termination of employees to ensure the elimination of employment barriers for women and minorities (individuals who we might refer to today as “people of color”).

**NOTE**

Additional information about Affirmative Action Plans (AAPs) is included later in this chapter.

## Uniform Guidelines on Employee Selection Procedures, 1978

The Uniform Guidelines on Employee Selection Procedures was intended to address the need to establish a uniform set of principles relative to all elements of the selection process—including interviewing, preemployment testing, and performance appraisal. One key purpose of the Uniform Guidelines was to deal with the concept of “adverse impact” (also known as “disparate impact”) as it pertains to the employment process. Another was to ensure that interview and selection processes are reliable (consistent) and valid:

“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” ([www.dol.gov](http://www.dol.gov)).

As mentioned earlier, the key purpose of the Uniform Guidelines was to deal with the concept of “adverse impact” (also known as “disparate impact”) as this concept pertains to the employment process and to ensure that interview and selection processes are reliable (consistent) and valid. For more information on this concept, see the section titled “Disparate (or “Adverse”) Impact.”

### Reliability

The degree to which a selection process or instrument is consistent is reflective of the degree to which that instrument is reliable.

All interviews for a position should generate consistent information for decision-making—even if several interviewers are involved, and even when all interviewers don't meet every candidate.

In this context, one important function of a well-defined and well-documented interviewing process is to ensure the most reliable results possible, even given the inevitable differences among interviewers. This is one reason why it is critical that interviewers prepare and consistently use a list of job-related questions that will be asked of all candidates for a particular position.

## **Validity**

Employment interviews measure applicants' skills. Valid interviews ensure that those skills relate meaningfully and clearly to the skills that are required to perform a particular job.

Validity establishes and demonstrates a clear relationship between performance on the selection procedure and performance on the job. Although it is difficult to establish good measures of validity, it is possible to make a case for validity if the interview has the following characteristics:

- ▶ It is based on job analysis.
- ▶ It contains questions that provide evidence about important job-related skills.
- ▶ Interview information is systematically related to a specific job.

HR professionals need to be familiar with at least the following four types of validity.

### **Content Validity**

A selection procedure has content validity if it assesses a candidate's ability to perform representatively sampled significant parts of the job.

Example: A typing test for an administrative assistant's position would demonstrate content validity.

### **Criterion-Related Validity**

A selection procedure has criterion-related validity if scores achieved by incumbents correlate highly with their respective job performance.

Example: A requirement that candidates have fluency in a particular foreign language would have criterion-related validity if it were shown that people who demonstrate fluency in that language actually perform better on the job than those who do not demonstrate fluency.

### **Construct Validity**

A selection procedure has construct validity if it measures the degree to which the test taker possesses a particular psychological trait (if, of course, it can be shown that the trait is required for successful performance of the position). More specifically, according to the EEOC Uniform Employee Selection Guidelines:

“Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated” (www.eeoc.gov).

Example: An instrument that assesses the degree to which candidates for a car salesperson's position are persistent would demonstrate construct validity.

### Predictive Validity

A selection procedure has predictive validity if the predictions that it makes actually manifest themselves in the test takers' subsequent performance.

Example: An instrument that is designed to assess the degree to which candidates for a position possess and demonstrate empathy would have predictive validity if individuals who scored well on this test demonstrated, after being hired, that they actually did possess and demonstrate this characteristic.

### A Closer Look at Testing

The Uniform Guidelines set forth—quite literally—uniform guidelines to ensure that the selection process remains focused on job-related criteria. The Uniform Guidelines may also, however, serve as an opportunity to look more closely at our selection processes—even if we have not found that adverse impact exists—so as to ensure that our processes are truly focused on the job and not on other extraneous factors. This does not, by itself, necessarily include or exclude the use of instruments that we commonly refer to as “tests.” It does, however, challenge HR professionals and hiring managers to ensure that the use of any such tests remains fixedly (and statistically) focused on job-related qualifications and requirements.

It might also challenge us to revisit tests that we have already incorporated into the selection process, perhaps applying a closer degree of scrutiny or a greater degree of rigor to our design or selection of each particular test. Testing is often seen as a panacea, of sorts, in the selection process—a black-or-white, make-or-break decision point (unless or until, of course, we aren't comfortable with a particular set of test results).

In addition to challenging us to look closer at the validity and reliability of the tests we use, consider allowing the Uniform Guidelines to serve as a challenge to rethink testing in general because, in the most literal sense, every step in the selection process constitutes a test of one sort or another and could be interpreted/analyzed/scrutinized as such by the EEOC.

#### NOTE

This applies even to the interview itself—even though this step in the selection process is often perceived as a semistructured (or even unstructured) opportunity to just “get a feel” for the candidate. Try to keep this perspective in mind as you take a closer look at the “Interviews and the Interview Process” section later in this chapter.

The EEOC has published the fact sheet shown in the following sidebar on “Employment Tests and Selection Procedures.”

### Employment Tests and Selection Procedures

Employers often use tests and other selection procedures to screen applicants for hire and employees for promotion. There are many different types of tests and selection procedures, including cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks.

The use of tests and other selection procedures can be an effective means of determining which applicants or employees are most qualified for a particular job. However, use of these tools can violate the federal antidiscrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability, or age (40 or older). Use of tests and other selection procedures can also violate the federal antidiscrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis unless the employer can justify the test or procedure under the law.

On May 16, 2007, the EEOC held a public meeting on employment testing and screening. Witnesses addressed legal issues related to the use of employment tests and other selection procedures. (To see the testimony of these witnesses, please see the EEOC's website at <http://eeoc.gov/eeoc/meetings/archive/5-16-07/index.html>.)

This fact sheet provides technical assistance on some common issues relating to the federal anti-discrimination laws and the use of tests and other selection procedures in the employment process.

### **Background**

- ▶ Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA) prohibit the use of discriminatory employment tests and selection procedures.
- ▶ There has been an increase in employment testing due in part to post 9-11 security concerns as well as concerns about workplace violence, safety, and liability. In addition, the large-scale adoption of online job applications has motivated employers to seek efficient ways to screen large numbers of online applicants in a nonsubjective way.
- ▶ The number of discrimination charges raising issues of employment testing, and exclusions based on criminal background checks, credit reports, and other selection procedures, reached a high point in FY 2007 at 304 charges.

### **Types of Employment Tests and Selection Procedures**

Examples of employment tests and other selection procedures, many of which can be administered online, include the following:

- ▶ Cognitive tests assess reasoning, memory, perceptual speed and accuracy, and skills in arithmetic and reading comprehension, as well as knowledge of a particular function or job.
- ▶ Physical ability tests measure the physical ability to perform a particular task or the strength of specific muscle groups, as well as strength and stamina in general.
- ▶ Sample job tasks (for example, performance tests, simulations, work samples, and realistic job previews) assess performance and aptitude on particular tasks.
- ▶ Medical inquiries and physical examinations, including psychological tests, assess physical or mental health. (Per ADA requirements, employers with 15 or more employees can only make such inquiries/exams after a conditional offer of employment has been extended.)
- ▶ Personality tests and integrity tests assess the degree to which a person has certain traits or dispositions (dependability, cooperativeness, safety) or aim to predict the likelihood that a person will engage in certain conduct (theft, absenteeism).
- ▶ Criminal background checks provide information on arrest and conviction history.
- ▶ Credit checks provide information on credit and financial history.
- ▶ Performance appraisals reflect a supervisor's assessment of an individual's performance.
- ▶ English proficiency tests determine English fluency.

## **Governing EEO Laws**

This section will focus on laws that relate to Equal Employment Opportunity in the workplace. These laws span more than 50 years—and growing.

Please note: the laws discussed in this book are effective at the federal level. Although state or local laws cannot be less generous, they can—and in many cases are—more generous. The HRCI certification exam will not address state and local laws, but HR professionals must be well versed with the laws that affect the geographic areas for which they are responsible.

## **Title VII of the Civil Rights Act of 1964**

Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin.

With respect to tests in particular, Title VII permits employment tests as long as they are not “designed, intended or used to discriminate because of race, color, religion, sex or national origin.” 42 U.S.C. § 2000e-2(h). Title VII also imposes restrictions on how to score tests. Employers are not permitted to (1) adjust the scores of, (2) use different cutoff scores for, or (3) otherwise alter the results of employment-related tests on the basis of race, color, religion, sex, or national origin. *Id.* at §2000e-2(l).

Title VII prohibits both “disparate treatment” and “disparate impact” discrimination.

Title VII prohibits intentional discrimination based on race, color, religion, sex, or national origin. For example, Title VII forbids a covered employer from testing the reading ability of African American applicants or employees but not testing the reading ability of their white counterparts. This is called “disparate treatment” discrimination. Disparate treatment cases typically involve the following issues:

- ▶ Were people of a different race, color, religion, sex, or national origin treated differently?
- ▶ Is there any evidence of bias, such as discriminatory statements?
- ▶ What is the employer’s reason for the difference in treatment?
- ▶ Does the evidence show that the employer’s reason for the difference in treatment is untrue and that the real reason for the different treatment is race, color, religion, sex, or national origin?

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.
- ▶ 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.

## **Title I of the Americans with Disabilities Act**

Title I of the Americans with Disabilities Act (ADA) prohibits private employers and state and local governments from discriminating against qualified individuals with disabilities on the basis of their disabilities.

The ADA specifies when an employer may require an applicant or employee to undergo a medical examination (a procedure or test that seeks information about an individual’s physical or mental impairments or health). The ADA also specifies when an employer may make “disability-related inquiries” (inquiries that are likely to elicit information about a disability).

When hiring, an employer may not ask questions about disability or require medical examinations until after it makes a conditional job offer to the applicant. 42 U.S.C. §12112 (d)(2).

After making a job offer (but before the person starts working), an employer may ask disability-related questions and conduct medical examinations as long as it does so for all individuals entering the same job category. *Id.* at § 12112(d)(3).

With respect to employees, an employer may ask questions about disability or require medical examinations only if doing so is job related and consistent with business necessity. Thus, for example, an employer could request medical information when it has a reasonable belief, based on objective evidence, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition, or when an employer receives a request for a reasonable accommodation and the person’s disability or need for accommodation is not obvious. *Id.* at § 12112(d)(4).

The ADA also makes it unlawful to do the following:

- ▶ Use employment tests that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test, as used by the employer, is shown to be job related and consistent with business necessity. 42 U.S.C. § 12112(b)(6).
- ▶ Fail to select and administer employment tests in the most effective manner to ensure that test results accurately reflect the skills, aptitude or whatever other factor that such

test purports to measure, rather than reflecting an applicant's or employee's impairment. Id. at § 12112(b)(7) .

- ▶ Fail to make reasonable accommodations, including in the administration of tests, to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such accommodation would impose an undue hardship. Id. at § 12112(b)(5).

## The Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) prohibits discrimination based on age (40 and over) with respect to any term, condition, or privilege of employment. Under the ADEA, covered employers may not select individuals for hiring, promotion, or reductions in force in a way that unlawfully discriminates on the basis of age.

The ADEA prohibits disparate treatment discrimination, i.e., intentional discrimination based on age. For example, the ADEA forbids an employer from giving a physical agility test only to applicants over age 50, based on a belief that they are less physically able to perform a particular job, but not testing younger applicants.

The ADEA also prohibits employers from using neutral tests or selection procedures that have a discriminatory impact on persons based on age (40 or older), unless the challenged employment action is based on a reasonable factor other than age. *Smith v. City of Jackson*, 544 U.S. 228 (2005). Thus, if a test or other selection procedure has a disparate impact based on age, the employer must show that the test or device chosen was a reasonable one ([www.eeoc.gov](http://www.eeoc.gov)).

## Age Discrimination in Employment Act, 1967

The Age Discrimination in Employment Act (ADEA) prohibits discrimination on the basis of age for employees and job applicants who are age 40 and above. There is no upper cap on age limit (although there initially was). Under the ADEA, it is unlawful to discriminate against a person because of her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

The ADEA also makes it unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.

The ADEA does permit employers to favor older workers based on age even when doing so adversely affects a younger worker who is 40 or older.

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

The EEOC has published the following Facts About Age Discrimination Fact Sheet:

The Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. The ADEA permits employers to favor older workers based on age even when doing so adversely affects a younger worker who is 40 or older.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.

The ADEA applies to employers with 20 or more employees, including state and local governments. It also applies to employment agencies and labor organizations, as well as to the federal government.

ADEA protections ([www.eeoc.gov](http://www.eeoc.gov)) include the following:

- ▶ Apprenticeship programs
- ▶ Job notices and advertisements
- ▶ Preemployment inquiries
- ▶ Benefits
- ▶ Waivers of ADEA rights

### **Apprenticeship Programs**

It is generally unlawful for apprenticeship programs, including joint labor-management apprenticeship programs, to discriminate on the basis of an individual's age. Age limitations in apprenticeship programs are valid only if they fall within certain specific exceptions under the ADEA or if the EEOC grants a specific exemption.

### **Job Notices and Advertisements**

The ADEA generally makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. A job notice or advertisement may specify an age limit only in the rare circumstances in which age is shown to be a BFOQ that's reasonably necessary to the normal operation of the business.

### **Preemployment Inquiries**

The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose rather than for a purpose prohibited by the ADEA.

### **Benefits**

The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to specifically prohibit employers from denying benefits to older employees. Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers and that those greater costs would create a disincentive to hire older workers. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age as long as the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

Employers are permitted to coordinate retiree health benefit plans with eligibility for Medicare or a comparable state-sponsored health benefit.



## Waivers of ADEA Rights

An employer may ask an employee to waive her rights or claims under the ADEA either in the settlement of an ADEA administrative or court claim or in connection with an exit incentive program or other employment termination program. However, the ADEA, as amended by OWBPA, sets out specific minimum standards that must be met for a waiver to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver must

- ▶ Be in writing and be understandable
- ▶ Specifically refer to ADEA rights or claims
- ▶ Not waive rights or claims that may arise in the future
- ▶ Be in exchange for valuable consideration
- ▶ Advise the individual in writing to consult an attorney before signing the waiver
- ▶ Provide the individual at least 21 days to consider the agreement and at least 7 days to revoke the agreement after signing it

If an employer requests an ADEA waiver in connection with an exit incentive program or other employment termination program, the minimum requirements for a valid waiver are more extensive.

## Fair Credit Reporting Act, 1970

The Fair Credit Reporting Act (FCRA) was the first law passed with the intention of ensuring fair and accurate consumer reporting. This law is particularly relevant to workforce planning and employment because some employers base hiring and promotion decisions, in part, on credit reports.

The FCRA is administered by the Federal Trade Commission, which has published the following information for employers:

<https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-employers-need-know>

## Equal Employment Opportunity Act, 1972

The Equal Employment Opportunity Act of 1972 expanded the reach of Title VII of the Civil Rights Act of 1964 to include educational institutions; state, local and federal governments; and private employers who employ 15 or more employees. This Act also allows charging parties a longer period of time within which to file claims, and “amends its sex discrimination guidelines to prohibit employers from imposing mandatory leaves of absence on pregnant women or terminating women because they become pregnant. EEOC also states it is sex discrimination for an employer to give women disabled by pregnancy less favorable health insurance or disability benefits than that provided to employees disabled by other temporary medical conditions” (www.eeoc.gov).

## Rehabilitation Act, 1973

The Rehabilitation Act of 1973 prohibits discrimination on the basis of physical and mental disabilities.

- ▶ **Section 503:** Requires affirmative action and prohibits employment discrimination by federal government contractors and subcontractors with contracts of more than \$10,000. According to the EEOC, “Section 503 of the Rehabilitation Act of 1973, as amended, protects qualified individuals from discrimination on the basis of disability in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. Disability discrimination includes not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, barring undue hardship. Section 503 also requires that Federal contractors take affirmative action to employ and advance in employment qualified individuals with disabilities at all levels of employment, including the executive level” ([www.eeoc.gov](http://www.eeoc.gov)).
- ▶ **Section 504:** States that “no otherwise qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under” any program or activity that either receives federal financial assistance or is conducted by any executive agency or the United States Postal Service.
- ▶ **Section 508:** Requires that federal agencies’ electronic and information technology is accessible to people with disabilities, including employees and members of the public.

## Pregnancy Discrimination Act, 1978

The Pregnancy Discrimination Act of 1978 (PDA) amended Title VII of the Civil Rights Act of 1964 to specifically prohibit discrimination on the basis of pregnancy, childbirth, or related medical conditions.

In short, it requires that employers treat applicants or employees who are pregnant or otherwise affected by related conditions in the same manner as other applicants or employees with other short-term conditions. This Act covers employers with 15 or more employees, including state and local governments. It applies to employment agencies, labor organizations, and the federal government.

Pregnancy-related protections include the following.

### Hiring

An employer cannot refuse to hire a pregnant woman because of her pregnancy, because of a pregnancy-related condition, or because of the prejudices of coworkers, clients, or customers.

### Pregnancy and Maternity Leave

An employer may not single out pregnancy-related conditions for special procedures to determine an employee’s ability to work. However, if an employer requires its employees to submit a doctor’s statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements.

- ▶ If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee. For example, if the employer allows temporarily disabled employees to modify tasks, perform alternative assignments, or take disability leave or leave without pay, the employer also must allow an employee who is temporarily disabled due to pregnancy to do the same.
- ▶ Pregnant employees must be permitted to work as long as they are able to perform their jobs. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, her employer may not require her to remain on leave until the baby's birth. An employer also may not have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.
- ▶ Employers must hold open a job for a pregnancy-related absence the same length of time jobs are held open for employees on sick or disability leave.

## Health Insurance

Any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as costs for other medical conditions. Health insurance for expenses arising from abortion is not required, except where the life of the mother is endangered.

- ▶ Pregnancy-related expenses should be reimbursed exactly as those incurred for other medical conditions, whether payment is on a fixed basis or a percentage of reasonable-and-customary-charge basis.
- ▶ The amounts payable by the insurance provider can be limited only to the same extent as amounts payable for other conditions. No additional, increased, or larger deductible can be imposed.
- ▶ Employers must provide the same level of health benefits for spouses of male employees as they do for spouses of female employees.

## Fringe Benefits

Pregnancy-related benefits cannot be limited to married employees. In an all-female workforce or job classification, benefits must be provided for pregnancy-related conditions if benefits are provided for other medical conditions.

- ▶ If an employer provides any benefits to workers on leave, the employer must provide the same benefits for those on leave for pregnancy-related conditions.
- ▶ Employees with pregnancy-related disabilities must be treated the same as other temporarily disabled employees for accrual and crediting of seniority, vacation calculation, pay increases, and temporary disability benefits.
- ▶ It is unlawful to retaliate against an individual for opposing employment practices that discriminate based on pregnancy or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

## Immigration Reform and Control Act, 1986

The Immigration Reform and Control Act (IRCA) prohibits employers from discriminating against job applicants on the basis of national origin and from giving preference to U.S. citizens. IRCA also established penalties for those who knowingly hire illegal aliens (people who are referred to, by some individuals and organizations, as “undocumented workers,” rather than “illegal aliens”).

IRCA accomplishes these objectives through several means. The most visible process requires employers to review and record information/documentation submitted by employees that establish that employee’s identity and eligibility to work in the United States. The form used to record this information is known as the I-9 form. The I-9 form must be completed within three business days of the employee’s date of hire (but not before the employer starts). Certain portions of the I-9 must be completed by the employee, and certain portions must be completed by the employer.

### NOTE

The I-9 lists acceptable documents for establishing identity and eligibility to work in the United States. Employees must provide either one document from Column A or one document each from Column B and Column C. Under no circumstances can an employer express preference for any particular document.

The government revised the I-9 form in 2013 (see Figure 2.1).

## Drug-Free Workplace Act, 1988

The Drug-Free Workplace Act requires federal contractors (with contracts of \$100,000 or more) and individuals and organizations that are awarded federal grants (of any size) to agree to maintain a workplace free of illegal drugs.

The Department of Labor (DOL) provides the following guidelines relative to the Drug-Free Workplace Act: “The Act does not apply to those who do not have, nor intend to apply for, contracts/grants from the Federal government. The Act also does not apply to subcontractors or subgrantees.”

Because the Act applies to each contract or grant on a case-by-case basis, you will need to determine coverage for each federal contract or grant you have or for which you are applying. If your company has a grant that is covered under the Act and a contract that is not, the Act does not cover the entire company but rather only employees working on the covered grant. Even though you may not be required to provide a drug-free workplace for all your employees, you may find it cost effective to do so — and a good way to protect your workers and your business profits.

Although all individuals with federal contracts or grants are covered, requirements vary depending on whether the contractor or grantee is an individual or is an organization ([www.dol.gov](http://www.dol.gov)).

These requirements can vary substantially. According to the DOL, “Although all covered contractors and grantees must maintain a drug-free workplace, the specific components necessary to meet the requirements of the Act vary based on whether the contractor or grantee is an individual or an organization. The requirements for organizations are more extensive, because organizations have to take comprehensive, programmatic steps to achieve a workplace free of drugs.”

HR professionals should partner with organizational leadership/counsel to ascertain the requirements that pertain to them (if any) under this Act.



Employment Eligibility Verification
Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 03/31/2016

START HERE. Read instructions carefully before completing this form. The instructions must be available during completion of this form.
ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Attestation (Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)
Last Name (Family Name) First Name (Given Name) Middle Initial Other Names Used (if any)
Address (Street Number and Name) Apt. Number City or Town State Zip Code
Date of Birth (mm/dd/yyyy) U.S. Social Security Number E-mail Address Telephone Number

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):

- A citizen of the United States
A noncitizen national of the United States (See instructions)
A lawful permanent resident (Alien Registration Number/USCIS Number):
An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy) . Some aliens may write "N/A" in this field. (See instructions)

For aliens authorized to work, provide your Alien Registration Number/USCIS Number OR Form I-94 Admission Number:

1. Alien Registration Number/USCIS Number:

OR

2. Form I-94 Admission Number:

If you obtained your admission number from CBP in connection with your arrival in the United States, include the following:

Foreign Passport Number:

Country of Issuance:

Some aliens may write "N/A" on the Foreign Passport Number and Country of Issuance fields. (See instructions)



Signature of Employee: Date (mm/dd/yyyy):

Preparer and/or Translator Certification (To be completed and signed if Section 1 is prepared by a person other than the employee.)

I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator: Date (mm/dd/yyyy):
Last Name (Family Name) First Name (Given Name)
Address (Street Number and Name) City or Town State Zip Code



FIGURE 2.1 The I-9 form.

Employee Polygraph Protection Act, 1988

Administered by the Department of Labor, the

"EPPA prohibits most private employers from using lie detector tests, either for pre-employment screening or during the course of employment. Employers generally may not require or request any 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. Employers may not use or inquire about the results of a lie detector test or discharge or discriminate against an employee or job applicant on the basis of the results of a test, or for filing a complaint, or for participating in a proceeding under the Act. Subject to restrictions, the Act permits polygraph (a type of lie detector) tests to be administered to certain job applicants of security service firms (armored car, alarm, and guard) and of pharmaceutical manufacturers, distributors and dispensers.

“Subject to restrictions, the Act also permits polygraph testing of certain employees of private firms who are reasonably suspected of involvement in a workplace incident (theft, embezzlement, etc.) that resulted in specific economic loss or injury to the employer. Where polygraph examinations are allowed, they are subject to strict standards for the conduct of the test, including the pretest, testing and post-testing phases. An examiner must be licensed and bonded or have professional liability coverage. The Act strictly limits the disclosure of information obtained during a polygraph test.”

## Worker Adjustment and Retraining Notification Act, 1988

The Worker Adjustment and Retraining Notification Act (WARN) mandates employer notification requirements under specific circumstances involving mass layoffs and plant closings, thus giving displaced workers time to make arrangements for other employment. (“Arrangements,” in this context, span a spectrum of possibilities ranging from transferring to another worksite to participating in retraining programs, or anything in between or beyond.)

WARNA covers employers with 100 or more full-time employees (or the equivalent—100 or more full-time and part-time employees who work a combined total of 4,000 or more hours per week).

### NOTE

Exceptions and clarifications abound when it comes to determining whether an employer is covered by WARNA. Review [www.dol.gov](http://www.dol.gov) for more information about how to make this determination.

WARNA requires these employers to give employees at least 60 days’ written notice before either a mass layoff or plant closing. According to the DOL, a mass layoff occurs under the following sets of circumstances:

- ▶ A covered employer must give notice if there is to be a mass layoff that does not result from a plant closing but that will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50–499 employees if they make up at least 33% of the employer’s active workforce. Again, this does not count employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice.
- ▶ An employer also must give notice if the number of employment losses that occur during a 30-day period fails to meet the threshold requirements of a plant closing or mass layoff, but the number of employment losses for 2 or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period, of either a plant closing or mass layoff. Job losses within any

90-day period will count together toward WARN threshold levels unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

WARNA is also triggered in the event of a plant closing, which occurs when a covered employer determines that an employment site (or one or more facilities or operating units within an employment site) will be shut down, if the shutdown will result in an employment loss (as defined later) for 50 or more employees during any 30-day period. This does not count employees who have worked less than 6 months in the past 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice.

Within the context of WARNA, the DOL defines an employment loss as

- ▶ An employment termination, other than a discharge for cause, voluntary departure, or retirement
- ▶ A layoff exceeding 6 months
- ▶ A reduction in an employee's hours of work of more than 50% in each month of any 6-month period

The DOL also cites certain exceptions to WARNA:

“An employee who refuses a transfer to a different employment site within reasonable commuting distance does not experience an employment loss. An employee who accepts a transfer outside this distance within 30 days after it is offered or within 30 days after the plant closing or mass layoff, whichever is later, does not experience an employment loss. In both cases, the transfer offer must be made before the closing or layoff, there must be no more than a 6 month break in employment, and the new job must not be deemed a constructive discharge. These transfer exceptions from the “employment loss” definition apply only if the closing or layoff results from the relocation or consolidation of part or all of the employer's business” ([www.dol.gov](http://www.dol.gov)).

Under WARNA, notice must be given to

“...the chief elected officer of the exclusive representative(s) or bargaining agency(s) of affected employees and to unrepresented individual workers who may reasonably be expected to experience an employment loss. This includes employees who may lose their employment due to ‘bumping,’ or displacement by other workers, to the extent that the employer can identify those employees when notice is given. If an employer cannot identify employees who may lose their jobs through bumping procedures, the employer must provide notice to the incumbents in the jobs which are being eliminated. Employees who have worked less than 6 months in the last 12 months and employees who work an average of less than 20 hours a week are due notice, even though they are not counted when determining the trigger levels.

“The employer must also provide notice to the State dislocated worker unit and to the chief elected official of the unit of local government in which the employment site is located” ([www.doleta.gov](http://www.doleta.gov)).

The DOL provides the following guidance with respect to required notification periods under WARN Act:

“With three exceptions, notice must be timed to reach the required parties at least 60 days before a closing or layoff. When the individual employment separations for a closing or layoff occur on more than one day, the notices are due to the representative(s), State dislocated worker unit and local government at least 60 days before each separation. If the workers are not represented, each worker’s notice is due at least 60 days before that worker’s separation.

“The exceptions to 60-day notice are:

“(1) Faltering company. This exception, to be narrowly construed, covers situations where a company has sought new capital or business in order to stay open and where giving notice would ruin the opportunity to get the new capital or business, and applies only to plant closings;

“(2) Unforeseeable business circumstances. This exception applies to closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required; and

“(3) Natural disaster. This applies where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm.

“If an employer provides less than 60 days advance notice of a closing or layoff and relies on one of these three exceptions, the employer bears the burden of proof that the conditions for the exception have been met. The employer also must give as much notice as is practicable. When the notices are given, they must include a brief statement of the reason for reducing the notice period in addition to the items required in notices” ([www.doleta.gov](http://www.doleta.gov)).

#### NOTE

Some states, such as California, have “baby WARN” laws in effect, which may have different notification thresholds or requirements. So, as always, be sure to check for—and ensure you are in adherence with—any relevant state laws.

## Americans with Disabilities Act, 1990

The Americans with Disabilities Act (ADA) guarantees equal opportunity for qualified individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications.

The EEOC has proudly described the ADA as “the world’s first comprehensive civil rights law for people with disabilities” and likens it to the Emancipation Proclamation for people with disabilities.

The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations. In addition, the ADA’s nondiscrimination standards apply to federal sector employees under section 501 of the Rehabilitation Act, as amended, and its implementing rules. According to the EEOC, Title I of the ADA prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.



Title I also covers medical examinations and inquiries, as well as drug and alcohol abuse:

- ▶ **Medical examinations and inquiries:** Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific 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 similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.
- ▶ **Drug and alcohol abuse:** Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations. Employers may hold illegal drug users and alcoholics to the same performance standards as other employees ([www.eeoc.gov](http://www.eeoc.gov)).

Title V of the ADA provides additional instructions with respect to its enforcement of the ADA by the EEOC, the federal agency charged with enforcing the employment provisions of the ADA.

The ADA also renders it unlawful to retaliate against an individual for opposing employment practices that discriminate based on disability or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADA.

At a minimum, HR professionals need to develop a solid understanding of the basic terminology used throughout the ADA to be able to effectively implement its provisions—and to move beyond simple compliance (“transactional”) toward a more strategic application of the ADA (“tactical,” or perhaps even “transformational”).

## Individual with a Disability

According to the EEOC, an “individual with a disability” 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
- ▶ Is regarded as having such an impairment

## Qualified Person

To be considered a “qualified person,” a candidate must meet minimum job requirements (education, experience, licenses, and so forth) and must be able to perform the essential functions of the position with or without reasonable accommodation.

## Reasonable Accommodation

A reasonable accommodation represents a change in the way that one or more responsibilities relating to the execution of a position is performed, so as to enable a person with a disability to perform the essential functions of the position. Accommodations, however, do not have to be adopted if they cause undue hardship to the organization.

## Undue Hardship

An undue hardship would be caused by an accommodation that would create significant difficulty (enough to disrupt business operations), result in a significant financial outlay, or change something about the essential nature of the business. If this language seems unclear, it is. Even the language drawn directly from the EEOC website relative to undue hardship is

somewhat ambiguous: “Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer’s size, financial resources, and the nature and structure of its operation.” Perhaps this could be rephrased to say “it depends”—because it does.

**NOTE**

In this context, the word “organization” is often interpreted to encompass more than just the location at which the employee who needs the accommodation works. Thus, the definitions of “reasonable accommodation” and “undue hardship” might vary substantially from what one might initially assume. This, like all decisions of a legal nature, should be made only after consulting with qualified counsel. Said differently, things are not always what they initially appear to be, so don’t make unilateral determinations about what constitutes undue hardship. Confer with legal counsel, client managers, or senior HR colleagues, as appropriate.

**Major Life Activities**

According to the EEOC, “major life activities” include—but are not necessarily limited to—walking, seeing, hearing, breathing, caring for oneself, performing manual tasks, sitting, standing, lifting, learning, and thinking. Major bodily functions are also considered to be a major life activity. Furthermore, according to the EEOC, “the determination of whether an individual’s (condition) substantially limits a major life activity is based on the limitations imposed by the condition when its symptoms are present (disregarding any mitigating measures that might limit or eliminate the symptoms)” ([www.eeoc.gov](http://www.eeoc.gov)).

**Civil Rights Act of 1991**

The Civil Rights Act of 1991 significantly expanded employees’ rights and remedies under Title VII of the Civil Rights Act of 1964. In addition to establishing the right for plaintiffs in Title VII cases to enjoy jury trials, it allowed for plaintiffs to be awarded compensatory and punitive damages (which is limited according to the size of the employer’s workforce and which caps at \$300,000 per individual for compensatory and punitive damages, combined).

Compensatory damages are designed to “make the employee whole” with respect to lost wages, benefits, and other expenses and losses. Punitive damages, as the name implies, are intended to punish employers who violate the Act.

“In addition, the 1991 Act added a new subsection to Title VII, codifying the disparate impact theory of discrimination, essentially putting the law back as it had been prior to *Wards Cove*. And in response to *Price-Waterhouse*, the Act provided that where the plaintiff shows that discrimination was a motivating factor for an employment decision, the employer is liable for injunctive relief, attorney’s fees, and costs (but not individual monetary or affirmative relief) even though it proves it would have made the same decision in the absence of a discriminatory motive. The Act also provided employment discrimination protection to employees of Congress and some high-level political appointees. Lastly, Title VII and ADA coverage was extended to include American and American-controlled employers operating abroad” ([www.eeoc.gov](http://www.eeoc.gov)).

**Family and Medical Leave Act, 1993**

The Family and Medical Leave Act (FMLA) entitles eligible employees (who work for covered employers) up to 12 weeks of unpaid, job-protected leave during any 12-month period for one or more of the following reasons:

- ▶ The birth and care of the newborn child of the employee
- ▶ Placement with the employee of a son or daughter for adoption or foster care
- ▶ Care for an immediate family member (spouse, child, or parent) with a serious health condition
- ▶ Medical leave when the employee is unable to work because of a serious health condition

The DOL has published a fact sheet on the FMLA at [www.dol.gov/whd/regs/compliance/whdfs28.pdf](http://www.dol.gov/whd/regs/compliance/whdfs28.pdf).

## **Uniformed Services Employment and Reemployment Rights Act, 1994**

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides reinforcement rights for individuals who miss work because of “service in the uniformed services,” which is defined as voluntary or involuntary uniformed service.

According to the Department of Justice: “USERRA is a federal statute that protects servicemembers’ and veterans’ civilian employment rights. Among other things, under certain conditions, USERRA requires employers to put individuals back to work in their civilian jobs after military service. USERRA also protects servicemembers from discrimination in the workplace based on their military service or affiliation” ([www.doj.gov](http://www.doj.gov)).

HR professionals must be fluent with the contents of the USERRA Fact Sheet 3, published by the DOL: [www.dol.gov/vets/programs/userra/userra\\_fs.htm](http://www.dol.gov/vets/programs/userra/userra_fs.htm).

## **Congressional Accountability Act, 1995**

Touted on the informational poster as “advancing safety, health, and workplace rights in the legislative branch,” the Congressional Accountability Act (CAA) protects Congress and Legislative Branch agency employees with coverage under 11 laws (which has subsequently been expanded to include 13 laws), including these:

- ▶ Fair Labor Standards Act (FLSA), 1938
- ▶ Title VII of the Civil Rights Act (Title VII), 1964
- ▶ Age Discrimination in Employment Act (ADEA), 1967
- ▶ Occupational Safety and Health Act (OSHA), 1970
- ▶ Rehabilitation Act, 1973
- ▶ Federal Service Labor-Management Relations Statute (FSLMRA), 1978
- ▶ Employee Polygraph Protection Act (EPPA), 1988
- ▶ Worker Adjustment and Retraining Notification Act (WARN Act), 1988
- ▶ Americans with Disabilities Act (ADA), 1990
- ▶ Family and Medical Leave Act (FMLA), 1993
- ▶ Uniformed Services Employment and Reemployment Act (USERRA), 1994

- ▶ Veterans' Employment Opportunities Act (VEOA), 1998
- ▶ Genetic Information Nondiscrimination Act (GINA), 2008

## **Americans with Disabilities Act Amendments Act, 2008**

The Americans with Disabilities Act Amendments Act (ADAAA) amended the ADA of 1990 by codifying a broader interpretation of the ADA, particularly with respect to the definition of a disability. Specifically, this Act established two new entitlements for military families: “qualifying exigency leave” and “military caregiver leave”:

“Qualifying exigency leave “may be taken for any qualifying exigency arising out of the fact that a covered military member is on active duty or call to active duty status” ([www.dol.gov](http://www.dol.gov)).

Military caregiver leave

“may be taken by an eligible employee to care for a covered servicemember with a serious injury or illness” ([www.dol.gov](http://www.dol.gov)).

“The Act 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.” ([www.eeoc.gov](http://www.eeoc.gov))

Also:

“The Act 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” ([www.eeoc.gov](http://www.eeoc.gov)).

## **Genetic Information Nondiscrimination Act, 2008**

Under Title II of the Genetic Information Nondiscrimination Act (GINA), it is “illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II (employment agencies, labor organizations and joint labor-management training and apprenticeship programs — referred to as ‘covered entities’) from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information” ([www.eeoc.gov](http://www.eeoc.gov)).

“The law forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. An employer may never use genetic information to make an employment decision because genetic information is not relevant to an individual’s current ability to work” ([www.eeoc.gov](http://www.eeoc.gov)).

HR professionals must be fluent in the following information about GINA, provided by the EEOC: [www.eeoc.gov/eeoc/newsroom/wysk/gina\\_nondiscrimination\\_act.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/gina_nondiscrimination_act.cfm).

## Lilly Ledbetter Fair Pay Act, 2009

The Lilly Ledbetter Fair Pay Act amended the Civil Rights Act of 1964 and was the first bill signed into law by President Barack Obama.

“Under the Act, an individual subjected to compensation discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, or the Americans with Disabilities Act of 1990 may file a charge within 180 (or 300) days of any of the following:

when a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;

when the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or

when the individual’s compensation is affected by the application of a discriminatory compensation decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or part on such compensation decision or other practice” (www.eeoc.gov).

In this sense, this Act expanded the procedural standing of employees (and former employees) who were negatively impacted by discriminatory wage decisions made in the past but which still impact current pay rates/earnings, to retain “standing” necessary to bring a lawsuit. How did it do so? By establishing that each paycheck event starts the statute of limitations anew.

Said differently, this “codifies the EEOC’s longstanding position that each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began. The Ledbetter Act recognizes the ‘reality of wage discrimination’ and restores ‘bedrock principles of American law. Particularly important for the victims of discrimination, the Act contains an explicit retroactivity provision” (www.eeoc.gov).

## Relevant Case Law

HR professionals must be well versed in key precedent-setting cases relating to EEO, as a subset of workforce planning and employment. The following summaries (presented in chronological order) describe the significance of some of those landmark cases.

### ***Griggs v. Duke Power, 1971***

**Key issue:** Adverse impact.

**Significance:** Discrimination need not be deliberate or observable to be real. Rather, it can exist if a particular policy or practice has a statistically significant adverse impact on members of a protected class. This is true even when the same requirement applies to all employees or applicants, as was the situation in this case. When a particular requirement does have an impact on members of a protected class, the burden of proof rests with the employer to demonstrate that the requirement is, in fact, job related and consistent with business necessity.

### ***McDonnell Douglas Corp v. Green, 1973***

**Key issue:** Disparate treatment/prima facie.

**Significance:** The initial burden of proof for establishing a prima facie (Latin for “at first view”) case of discrimination against an employer (or potential employer) under Title VII of the Civil Rights Act of 1964 rests with the employee (or applicant), who must be able to establish four key elements:

- ▶ The person is a member of a protected class.
- ▶ The person applied for a job for which the employer was seeking applicants.
- ▶ The person was rejected, despite being qualified for the position.
- ▶ After this rejection, the employer continued to seek other applicants with similar qualifications.

After the employee establishes a prima facie case for disparate treatment, the burden of proof then shifts to the employer, who must provide a nondiscriminatory reason for its decision.

This case falls under the category of “reverse discrimination” because it alleged race discrimination and was brought by individuals who were not minorities/people of color.

## ***Albemarle Paper v. Moody, 1975***

**Key issue:** Employment tests — job relatedness and validity of employment tests.

**Significance:** Any tests that are used as part of the hiring or promotional decision-making process must be job related. This applies to any instrument that is used as a “test,” even if that was not its original purpose. This case also established that employment tests must demonstrate predictive validity, consistent with the Uniform Guidelines for Employee Selection Procedures.

## ***Washington v. Davis, 1976***

**Key issue:** Employment tests and disparate impact.

**Significance:** A test that has an adverse impact on a protected class is still lawful as long as the test can be shown to be valid and job related.

## ***Regents of California v. Bakke, 1978***

**Key issue:** Affirmative action.

**Significance:** The Supreme Court ruled that although race could be a factor in college admission decisions, quotas could not be established.

Although this case was based on a college admissions program, its significance extended to workplace affirmative action programs.

This case falls under the category of “reverse discrimination” because it alleged race discrimination and was brought by someone who was not a minority/person of color.

## ***United Steelworkers v. Weber, 1979***

**Key issue:** Affirmative action.

**Significance:** Affirmative action plans that establish voluntary quotas that have been jointly agreed to by an organization as well as its collective bargaining unit do not constitute race

discrimination under Title VII of the Civil Rights Act of 1964 if they are designed to remedy past discrimination that has resulted in current underutilization.

This case falls under the category of “reverse discrimination” because it alleged race discrimination and was brought by someone who was not a minority/person of color.

## ***Meritor Savings Bank v. Vinson, 1986***

**Key issue:** Sexual harassment.

**Significance:** This was the first ruling to establish that sexual harassment (whether quid pro quo or hostile environment) constitutes a violation of Title VII of the Civil Rights Act of 1964. In addition, the court ruled that it isn’t enough for an organization to have a policy prohibiting discrimination. Instead, the ruling stated, “Reasonable care requires effective communication of policies and training. The employer has the burden of proof.”

## ***Johnson v. Santa Clara County Transportation Agency, 1987***

**Key issue:** Affirmative action.

**Significance:** Gender can be used as a factor in the selection process if there is underrepresentation in a particular job classification, as long as the AAP does not set forth a quota.

This case falls under the category of “reverse discrimination” because it alleged sex discrimination and was brought by a man.

## ***Martin v. Wilks, 1988***

**Key issue:** Affirmative action.

**Significance:** Current employees who are negatively affected by consent decrees that were established in an earlier time and that sought to resolve discrimination that was present in an earlier time may challenge the validity of such decrees.

This case falls under the category of “reverse discrimination” because it alleged race discrimination and was brought by individuals who were not minorities/people of color.

## ***Automobile Workers v. Johnson Controls, 1990***

**Key issue:** Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act.

**Significance:** The Supreme Court ruled that Johnson Controls’ fetal protection policy constituted a violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act. As such, even rules that are well intentioned are unlawful if such rules result in discrimination on the basis of sex.

## ***Harris v. Forklift Systems, 1993***

**Key issue:** Sexual harassment.

**Significance:** The court clarified the standard relative to what constitutes a sexually hostile work environment: “This standard, which we reaffirm today, takes a middle path between

making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.”

### ***Taxman v. Board of Education of Piscataway, 1993***

**Key issue:** Affirmative action.

**Significance:** The U.S. Court of Appeals for the Third Circuit ruled that—in the absence of underrepresentation as demonstrated and documented through an affirmative action plan—organizations cannot take race into account when making decisions relative to who will be laid off and who will be retained. Doing so would constitute a violation of Title VII of the Civil Rights Act of 1964.

This case falls under the category of “reverse discrimination” because it alleged race discrimination and was brought by a person who was not a minority/person of color.

### ***St. Mary’s Honor Center v. Hicks, 1993***

**Key issue:** Burden of proof.

**Significance:** To ultimately prevail in an allegation of discrimination under Title VII of the Civil Rights Act of 1964, the charging party (meaning, the employee who filed the charge) must go beyond a prima facie case and actually prove that the employer’s actual reasons for an employment action are, in fact, discriminatory.

### ***McKennon v. Nashville Banner Publishing Co., 1995***

**Key issue:** After-acquired evidence.

**Significance:** An employer will be held accountable for discriminatory employment actions even if it discovers evidence after taking the discriminatory employment action that would have led the employer to that same employment action for legitimate, nondiscriminatory reasons.

This case falls under the category of “reverse discrimination” since it alleged race discrimination and was brought by someone who was not a minority/person of color.

### ***Faragher v. City of Boca Raton, 1998, and Ellerth v. Burlington Northern Industries, 1998***

**Key issue:** Sexual harassment.

**Significance:** If an employee is subjected to a tangible adverse employment action because of a supervisor’s sexually harassing behavior, the employer is liable. The employer is also vicariously liable when its supervisors create a sexually hostile work environment, even if the employee is not subjected to an adverse employment action. This is true whether or not the employer itself was negligent or otherwise at fault. However, if the employee is not subjected to tangible adverse employment action, the employer may be able to raise as a defense that



he acted reasonably to prevent or promptly correct any sexually harassing behavior and that the plaintiff unreasonably failed to take advantage of the employer's preventive or corrective opportunities.

### ***Oncale v. Sundowner Offshore Services, 1999***

**Key issue:** Sex discrimination, by members of one sex against a person of the same sex.

**Significance:** Title VII's prohibition of sex discrimination does include harassment of individuals by others who happen to be the same sex.

### ***Kolstad v. American Dental Association, 1999***

**Key issue:** Punitive damages under the Civil Rights Act of 1991.

**Significance:** Punitive damages can be awarded only when the employer has acted with malice and reckless indifference to the employee's federally protected rights.

This subjective standard was considered to be easier to establish than the more objective standard that would be required if employees had to prove that the nature of the actual behavior to which they had been subjected reached a level in which it would be considered "egregious."

### ***Circuit City Stores, Inc. v. Adams, 2001***

**Key issue:** Mandatory arbitration agreements as a condition of employment.

**Significance:** The Supreme Court confirmed the legality of requiring employees to sign mandatory arbitration agreements as a condition of employment and that such agreements are enforceable under the Federal Arbitration Act (FAA), with the exception of seamen and railway workers.

### ***Grutter v. Bollinger and Gratz v. Bollinger, 2003***

**Context:** Barbara Grutter was applying for admission to the University of Michigan Law School, and Jennifer Gratz was applying for admission to the University of Michigan as an undergraduate student. Lee Bollinger was the president of the University of Michigan.

**Key issue:** Affirmative action.

**Significance:** Race can be taken into account as an admissions factor because it furthers the establishment of diversity—a "compelling state interest"—as long as the admissions process is "narrowly tailored" to achieve the objective of achieving a diverse student body.

Interestingly, Supreme Court Justice Sandra Day O'Connor indicated that cases of this sort will likely be ruled differently at some point in the future: "Race-conscious admissions policies must be limited in time. The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

These cases fall under the category of "reverse discrimination" because they alleged race discrimination and were brought by people who were not minorities/people of color.

## ***General Dynamics Land Systems v. Cline, 2004***

**Key issue:** Age discrimination (relative).

**Significance:** Younger employees (even if they are over the age of 40) cannot allege age discrimination because of the establishment of programs or decisions that favor older employees. As Justice David Souter wrote in the opening of his opinion, “The Age Discrimination in Employment Act of 1967 (ADEA or Act), 81 Stat. 602, 29 U.S.C. § 621 et seq., forbids discriminatory preference for the young over the old. The question in this case is whether it also prohibits favoring the old over the young. We hold it does not.”

This case falls under the category of “reverse discrimination” because it alleged age discrimination and was brought by a person who was relatively younger.

## ***Ricci v. DeStefano, 2009***

**Key issue:** Disparate impact.

**Significance:** The Supreme Court confirmed that, “fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.”

## ***Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc., 2015***

**Key issue:** The need for religious accommodation, when such need has not been explicitly communicated to the employer.

**Significance:** According to the Supreme Court, “motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.”

This case involved an applicant named Samantha Eluef. Eleuf, a practicing Muslim, wore a hijab to her interview but did not specifically request a religious accommodation to wear it on a daily basis at work.

# **Legal Concepts/Definitions Relevant to Workplace Planning and Employment**

In addition to knowing the laws listed earlier, it’s also essential to know, understand, and be able to identify the relevance of a variety of legal concepts and definitions. In this section, we’ll explore and discuss those that pertain primarily to Workforce Planning and Employment.

## **Equal Employment Opportunity: The Basics**

EEO represents a commitment to ensure that equal opportunity throughout all dimensions of the employment relationship serves as the backdrop to employment-related legislation. To

be effective in their roles (and to ensure compliance with the law), HR professionals need to understand certain fundamental Equal Employment Opportunity (EEO)-related concepts. This section will address and discuss some basic EEO-related concepts.

## Protected Class

A *protected class* is a group of people who share a common characteristic and who are protected by law from discrimination and harassment on the basis of that shared characteristic.

## Discrimination

Discrimination, in the truest sense of the word, is not necessarily illegal. To discriminate is to make a distinction, or to discern. When distinctions or discernments are made on the basis of factors, traits, or characteristics that are protected by law, however, discrimination becomes unlawful.

### Types of Unlawful Discrimination

HR professionals must be knowledgeable about the following types of discrimination:

- ▶ Disparate (or “adverse”) treatment
- ▶ Disparate (or “adverse”) impact
- ▶ Perpetuating past discrimination

### ***Disparate (or “Adverse”) Treatment***

*Disparate (or “adverse”) treatment* is a type of unlawful discrimination that occurs when an employer intentionally treats applicants or employees differently on the basis of their race, color, sex, religion, national origin, age, disability, military or veteran status, or any other characteristic protected by law. The following would constitute examples of disparate treatment:

- ▶ Candidates who indicate on their employment application that they speak Spanish are interviewed (in part or in whole) in Spanish, but all other candidates are interviewed in English.
- ▶ Female members of a team or department are asked to take meeting minutes or provide refreshments, whereas male members are not.
- ▶ The quality or quantity of work that is performed by employees who request a modified work schedule so they can attend religious services is more closely scrutinized than the quality or quantity of work performed by employees who do not make such a request.

### ***Disparate (or “Adverse”) Impact***

*Disparate (or adverse) impact* occurs when a seemingly neutral policy or practice has a disproportionately negative effect upon one or more members of a protected class. In this context, policies or practices that do not reflect legitimate job requirements but do have a statistically significant impact on members of a protected class may constitute unlawful discrimination. For instance:

- ▶ An organization requires that all newly hired employees have a college degree, even though a degree is not required to perform some of the jobs that exist within the organization. If members of protected classes are “screened out” at a statistically higher rate, an allegation of disparate impact might be upheld.

- ▶ An organization requires that all newly promoted managers spend the first six months on the job working at six different—and geographically dispersed—locations throughout the country. If members of a protected class are eliminated from consideration for employment at a statistically higher rate because of this policy, and if this policy is found to be unrelated to successful performance of the position, an allegation of disparate impact might be upheld.

### **Determining Whether Adverse Impact Exists Within a Selection Process**

It's important to know how to mathematically determine whether adverse impact exists within a selection process. The Uniform Guidelines on Employee Selection Procedures (1978), which is explored in the "Uniform Guidelines on Employee Selection Procedures (1978)" section in this chapter, discusses and defines adverse impact in two separate—but interrelated—ways. First, let's take a look at the "bottom-line" concept":

"If the information called for by sections 4A and B of this section shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in paragraphs (1) and (2) of this section, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component" ([www.dol.gov](http://www.dol.gov)).

Next, let's take a look at the "four-fifths" rule:

"A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force" ([www.dol.gov](http://www.dol.gov)).

Thus, whereas disparate treatment is an intentional form of discrimination, disparate impact may be either intentional or unintentional. Ultimately, however, the question of intent has limited importance in that lack of intent neither alters nor excuses the fact that unlawful discrimination has occurred.

***Perpetuating Past Discrimination***

Unlawful discrimination also occurs when an employer's past discriminatory practices are perpetuated through current policies or practices—even those that appear to be nondiscriminatory. When linked in some way with past discrimination, seemingly nondiscriminatory practices can have a discriminatory effect.

One of the most commonly recognized examples of how past discrimination can be perpetuated through current policy or practice can be found in the use of employee referral programs. Here's how this can happen: if discriminatory hiring decisions have been made in the past, an employer's workforce may now be primarily composed of people who are not members of protected classes—perhaps people who are white or male. If that same employer uses referrals from current employees as the primary means of recruiting new employees, it is likely that the individuals who will subsequently be brought into the workforce may also be primarily white or male—thus perpetuating the potentially discriminatory (albeit unintentional) staffing decisions that were made in the past.

***Harassment: (Yet) Another Type of Unlawful Discrimination***

Unlawful workplace discrimination can also manifest itself as harassment of a person on the basis of her membership in a protected class. Although most of the landmark court cases and media coverage on this topic focus on sexual harassment, HR professionals must be cognizant of the fact that harassment on the basis of any protected class—not just sex—may constitute unlawful discrimination.

The EEOC has issued the following information/guidelines around harassment:

“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 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 antiharassment

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” ([www.eeoc.gov](http://www.eeoc.gov)).

### ***Sexual Harassment***

Sexual harassment is a form of sex discrimination, which was rendered illegal by Title VII of the Civil Rights Act of 1964. The EEOC defines sexual harassment as follows:

“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.
2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.”

There are two categories of sexual harassment:

- ▶ **Quid pro quo:** As previously articulated in point 2, quid pro quo harassment occurs when an individual's submission to or rejection of sexual advances or conduct of a sexual nature is used as the basis for employment-related decisions. Quid pro quo harassment, therefore, originates from a supervisor or from others who have the authority to influence or make decisions about the employee's terms and conditions of employment.
- ▶ **Hostile work environment:** Hostile work environment harassment occurs when unwelcome sexual conduct unreasonably interferes with an individual's job performance or creates a hostile, intimidating, or offensive work environment. Hostile work environment

harassment can be found to exist whether or not the employee experiences (or runs the risk of experiencing) tangible or economic work-related consequences. By definition, a hostile work environment can be created by virtually anyone with whom an employee might come in contact in the workplace (or “workspace,” in the event of remote harassment through electronic means such as emails, faxes, instant messages (IMs), and so on).

## Key EEO-Related Terms

In going through this section, and as you prepare for the PHR exam, there are some terms that you’ll need to be familiar with:

- ▶ **Charge:** A formal complaint, submitted to an agency, that alleges unlawful discrimination.
- ▶ **Charging party:** A person who alleges that he has experienced unlawful discrimination (also called the complainant).
- ▶ **Complainant:** A person who alleges that she has experienced unlawful discrimination (also called the charging party).
- ▶ **EEOC:** The government agency responsible for enforcing Title VII of the Civil Rights Act of 1964 (Title VII), the Equal Pay Act (EPA), the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA).
- ▶ **Plaintiff:** A party who files a lawsuit alleging unlawful discrimination.
- ▶ **Respondent:** The employer, person, or party against whom a charge of unlawful discrimination has been filed.
- ▶ **Fair Employment Practices Agencies (FEPAs):** State or local agencies responsible for enforcing EEO laws that are specific to their respective jurisdiction. At the state level, 47 states (all except Alabama, Arkansas, and Mississippi) have agencies that respond to charges of EEO violations.

## Federal, State, and Local Jurisdictions

On the federal level, the agency charged with enforcing many of the laws that are aimed at eliminating discrimination is the EEOC.

Sometimes charges can be filed under two or even three jurisdictions. For instance,

- ▶ If a charge is filed with a FEPA but is also covered by federal law, the FEPA “dual files” the charge with EEOC to protect federal rights. In this scenario, the FEPA will usually maintain responsibility for handling the charge.
- ▶ If a charge is filed with EEOC but is also covered by state or local law, EEOC “dual files” the charge with the state or local FEPA. In this scenario, the EEOC will usually maintain responsibility for handling the charge.

At other times, when a state or local EEO law is more protective than the corresponding federal law (or when a corresponding federal law does not exist), a charge may be filed only with the FEPA, whose laws offer greater protection to employees.

## Filing Charges: Time Limits and Related Information

The EEOC offers the following guidelines relative to filing charges of discrimination ([www.eeoc.gov](http://www.eeoc.gov)):

### Filing a Charge of Employment Discrimination

Federal employees or applicants for federal employment should see Federal Sector Equal Employment Opportunity Complaint Processing.

### Who Can File a Charge of Discrimination?

Any individual who believes that her employment rights have been violated may file a charge of discrimination with EEOC.

In addition, an individual, organization, or agency may file a charge on behalf of another person to protect the aggrieved person's identity.

### How Is a Charge of Discrimination Filed?

A charge may be filed by mail or in person at the nearest EEOC office.

Individuals who need an accommodation to file a charge (such as a sign language interpreter or print materials in an accessible format) should inform the EEOC field office so appropriate arrangements can be made.

Federal employees or applicants for employment should see Federal Sector Equal Employment Opportunity Complaint Processing.

### What Information Must Be Provided to File a Charge?

The following information must be provided to file a charge:

- ▶ The complaining party's name, address, and telephone number.
- ▶ The name, address, and telephone number of the respondent employer, employment agency, or union that is alleged to have discriminated, and the number of employees (or union members), if known.
- ▶ A short description of the alleged violation (the event that caused the complaining party to believe that his or her rights were violated).
- ▶ The date(s) of the alleged violation(s).

Federal employees or applicants for employment should see Federal Sector Equal Employment Opportunity Complaint Processing.

### What Are the Time Limits for Filing a Charge of Discrimination?

All laws enforced by EEOC, except the Equal Pay Act, require filing a charge with EEOC before a private lawsuit may be filed in court. There are strict time limits within which charges must be filed:

- ▶ A charge must be filed with EEOC within 180 days from the date of the alleged violation to protect the charging party's rights.
- ▶ This 180-day filing deadline is extended to 300 days if the charge also is covered by a state or local antidiscrimination law. For ADEA charges, only state laws extend the filing limit to 300 days.



- ▶ These time limits do not apply to claims under the Equal Pay Act because under that Act persons do not have to first file a charge with EEOC to have the right to go to court. However, because many EPA claims also raise Title VII sex discrimination issues, it may be advisable to file charges under both laws within the time limits indicated.
- ▶ To protect legal rights, it is always best to contact EEOC promptly when discrimination is suspected.
- ▶ Federal employees or applicants for employment should see Federal Sector Equal Employment Opportunity Complaint Processing.

### **What Agency Handles a Charge That Is Also Covered by State or Local Law?**

Many states and localities have antidiscrimination laws and agencies responsible for enforcing those laws. EEOC refers to these agencies as FEPAs. Through the use of “work sharing agreements,” EEOC and the FEPAs avoid duplication of effort while ensuring that a charging party’s rights are protected under both federal and state law.

- ▶ If a charge is filed with a FEPA but also covered by federal law, the FEPA “dual files” the charge with EEOC to protect federal rights. The charge usually will be retained by the FEPA for handling.
- ▶ If a charge is filed with EEOC but also covered by state or local law, EEOC “dual files” the charge with the state or local FEPA but ordinarily retains the charge for handling.

### **How Is a Charge Filed for Discrimination Outside the United States?**

U.S.-based companies that employ U.S. citizens outside the United States or its territories are covered under EEO laws, with certain exceptions. An individual alleging an EEO violation outside the U.S. should file a charge with the district office closest to her employer’s headquarters. However, if you are unsure where to file, you may file a charge with any EEOC office.

## **EEOC—Handling Charges**

After a charge of discrimination has been filed, the EEOC sends a letter to the employer notifying it that a complaint has been filed. At this point, some employers will decide to “settle.” There are any number of reasons why an organization might decide to settle, just a few of which include the following:

- ▶ To elude the requirement of providing information to the EEOC.
- ▶ To avoid allocating resources (financial, human, emotional, and otherwise) to the process of responding to a charge of discrimination, especially if it appears that the costs of fighting may outweigh the benefits of prevailing (“winning”)—even if the organization believes that no unlawful discrimination has taken place.
- ▶ To prevent the possibility of bad press that can, at times, be generated even by the mere filing of a charge of discrimination.
- ▶ To seek a resolution to a situation in which the employer believes that there may be exposure (in other words, where the charge of discrimination may be valid).

Alternatively, many employers choose not to seek a settlement agreement when a charge of discrimination is first filed. In such situations, there are four primary ways that the EEOC can handle the charge:

- ▶ **Investigate it:** Investigations can be designated as “high priority” or “non-high priority,” depending upon the strength of the facts that have been presented in the charge. An EEOC investigation can take myriad forms, including written requests for information, in-person interviews, document reviews, and even a visit to the location where the discrimination allegedly occurred.
- ▶ **Settle it:** A charge can be settled at any stage of the investigation if the charging party and the employer are both interested in doing so. If no settlement is reached, the investigation resumes.
- ▶ **Mediate it:** The EEOC offers a confidential mediation program as an alternative to a lengthy investigative process. For a charge to be mediated, the charging party and the employer must both be willing to participate. If the mediation process is not successful, the charge will be investigated.
- ▶ **Dismiss it:** A charge can be dismissed at any point in the process if the agency determines that further investigation will not be able to establish that the alleged unlawful discrimination actually occurred. When a charge is dismissed, a notice is issued in accordance with the law that gives the charging party 90 days within which to file a lawsuit on his own behalf.

## EEOC Determinations

The EEOC determines whether there is “reasonable cause” to believe that unlawful discrimination has occurred.

When the EEOC determines that discrimination has likely occurred, it issues a finding of “reasonable cause.” This determination is based on the evidence gathered during the investigation. If the EEOC determines that there is reasonable cause, the EEOC will attempt conciliation with the employer in an effort to develop a remedy for the discrimination. If the EEOC cannot conciliate the case, the EEOC will decide whether to take the case to court. (The EEOC chooses to litigate a very small percentage of cases.) If the EEOC does not take the case to court, it will close the case and issue the charging party a “right to sue” letter.

If the EEOC determines that there is no reasonable cause, the case is closed, the parties are notified, and the charging party is given a “right to sue” letter. The charging party then has 90 days to file a private lawsuit.

The charging party can also request a right to sue letter from the EEOC 180 days after the charge was filed (60 days for ADEA). A charging party may not bring a case to court if the charge has been successfully conciliated, mediated, or settled.

## EEO—Going to Court

If a case does proceed to court, HR’s role will vary significantly, depending on a host of factors. For instance, in some organizations, HR may be called on to assist in-house or outside counsel with responding to a complaint, to collect data as part of the discovery process, or to be available to assist and facilitate the process. Depending on HR’s role in the actual case,

HR professionals may be deposed, testify, or represent the organization during the trial—in a sense, being the “face” of the organization to the judge and jury.

#### NOTE

It is important to keep in mind the critical and unique role of juries. A “jury of one’s peers” might be more likely to identify with a plaintiff than with an organization. In short, from the perspective of the organization, the turf is a bit less friendly and the stakes are higher than they were before 1991.

## Relief or Remedies

When a plaintiff prevails in an EEO lawsuit, she may be awarded various forms of “relief” or remedies (whether the discrimination was intentional or unintentional):

- ▶ Back pay
- ▶ Hiring, or front pay (instead of hiring the individual)
- ▶ Promotion
- ▶ Reinstatement, or front pay (instead of rehiring the individual)
- ▶ Reasonable accommodation
- ▶ Other actions that will make an individual “whole” (in the condition that she would have been but for the discrimination)
- ▶ Attorneys’ fees
- ▶ Expert witness fees
- ▶ Court costs

Compensatory and punitive damages may also be available when the discrimination is found to be intentional (and in rare cases, even when the discrimination is found to be unintentional).

## Understanding Front Pay

The concept of front pay is one with which HR professionals should be familiar. According to the EEOC ([www.eeoc.gov](http://www.eeoc.gov)):

“The remedy of front pay compensates a victim in situations where reinstatement or nondiscriminatory placement would be an available remedy, but is denied for reasons peculiar to the individual claim. The compensation of front pay makes the victim of discrimination whole generally until such nondiscriminatory placement can be accomplished. See *Romero v. Department of the Air Force*.”

Numerous decisions of the Commission have recognized the Commission’s authority to award front pay as a remedy and have discussed the propriety of such an award under the particular facts of those cases. The Commission decisions discussed in this article were selected to illustrate the Commission’s treatment of the front pay remedy.

Reinstatement or nondiscriminatory placement is preferred over the remedy of front pay. See *Romero*. However, front pay may be determined to be more appropriate in certain situations. The Court in *EEOC v. Prudential Federal Savings and Loan Association* stated that front pay should be awarded “when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible.”

The Commission in *Finlay v. United States Postal Service*, and in earlier cases cited in Finlay, set out three circumstances in which front pay may be awarded in lieu of reinstatement: (1) Where no position is available; (2) Where a subsequent working relationship between the parties would be antagonistic; or (3) Where the employer has a record of long-term resistance to discrimination efforts.

#### NOTE

This highlights the reality that any situation could potentially devolve into a lawsuit. Sometimes there is nothing you can do to prevent that from happening. It's also not helpful to worry excessively about the possibility of litigation. The best that any of us can do is to ensure that we handle situations well (and consistently), that we seek to deescalate situations whenever possible, that we invite employees to raise concerns internally, and that we—along with the clients with whom we consult—conduct ourselves in a manner that will, if subjected to scrutiny, hold up.

HR professionals play various roles in the organization; one of the most important is the role of proactive observer. In short, if you believe that a situation has the possibility to produce a charge of discrimination or any other legal challenges, notify your senior HR colleagues and, as appropriate, counsel. Depending on the culture of your organization, you may want to consider seeking input from counsel along the way. Also remember the fine line that HR cannot cross—HR professionals cannot practice law. We must, however, recognize when we need to call in someone who can (such as in-house or outside counsel). This can, at times, be a fine line to walk.

### Equal Opportunity...for Whom?

Ensuring EEO is an ever-evolving concept. As such, it might be more accurate to say that, as of today, these laws ensure equal opportunities for “most,” rather than for “all.”

There are still individuals who—at a federal level—can be excluded from consideration for employment on the basis of shared characteristics or traits—even though those characteristics or traits are not job related. For instance, as of the time when this book was published, no federal law exists prohibiting employment discrimination on the basis of sexual orientation or on the basis of marital status, even though certain states do offer those additional protections.

This chapter is based upon the assumption that all workforce planning and employment decisions should be based on job-related factors. Doing so will help ensure that we do not run afoul of the law. Additionally—and perhaps just as important—this will also ensure that we do not eliminate qualified individuals on the basis of factors that have nothing to do with whether they can perform the jobs for which they are applying.

#### RESPONSIBILITY

### WPE Responsibility 02

Identify workforce requirements to achieve the organization's short- and long-term goals and objectives (for example: corporate restructuring, workforce expansion, or reduction).

#### RESPONSIBILITY

### WPE Responsibility 03

Conduct job analyses to create and/or update job descriptions and identify job competencies.

#### RESPONSIBILITY

### WPE Responsibility 04

Identify, review, document, and update essential job functions for positions.

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### WPE Responsibility 05

Influence and establish criteria for hiring, retaining, and promoting based on job descriptions and required competencies.

**RESPONSIBILITY**


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### WPE Responsibility 15

Develop, implement, and evaluate employee retention strategies and practices.

**RESPONSIBILITY**


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### Knowledge 23

Internal workforce assessment techniques (for example: skills testing, skills inventory, workforce demographic analysis).

**KNOWLEDGE**

HR professionals must partner with management and leadership to determine functionally—and on a job-by-job basis—what these employees will need to do to move the organization to where it needs to go. These are the all-important workforce analysis and planning functions. It is in this context that we will look at jobs.

It's important to note that not all organizations conduct this process in the same order. And that's okay. It's more important to ensure that all these steps are taken in a logical way that will yield solid results than it is to mandate a particular process.

## Job Analysis

Job analysis is the process by which information about a specific position is collected. Job analysis produces three important outputs that are critical to the workforce planning process:

- ▶ Job description
- ▶ Job specifications
- ▶ Job competencies

### Job Description

Job descriptions are a key tool for many of the functions that HR professionals perform. Although they can take many different formats, most job descriptions have several elements in common:

- ▶ **Identifying information:** This includes job title, department or division name, reporting relationship, FLSA status, the date on which the description was written, the name of the person who wrote it, and so on.
- ▶ **Scope information:** This is the area of responsibility for, over, or within which this position has authority or responsibility.
- ▶ **Responsibility for supervision, if applicable:** This includes any positions whom the position incumbent supervises.
- ▶ **Physical work conditions or physical demands:** Although easy to overlook, it's critical to include this information in the job description.

- ▶ **Minimum requirements:** Often, this refers to experience, education, or other mandatory credentials required to perform the position successfully. These are often the factors that will be initially used to screen candidates in or out during the résumé review process and to determine who will be interviewed.
- ▶ **Knowledge, skills, and abilities required:** These are acceptable levels of knowledge, skills, and abilities (also known as KSAs). These may include items that organizations or interviewers sometimes mistakenly take for granted and do not explore enough with candidates during the selection process.
  - ▶ **Knowledge:** Simply stated, knowledge is what the incumbent needs to know about a specific body of information to be able to perform the position successfully. For instance, an instructor who conducts training onsite at a particular organization may need to have knowledge of organizational dynamics. An automotive mechanic may need to have knowledge of mechanical, electronic, and computer technology.
  - ▶ **Skills:** Skills refer to the ability to perform a particular task. For instance, the instructor may need to possess the ability to engage participants in facilitated discussions about the workshop topics. The automotive mechanic may need to possess the ability to drive a standard (or “stick”) shift.
  - ▶ **Abilities:** Abilities refer to specific traits or behavioral characteristics required to perform successfully in a position. For instance, an instructor may need to demonstrate a willingness and comfort to engage quickly with people with whom she is not previously acquainted (which could perhaps be referred to as “outgoing”). The automotive mechanic might need to be mechanically inclined.
- ▶ **Overall purpose of the position:** This is a short (usually less than a paragraph, and maybe even as short as a sentence) statement summarizing why the position exists and what it is intended to accomplish.
- ▶ **Overall purpose/mission of the organization:** Some organizations choose to include the mission of the organization on each job description as a way of ensuring that the mission of the position is—and remains—meaningfully linked to and aligned with the mission of the organization.
- ▶ **Duties and responsibilities:** These are tasks and functions that the incumbent is expected to perform. Sometimes job descriptions also indicate the percentage of time that is spent on each major responsibility or group of responsibilities (which may or may not correlate to the importance of the responsibility).

Although there is no one definitive, or master, list of what should be included in a job description, selecting and including appropriate elements (such as those listed here) ensures that the job description is accurate, thorough, and on target to serve (ultimately) as a valuable resource for other projects and initiatives.

### **Essential and Nonessential Job Functions**

For ADA and other purposes, duties and responsibilities should be divided into two categories: essential and nonessential job functions.

The ADA states that “consideration shall be given to 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” ([www.eeoc.gov](http://www.eeoc.gov)). Failure to have a job description in place, therefore, could diminish the strength of the employer’s position in defending an allegation that an employee or applicant has been discriminated against on the basis of disability. In short, employers can’t “make up” (or look like they are making up) requirements after the fact.

Essential functions are those that are inherently fundamental and necessary to a position. Together—and perhaps even on their own—they constitute part (or even most, or all) of the reason that the job exists. Often, an essential function cannot be performed by many—or perhaps even by any—other employees in the organization.

Conversely, nonessential functions are more peripheral to the position. They generally constitute a smaller and relatively unimportant part of the position and could fairly easily be performed by other employees.

#### NOTE

Confer with managers, senior HR staff, and counsel—as appropriate—relative to delineating essential from nonessential functions. This decision should never be made in a vacuum.

### Job Specifications (or “Specs”)

Job specifications refer to the qualifications that a successful candidate must possess or demonstrate to perform effectively in a position. These could refer to the skills, knowledge, abilities, behavioral characteristics, and other credentials and experience necessary to perform a position successfully. They do *not*, however, refer to the qualifications that the best-qualified candidate might possess or bring to a role; instead, they refer to what it will take to get the job done in a manner that fully meets expectations of the position.

Job specs can be expressed as

- ▶ **KSAs:** The minimally acceptable levels of knowledge, skills, and abilities required to successfully perform a position
- ▶ **Credentials:** Years of experience, educational requirements, and so on
- ▶ **Requirements:** Physical or mental

#### NOTE

Credentials, although important to establish and consider, can be misleading. Said differently, a person who possesses or has earned a particular credential doesn’t necessarily have the knowledge or skills that one might assume go along with that credential. Earning a four-year degree in accounting, for instance, doesn’t necessarily mean that a candidate can perform certain accounting functions. Similarly, the greatest accomplishment of a candidate who has five years of related professional-level experience may, in fact, be that she was not terminated during those five years. Or, she might have one year’s worth of professional-level experience that she has repeated five times. The bottom line—don’t make assumptions. Credentials should be a starting point, not an ending point, for making selection decisions.

### Job Competencies

Job competencies speak to broad categories of skills, abilities, or behavioral characteristics that are required to perform successfully in a particular position, department, or organization. These are often embraced by organizations with terms such as “key success factors,” “competencies for success,” or “performance factors.” They could include things such as

“communication skills,” “teamwork,” or “initiative.” The same competencies may manifest themselves differently in different positions or departments throughout the organization.

*BFOQs* are legitimate job requirements mandated by business necessity that can have an unintended discriminatory (disparate) impact on applicants or employees.

## Job Analysis

Job analysis is the process through which information about a position is inventoried. The elements that compose each job in the organization are identified through this process. These elements often include

- ▶ Responsibilities, duties, and tasks performed by the position incumbent.
- ▶ How those responsibilities, duties, and tasks relate to each other and to other jobs within the organization. This includes how frequently each of those activities is performed as well as how activities relate to each other in terms of importance.

Job analysis also identifies the KSAs required for successful performance of the position.

### NOTE

Although HR professionals usually lead job analysis initiatives, “leadership” must not become confused with “ownership.” HR professionals perform job analysis on behalf of clients. The clients are the ones, however, who own the initiatives and must live with the results. HR must function in a consultative manner to ensure support and buy-in from internal clients.

Job analysis is not about completing a form. It is also not just about the job description that will be produced as a byproduct of the job analysis. Rather, it is a building block as you continue to form relationships with your internal clients. It will either enhance or diminish how others within your organization perceive you.

### NOTE

There may be a temptation to define a job according to the skills, abilities, or behavioral characteristics that the current—or former—incumbent brings to it. However, job analysis must focus on the job, not on the individual who holds, or held, that particular position. It must also not be unduly influenced by the current labor market—real or perceived.

## How to Conduct a Job Analysis

There are many ways to collect information that will be used in conducting a job analysis. Depending on what is appropriate in your organization, consider the following:

- ▶ Interviewing the incumbent, or the prior incumbent, if that person is available
- ▶ Interviewing the person who supervises the position
- ▶ Interviewing the supervisor’s supervisor
- ▶ Interviewing coworkers
- ▶ Interviewing direct reports, if applicable
- ▶ Interviewing clients or customers with whom the position interacts



- ▶ Interviewing vendors with whom the position interacts
- ▶ Observing the incumbent performing the position, if possible and appropriate
- ▶ Reviewing work product
- ▶ Reviewing any documentation, reports, or performance-related statistics or records generated by—or about—the position

**NOTE**

Another option is to consider taking a 360-degree/multi-rater approach to conducting a job analysis for the position. This would involve collecting input from multiple individuals (up to, and possibly including everyone) with whom the position interacts.

**Conducting Job Analysis Interviews**

Interviews can be conducted in person, through written or emailed surveys, or by a combination of both. Either way, be sensitive to the amount of time you ask people to invest in this process. Work to ensure that this process remains as streamlined and efficient as possible, while still ensuring that you collect the information you need.

Interviews/questionnaires may vary in length and content, depending on the nature and amount of involvement and contact that the interviewee has with the position. Also be certain that you explain the purpose of the interview/questionnaires and the way in which participating in this process will ultimately benefit the interviewee.

**Job Descriptions**

One of the primary results generated by a job analysis is a job description. A job description is an inventory of important information gathered about the position during the job analysis process.

Different organizations structure their job descriptions differently. In large part, this is a function of the job evaluation system that will be used. Job descriptions, however, incorporate stylistic as well as substantive considerations. They reflect, to a degree, the culture of the organization.

**How to Create a Job Description**

However the job description is designed, certain elements should be included:

- ▶ Job title
- ▶ Date on which the description was completed
- ▶ Name of person preparing the description
- ▶ Department, unit, or division
- ▶ Supervisory reporting relationship(s)
- ▶ Direct reporting relationships, if applicable
- ▶ Essential functions
- ▶ Nonessential functions

- ▶ Working conditions and environment
- ▶ Physical requirements of the position
- ▶ Degree of financial accountability
- ▶ Qualifications required to perform the position

Although there is no one definitive, or master, list of what should be included in a job description, selecting and including appropriate elements (such as those listed above) in the job description ensures that the job description is accurate, thorough, and on target to serve (ultimately) as a valuable resource for other projects and initiatives.

### RESPONSIBILITY

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#### WPE Responsibility 06

Analyze labor market for trends that impact the ability to meet workforce requirements (for example: federal/state data reports).

### RESPONSIBILITY

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#### WPE Responsibility 07

Assess skill sets of internal workforce and external labor market to determine the availability of qualified candidates, utilizing third-party vendors or agencies as appropriate.

### RESPONSIBILITY

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#### WPE Responsibility 08

Identify internal and external recruitment sources (for example, employee referrals, diversity groups, social media) and implement selected recruitment methods.

### RESPONSIBILITY

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#### WPE Responsibility 10

Brand and market the organization to potential qualified applicants.

### KNOWLEDGE

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#### Knowledge 13

Recruitment sources (for example, employee referral, social networking/social media) for targeting passive, semi-active and active candidates.

### KNOWLEDGE

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#### Knowledge 14

Recruitment strategies.

### KNOWLEDGE

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#### Knowledge 15

Staffing alternatives (for example, outsourcing, job sharing, phased retirement).

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**Knowledge 16**

Planning techniques (for example, succession planning, forecasting).

**KNOWLEDGE**

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**Knowledge 25**

Employer marketing and branding techniques.

**KNOWLEDGE**

## Recruiting Candidates

“Recruiting and selection” are often thought of as a single process. In fact, however, they are two separate components of the staffing process and need to be approached and carried out separately. Recruiting is the process of attracting and creating a pool of qualified candidates. Selection is the process of identifying the candidate(s) to whom the position will be offered.

## Employer Branding

Before an employer goes out in search of new employees, it needs to consider how potential candidates in the labor market will perceive the organization. Organizations create a “brand” as an employer in much the same way they create a brand for the product or service that they market to their customers. So, just as an organization markets its products or services deliberately and intentionally, it must deliberately and intentionally decide on a marketing strategy that will be used to promote the employer’s brand within the labor market.

## Relevant Labor Market

In looking at drawing from an external pool of candidates, it is important to first define the relevant labor market. This refers to the size and scope of the geographic area within which an organization would seek to attract qualified candidates for a particular position(s).

Even within the same organization, the relevant labor market for different positions can vary widely depending upon the skills, knowledge, abilities, and behavioral characteristics required to perform each position successfully. Other factors that impact how an organization defines the relevant labor market might be the degree of competition that exists among employers for particular skills or knowledge and the degree to which certain skills or knowledge requirements are industry specific.

## Selection Criteria

The first step that must be taken to begin the process of creating a pool of qualified candidates is to identify and develop selection criteria for the position. Selection criteria can be likened to a “shopping list” of what you’re looking for in the individuals who will populate your candidate pool (and, ultimately, the candidate(s) who will join the organization). This could—and often will—include KSAs, job specifications, and specific requirements stemming from the job competencies.

### **Never Go Shopping—or Recruiting—Without a List**

If you go grocery shopping without a list, you can lose your focus, forget items you need, purchase things you don't really need, or be attracted to items that are marketed well but that might lack substance. If this happens when you're going grocery shopping, it's no big deal—you can just go back to the store again to get what you missed the first time around. However, if you begin the recruitment and selection process without a clear idea of the qualifications that your successful candidate must ultimately possess, the stakes can be a bit higher.

Sometimes our ideas about the requirements for a particular position are unintentionally tainted by other factors—for instance, the qualifications that the prior incumbent possessed, or the qualifications of the individuals in the broader labor pool or who are actually applying for an open position. The best, most objective, and most legally defensible way to establish selection criteria is to do so objectively, within the context of the job-related information that has been generated through the job description, job specs, and the like. It's critical to do this up front before you look at a single résumé.

## **Internal and External Recruiting**

After you've determined (in collaboration with your internal client—most likely the hiring manager, in this case) the selection criteria for a particular position, the next step is to decide whether to seek to create a candidate pool internally, externally, or through a combination of both approaches.

### **Recruiting Internal Candidates**

Many—in fact, most—organizations embrace the idea of promoting current employees from within the organization. This begins by creating a pool of qualified candidates from among current employees. Three primary mechanisms for seeking internal candidates for positions within the organization are job posting, job bidding, and succession planning.

#### **Job Posting**

Job posting systems announce position openings to current employees within the organization. Candidates who believe that they meet the minimum requirements of the position (as posted) are invited to apply for positions—sometimes even before external candidates are sought.

#### **Job Bidding**

Although the job posting process isn't triggered until a job opens, job bidding systems invite employees to express interest in positions at any time, even if a position is not currently available. Candidates who are determined to meet the qualifications for a position in which they have expressed interest will automatically be put into consideration when that position becomes available.

#### **Succession Planning**

In addition to job posting and job bidding, many organizations take further proactive steps toward succession planning: the detailed, ongoing process through which an organization identifies individuals who might be able to fill higher-level positions that could become available in the future.

Succession plans are “living, breathing” tools that impact individual and group professional development planning and that—through predictive efforts and proactive planning—strive to ensure that the overarching mission and goals of the organization will not be derailed by the inevitable departure of individuals from the organization.

You can find more information about succession planning in Chapter 3, “ Human Resource Development.”

### **Internal Candidates: Advantages and Disadvantages**

Recruiting internal candidates can benefit employees as well as employers. Through internal recruitment, employees can grow and develop without leaving the organization. Employers can select from a pool of internal candidates about whom they have more job-related knowledge than they would normally have about an external candidate. Both employees and employers can build on the investments they have already made in each other and may even experience an enhanced sense of loyalty and dedication to each other.

Recruiting internal candidates, however, also presents certain risks, such as these:

- ▶ Relying too heavily on performance appraisals that, for a variety of reasons, may not be reflective of actual past performance (see Chapter 3).
- ▶ Relying too heavily on performance appraisals that, even when accurate, may reflect KSAs that are not wholly relevant to the position for which the candidate is applying.

Particular risk exists when a position is posted for which a strong internal candidate has already been identified. If it is fully expected (in other words, predetermined) that a particular individual will be selected for an open position, the integrity of the job posting or bidding system could be seriously—and perhaps irreparably—compromised.

### **Policy Considerations**

The organizational policies surrounding internal recruiting systems must be thought through carefully and administered consistently. For instance

- ▶ Is an employee who posts or bids for a position required to notify her current supervisor? Is the supervisor required to grant “permission” for the employee to post for another position?
- ▶ If an employee is selected for a position, how long must that employee wait before being “allowed” to start his new job? Must a replacement for the employee’s former position be found before the employee can move on to his new position?
- ▶ Must an employee be performing satisfactorily in her current position to be considered for another position within the organization? Would certain areas of unsatisfactory performance be acceptable, such as those that are unrelated to the new position?
- ▶ Must an employee work for a specified period of time in one position before posting for a different position within the organization?
- ▶ Are employees who currently hold exempt-level positions subject to different requirements than employees who hold non-exempt-level positions?

Any of these considerations, depending on how they are handled, can either strengthen or diminish the ultimate effectiveness of the job posting or bidding system.

### **Recruiting External Candidates**

There are various options available for recruiting external candidates. A few of these options include

- ▶ Internet job listing websites
- ▶ Newspaper advertisements
- ▶ Radio advertisements
- ▶ “.jobs” websites
- ▶ College and university career development/placement offices
- ▶ Job fairs
- ▶ Open houses
- ▶ Alumni networks (alumni of colleges/universities, as well as alumni of companies)
- ▶ Former employees
- ▶ Walks-ins
- ▶ Professional organizations
- ▶ Referrals from current employees or industry network colleagues
- ▶ State unemployment offices
- ▶ Organizational websites
- ▶ Prior applicants
- ▶ Social media

Perhaps the newest and least traditional of these methods is the use of social media. Let’s explore this in more detail.

### **Using Social Media to Find Candidates**

There are many social media platforms, the most popular of which (as of this printing) are considered LinkedIn, Facebook, and Twitter. Of these three platforms, LinkedIn is the most professionally oriented, and Facebook is the most personally oriented —although that is shifting quickly, as Facebook is quickly becoming a way for candidates and employers to “find” each other.

“Finding” each other is one of the great potential benefits of social media. Although active candidates —those who are actively seeking a new position —will look for new opportunities, passive job seekers —by definition —will not. Social media (particularly LinkedIn, at the moment) provide a way for employers to find individuals who might not currently be seeking a new job but who might be well suited for a job opening and who might be willing to consider new opportunities.

In this overlap between these two types of candidates are semi-active candidates: those who occasionally look for a new position (perhaps when feelings of dissatisfaction or lack of appreciation relative to their current positions mount) but who do not make a full-time, concerted effort to do so. These individuals can also be reached through social media and might be more receptive to considering new employment than passive candidates would be.

### **Using Social Media to Learn About Candidates**

Of potential greater concern —and greater debate —is the use of social media (especially Facebook) as a way to gather information about current candidates. There are legal, as well

as ethical, questions surrounding this practice —and the “jury is still out” (literally, as well as figuratively).

Here are some things to keep in mind as you consider using Facebook to gather information about candidates:

- ▶ To what degree is the information you are gathering reflective of the individual?
- ▶ To what degree is the information you are gathering related to the qualifications of the position?
- ▶ To what degree can you be confident that the candidate created/posted the content on his page?
- ▶ To what degree is the information you are gathering likely to expose you to information that is covered by EEO laws?
- ▶ To what degree might gathering such information unlevel the playing field for candidates?
- ▶ What would your measure of comfort be if you were required to discuss this practice with counsel? Or what if you were on the witness stand and were called to testify?

HR professionals —and all who are involved in the hiring process —are advised to speak with counsel before incorporating social media into the candidate evaluation process.

### **They *Are* External Candidates, But...**

Considering prior candidates for openings for which they did not specifically apply can have repercussions relative to who is considered to be an applicant, particularly with respect to EO 11246 and EEO-1 reporting. Repercussions can also result from allowing walk-in candidates who are filling out applications for any position, rather than for one particular job opening. These considerations can even affect the way in which employers phrase rejection letters. For this reason, HR professionals need to familiarize themselves with guidelines and possible ramifications before committing to candidates in their “rejection letters” that they will be “considered for any future job openings for which they may be qualified,” or before digging through files to find a great candidate that previously interviewed for a different position.

### **Employment Agencies**

There are several different types of employment agencies of which HR professions must have knowledge.

#### ***Employment Agencies—State***

Each state has a service through which unemployed individuals who are currently looking for work are often required to register, thus providing a potentially rich pool of candidates to employers. These public agencies will also provide preliminary screening and candidate referral services to employers.

#### ***Employment Agencies—Temporary***

Many organizations utilize temporary employment agencies to secure services that are needed on a short-term basis. This allows organizations the flexibility to meet temporary, short-term, or unexpected needs. Some organizations also use a “temp to hire” model to try out the employee before extending an offer of regular employment. This also gives the employee the

opportunity to try out the organization before deciding whether to make a commitment to a particular organization or position.

This process used to be referred to as “temp to perm.” It is no longer advisable to use this language, however, because there is no such thing as permanent employment. Employers — and HR professionals, in particular — should be careful not to say anything or use any verbiage that could potentially imply otherwise or that could unintentionally create an implied contract.

### ***Private Employment Agencies (Also Known as Private Search Firms)***

Employers may also enlist the services of private employment agencies to assist them in finding regular employees. There are two primary options:

- ▶ **Contingency employment agencies/search firms:** The employer pays a fee to the firm only when a candidate is hired through its efforts. This type of agency would be selected more often for entry-level professional or supervisory recruiting efforts.
- ▶ **Retained employment agencies/search firms:** The employer pays a fee to the firm whether or not a candidate is hired. This type of agency would be selected more often for executive-level recruiting efforts.

#### **NOTE**

Different terms, conditions, and “guarantees” apply to different types of agencies. Terms can differ from employer to employer or even from position to position. It’s important to negotiate knowledgeably, to finalize terms before beginning a search, and to review any agreements carefully before signing.

It is also advantageous for HR professionals to maintain awareness of less traditional and nontraditional sources for recruiting external candidates—such as prisons, houses of worship, displaced homemaker services, and so on.

### **Employee Referral: A Hybrid Approach**

Many organizations embrace employee referral systems—a recruiting technique whereby current employees are used as a source for recruiting external candidates into the applicant pool.

This approach offers distinct advantages—and potential disadvantages, as well. Some potential advantages include

- ▶ Candidates who are referred by current employees may have a better understanding of the culture and values of the organization and thus have more realistic expectations about the job and about the organization.
- ▶ Current employees are more likely to refer individuals who they believe (rightly or wrongly) have a high likelihood of succeeding. This happens because current employees often believe that the performance of the person whom they refer will have an impact on how they are perceived by the organization.
- ▶ Employee referral programs—even those that offer rich rewards—are significantly more cost-effective than most other forms of recruiting.

Employee referral programs also have the potential for significant disadvantages:

- ▶ If the current organization is not particularly diverse (with respect to gender, age, race, education background, or a host of other factors), employee referral programs might perpetuate that lack of diversity.



- ▶ If an affirmative action plan is in place, and if there are areas of underutilization, an employee referral program is not likely to demonstrate “good faith efforts” to recruit candidates who are women or minorities.
- ▶ In organizations where there are prior patterns of hiring discrimination, employee referral programs are likely to reinforce those patterns.

In many cases, organizations will not rely exclusively on employee referral programs for creating pools of candidates. Instead, employee referral programs are one of several techniques used to create a pool of qualified and, ideally, diverse candidates.

### **Nontraditional Staffing Alternatives**

HR professionals also need to be familiar with other, more flexible, less traditional staffing arrangements. These arrangements do not necessarily fall within “internal” or “external” sources because these options could be offered to existing employees within the organization, could be used as a way to attract external candidates, or could even result in the outsourcing of functions that were formerly performed within the organization.

Examples of nontraditional staffing alternatives could include the use of temporary help, temp-to-hire arrangements, outsourcing to third-party vendors (any entity or person outside the organization to whom work can be outsourced), off-shoring (a specific type of outsourcing that uses vendors located overseas), or contracting with consultants. Current or newly hired employees can also participate in flexible staffing programs through part-time employment, telecommuting, job sharing arrangements, or seasonal employment.

### **Outsourcing**

More and more organizations are deciding to have certain services performed by individuals or entities that are external to the organization rather than by employees. Welcome to the ever-expanding world of third-party contracts.

Third-party relationships are no longer a phenomenon; rather, they are progressively becoming a standard—and even expected—way of conducting business. Some services that are outsourced represent new initiatives or projects. At other times, work that is currently being performed by employees is outsourced to individuals or entities outside the organization.

Different organizations may choose to outsource different functions. Many functions (and some people would argue that almost any function) within an organization can be outsourced.

Many HR departments outsource significant functions as well. Some of the HR functions that are often partially—or fully—outsourced include the following:

- ▶ 401(k) or 403(b) programs
- ▶ Pensions/benefits
- ▶ Stock option administration
- ▶ Learning and development
- ▶ Payroll
- ▶ Safety and security

## Request for Proposal

The Request for Proposal (RFP) is a written document that invites third-party contractors to propose written solutions that address the organization's needs—ideally, within a price that the customer is willing to pay. Developing a solid and carefully constructed RFP is critical; a poorly designed or overly vague RFP may yield proposed solutions that do not address the organization's actual problems. Worse yet, those solutions may appear to be workable and appropriate—until they have been implemented.

### KNOWLEDGE

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#### Knowledge 17

Reliability and validity of selection tests/tools/methods.

### KNOWLEDGE

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#### Knowledge 18

Use and interpretation of selection tests (for example, psychological/personality, cognitive, motor/physical assessments, performance, assessment center).

## Preemployment Testing

Preemployment testing is another way of ascertaining the degree to which a candidate possesses and can demonstrate the knowledge, skills, and abilities/behavioral characteristics required to successfully perform the position. Any tests that are used must be job related and valid. (See the section “Uniform Guidelines on Employee Selection Procedures” earlier in this chapter.)

Some of the most commonly used types of preemployment exams are discussed in this section.

### Agility Tests

Agility tests are preemployment tests that are used to ascertain whether the candidate can perform the physical requirements of the position for which she is applying.

### Aptitude Tests

Aptitude tests are preemployment tests that are used to ascertain whether the candidate possesses the skills or knowledge required to perform the position for which he is applying.

### Assessment Center

Assessment centers are facilities that assess evaluate candidate's absolute and relative qualifications for open positions within an organization, or with respect to overall potential/talent.

### Cognitive Ability Tests

Cognitive ability tests are preemployment tests that are used to assess the candidate's intelligence or current skill level with respect to a job-related function. Cognitive tests could be administered to assess skills such as problem-solving, mathematical skill, or numerical ability.

### Integrity, or Honesty, Tests

These tests are preemployment tests that are used to ascertain the degree to which a candidate would be likely to engage in behavior that is dishonest or that reflects a potential lack of integrity.

## Medical Tests

These tests are preemployment medical tests, or exams, that can be conducted only if the exam is job related and consistent with business necessity, and even then only after an offer (or a conditional offer) of employment has been extended to the candidate. It is important to note that an offer of employment cannot be rescinded simply because a medical test reveals that a candidate has a disability. Instead, in this situation, the employer would then determine the feasibility of extending a reasonable accommodation that does not cause undue hardship.

## Personality Tests

Personality tests are preemployment tests that are used to gather information about a candidate's personality traits, motivation, discipline, and other characteristics.

## Preemployment Drug Testing

Preemployment drug testing is urine (or, less often, blood or hair sample) that is subjected to testing to identify the presence of illegal drugs. When used in a preemployment context, drug tests are not considered to be medical tests. Most employers, however, do not conduct drug testing until a conditional offer of employment has been extended to, and accepted by, the candidate.

## Prepromotion Drug Testing

Prepromotion drug testing is conducted to decrease the likelihood of promoting someone who is currently using/abusing illegal drugs.

### NOTE

This may not apply to public-sector employers unless permitted by the collective-bargaining agreement or for safety-sensitive positions.

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### WPE Responsibility 09

Establish metrics for workforce planning (for example, recruitment and turnover statistics, costs).

**RESPONSIBILITY**

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### Knowledge 12

Methods to assess past and future staffing effectiveness (for example, costs per hire, selection ratios, adverse impact).

**KNOWLEDGE**

## Measuring Recruiting Costs and Effectiveness

There are numerous ways to calculate the costs associated with recruiting as well as the overall effectiveness of the recruiting process. Some of those measures focus on the actual recruiting process (for instance, cost per hire or time to file), while others take a more forward-looking approach (for instance, voluntary or involuntary turnover percentage for new hires within the first 3, 6, or 12 months).

The most critical points to keep in mind about measuring recruiting costs and interviewing effectiveness are these:

1. Do it.
2. Do it consistently.

Historically, HR professionals can —and often have — become their own worst enemies by settling for subjective and qualitative answers to the question, “How am I doing?” The good news, however, is that this offers us yet another opportunity to learn to be more strategic. So, in conjunction with your clients and with HR leadership, determine which measures will be most relevant and valuable. Ask questions such as these:

- ▶ Which recruiting sources yield the most applicants?
- ▶ Which recruiting sources yield the best qualified applicants?
- ▶ On that note, how do you define a “good applicant”? Is it one who meets the minimum qualifications of the position? One to whom an offer of employment is extended? One who accepts an offer of employment? Or one who is still with the organization 3, 6, or 12 months after being hired?
- ▶ Which recruiting sources are the least expensive on a cost-per-hire basis?
- ▶ How much time, effort, and attention does each recruiting source require from HR, or from the manager, during the recruiting process?

To calculate many of these measures, you’ll need to calculate yield ratios. A yield ratio calculates the percentage of applicants from a particular recruiting source who advance to a particular stage in the recruiting process. For instance, one pertinent yield ratio might refer to the number of résumés from minimally (at least) qualified candidates as a percentage of the number of total résumés received (from particular recruiting sources). It might also be helpful to compare this yield ratio for different recruiting sources.

### **Cost per Hire**

HR professionals must be well versed in calculating accurate cost per hire metrics. The formula for calculating cost per hire follows:

$$\frac{\text{Total of all costs associated with recruiting, selecting, and hiring employees}}{\text{Number of individuals hired}}$$

Generally, this calculation will be made over a one-year period.

One of the most crucial considerations for calculating cost per hire accurately is ensuring that all costs —internal as well as external, and direct as well as indirect —are included in the numerator of this calculation. Otherwise, the cost per hire will be inaccurate (and understated). Review, and perhaps even use, cost-per-hire calculators that are available online through reputable sources.

### **Turnover Analysis**

HR professionals must also be well-versed in calculating turnover. Turnover measures the percentage of the workforce that has left the organization during a specified period of time.

Most often expressed on an annual basis, turnover is calculated as follows:

$$\frac{\text{Number of terminations during a specified period of time divided by the average}}{\text{Number of employees in the workforce during that same period of time}}$$

This information can be used in a number of ways—one of which is to help predict future turnover rates, which can affect staffing needs. Turnover can be voluntary (for instance, an employee accepts employment at another organization) or involuntary (for instance, an employee is laid off). Turnover can be broken down in any number of ways:

- ▶ Total for the entire organization
- ▶ Total for one—or more—particular departments
- ▶ FLSA (exempt or nonexempt) status
- ▶ Length of service

#### NOTE

Despite popular opinion, turnover is not inherently bad. Just like cholesterol, there is “good turnover” and “bad turnover.” An example of good turnover might be an individual who accepts a more challenging or appropriate position in a different unit or division within the organization. An example of “bad turnover” might be a relatively new employee who quits after two weeks because he did not accurately understand the requirements of the position for which he was hired.

Whether turnover is deemed “good” or “bad,” of course, involves making value judgments, which will vary from organization to organization. In one organization, for instance, an employee resigning to pursue higher education on a full-time basis or to serve the nation (through military service or the Peace Corps, for instance) might be counted as “good” turnover. In other organizations, these same reasons might be counted as “bad” turnover. Some organizations use the terms “acceptable” and “unacceptable” rather than “good” or “bad,” so as to downplay the value judgments inherent to these labels.

It’s also possible to look at turnover in terms of controllability. Controllable turnover might include voluntary terminations, and noncontrollable turnover might include death or retirement.

### Adverse Impact

Please also ensure that you review information about adverse impact, discussed earlier in this chapter.

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#### WPE Responsibility 11

Develop and implement selection procedures (for example, applicant tracking, interviewing, reference and background checking).

**RESPONSIBILITY**

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#### Knowledge 19

Interviewing techniques (for example, behavioral, situational, panel).

**KNOWLEDGE**

## The Selection Process

After you’ve put together a pool of candidates who—at the very least—meet the minimum qualifications for the position, the recruiting process is essentially complete. At this point, the selection process can begin.

## The Employment Application

In most cases, candidates submit résumés during the recruiting process. (This may not be true for all positions, such as for certain entry-level positions.) From the candidate's perspective, résumés are essentially advertisements that are designed to get the candidate's foot in the door. This statement is actually quite literal because the candidate's goal at this point is to be invited for an interview.

### Résumés: Fact or Fiction?

A résumé is often written by someone other than the candidate who is submitting it—someone who may have great skill at presenting the candidate in the best possible light and can perhaps make the candidate look stronger than she actually is. Résumés can also be created as the product of highly structured and preformatted software programs. These programs provide a host of possible qualifications, accomplishments, and responsibilities for hundreds of different positions that a candidate can choose to include in her résumé. Although software such as this can be helpful in constructing a résumé, it can also enable candidates to craft résumés that are not wholly reflective of reality. In other words, candidates can end up appearing much better on paper than they actually are in person.

HR professionals and hiring managers must recognize that although résumés are intended to provide a record of candidates' employment, education, skills, and job-related experiences, they are sometimes more "story" than "history." In addition, there is nothing on the résumé itself that requires the candidate to formally attest to the truthfulness of its contents—so relying on it to make employment-related assessments (beyond selecting whom to interview) may be ill advised.

In addition to requesting a résumé, most organizations require candidates to complete an application form, usually before being interviewed. Like all other recruiting and selection tools, the application must seek information that is job related and that is valid with respect to its ability to predict the applicant's ability to successfully perform the position.

### Treating Applicants Differently —Proceed with Caution (Better Yet...Don't Proceed At All)

Some organizations may require some, but not all, candidates to complete an evaluation form before being interviewed. When this happens, individuals applying for "lower-level" positions are often more likely to be required to complete the application before the first face-to-face interview, whereas applicants for "higher-level" positions are sometimes more likely to be permitted to postpone that requirement until it is determined that they will move forward in the selection process. Although commonplace, this practice is potentially problematic on a number of levels. First, it is unfair and inconsistent. Second, if more women and people of color apply for lower-level positions (and are therefore required to complete an application form), this policy could have an adverse impact against women or people of color.

The EEOC considers the employment application to be a test—so be sure to scrutinize and assess it the same way you would scrutinize or assess any other test.

## Types of Employment Applications

Employment applications provide a means for ensuring that all candidates present information about their work history, education, and experience—in a consistent format. Be careful on this point, however, especially if the same organization operates in different states in which different laws might be in effect. In addition, different types of applications are sometimes used for different types of positions within the same organization. This practice is generally

considered to be permissible as long as similarly situated applicants are required to complete the same type of application form at the same point in the selection process.

### **Short-Form Employment Applications**

Short-form employment applications are shorter versions of an organization's standard employment application. In this sense, the word "short" is used in a relative sense; even the short-form application could still be several pages in length.

Short-form employment applications may be used as a prescreening tool or for certain "lower-level" positions within the organization that require fewer, less complex, or less technical skills. Short-form employment applications could also be used at an early phase in the selection process. In this case, candidates who progress to a later stage of the selection process might be required to complete a longer application at that time.

### **Long-Form Employment Applications**

Long-form employment applications require candidates to provide more detailed and comprehensive information.

### **Job-Specific Employment Applications**

Job-specific employment applications are sometimes used when an organization does high-volume recruiting for a particular position or for particular types of positions. In such cases, the application would be tailored to seek highly specific and relevant information pertaining to the specific position or job category for which the candidate is seeking employment.

### **Weighted Employment Applications**

Weighted employment applications are intended to facilitate the process of evaluating candidates' qualifications in a consistent and objective manner by assigning relative weights to different portions of the application. These different weights will vary depending on the relative importance of each section, as determined by the requirements of the position.

#### **NOTE**

Weighted employment applications are difficult and time consuming to create and maintain because positions are almost constantly evolving and changing in some way. They can also run afoul of EEO guidelines (for example, if extra credit is granted for factors that are not truly related to the job or that are not as important/unimportant as the weighting might imply).

### **Critical Parts of the Employment Application**

Whatever type of employment application an organization chooses, many applications share a variety of elements. As such, the application will often require the candidate to provide information relative to the following areas:

- ▶ Personal data (name, address, contact information)
- ▶ Education
- ▶ Training
- ▶ Credentials/certificates/job-related skills
- ▶ Employment history (including organizations, dates of employment, titles, supervisors' names, and reasons for leaving prior positions)

- ▶ Names of professional references
- ▶ The candidate's ability to provide proof during the first three days of employment of her identity and eligibility to work in the United States (in the event that she is hired)

The application also serves as a vehicle to formally secure permission from or communicate information to the candidate—and to require the candidate to acknowledge the granting of that permission or the receipt of that information by signing the application. Examples of this might include

- ▶ Permission to verify information provided on the application.
- ▶ Permission to check references (former employers, supervisors, or professional references).
- ▶ Employment-at-will statement. This statement articulates and reaffirms that in almost every state the organization can terminate the individual's employment at any time, with or without cause. Most employment applications also confirm and articulate that the employee also has the right to leave the organization at any time, with or without notice.
- ▶ EEO statement (and, if applicable, affirmative action statement).
- ▶ Acknowledgement that the organization reserves the right not to hire the candidate if it is determined that he has provided any information that is not truthful.
- ▶ Acknowledgement that the organization may, or will, terminate candidacy or employment if it is determined (before or after the candidate has been hired) that she provided any information on the application that was not truthful at the time the application was completed.

#### NOTE

Whoever accepts applications from the candidate (whether electronically or face to face) must ensure that the application is fully completed before it is accepted. What this means, in practice, is that the candidate may not write the words “see résumé” on any portion of the application. It also means that all questions have been answered completely. Sometimes candidates will leave a question blank that they do not want to answer. This way they can still attest to the truthfulness of the information they have provided on the application but attempt to avoid the sanctions that can stem from lying on an application.

## Interviews and the Interview Process

From the perspective of the candidate, the purpose of a résumé is to get a job interview. From the perspective of the organization, the purpose of a résumé is to decide whom to interview. Taking this a step further, the purpose of an interview is to collect information that will enable the interviewer and the organization to determine the degree to which each candidate possesses and demonstrates the knowledge, skills, abilities, and other job specifications required to successfully perform the position.

Interviewing is one of those skills that many people learn by observation or through independent practice. Unfortunately, however, this skill is too critical to be learned through osmosis—in other words, the “sink or swim” approach doesn't always work. Sometimes what happens instead is that interviewers will learn to swim but will swim poorly (and perhaps even



risk drowning —themselves, and maybe even others). In addition, sometimes the people whom new interviewers observe (and emulate) may not be skilled in the process.

Increased knowledge about and skill in interviewing can have a significant impact on the quality of the selection process.

## Styles of Selection Interviews

Interviews fall into two primary types of styles—directive and nondirective.

- ▶ **Directive interviews:** Directive interviews take a more structured approach by asking consistent questions of all candidates. The interviewer maintains control of the interview—despite the fact that candidates sometimes make significant attempts to seize that control away from them.
- ▶ **Nondirective interviews:** Nondirective interviews are relatively unstructured. The candidate, not the interviewer, ends up guiding the interview and therefore ends up controlling the flow and content of information.

### To Direct, or Not to Direct

Which style is better to use in selection interviews: directive or nondirective? Generally speaking, a directive style is more effective and appropriate than a nondirective style for a number of reasons:

- ▶ If a résumé is equivalent to a candidate's advertisement, giving a candidate control of the interview is like letting her broadcast an infomercial. Candidates will unfailingly present and highlight information that is most flattering to them—but that information won't necessarily coincide with the information that the interviewer needs to collect and assess relative to each candidate's ability to perform the job. It also isn't likely to be consistent with information provided by other candidates, which can lead to unfair and even flawed comparisons between candidates—comparisons that would be difficult to defend in the event of a legal challenge.
- ▶ To conduct a fair, reliable, and legally defensible interview, interviewers must ask candidates consistent questions. This is exceedingly difficult, if not impossible, to accomplish during a nondirective interview.
- ▶ Perhaps the most effective approach is a combination of both of these approaches—a combination that, in a sense, reflects the reality that selection interviewing is an art as well as a science. Developing a style that reflects a structured conversation ensures that all candidates are asked consistent questions, yet allows for related follow-up questions that keep the interaction lively, dynamic, revealing, and informative (all within a consistent and job-related context).

## Types of Selection Interviews

There are a variety of selection interviews. In this section, we'll look at some of the better-known types of preemployment interviews:

- ▶ Phone interviews
- ▶ Prescreen interviews
- ▶ Behavior-based interviews
- ▶ Stress interviews
- ▶ One-on-one versus panel/team interviews

### Phone Interviews

Sometimes organizations choose to conduct a short phone interview before deciding whether to bring a candidate onsite for a face-to-face interview. This can be particularly helpful in surfacing legitimate job-related “knock-out” factors that could either cause the employer to decide to eliminate a candidate from consideration or that could cause a candidate to self-select out of the selection process. Factors that might be discussed could involve job requirements (such as overtime or work conditions), salary requirements, or basic technical knowledge or skill, just to name a few possibilities.

#### NOTE

Phone interviews can be an efficient and effective way of showing respect for your candidates, your internal clients, and yourself. Just be certain to be consistent in the questions you ask each candidate—even at this point in the process.

### Prescreen Interviews

In many organizations, HR conducts initial prescreening interviews with candidates. The purpose of prescreen interviews is to determine which candidates meet specific job requirements—the same ones that were identified in advance. This can include the process of verifying that the candidate actually meets the minimum requirements for the position and establishing whether the candidate meets other specific fundamental requirements. (We have used the word “actually” in light of the recognition, once again, that a résumé might be more “story” than “history.”)

#### NOTE

Here, too, the HR professional has an opportunity to partner with line managers. Don't make assumptions about what qualifications you should try to assess during a prescreen interview; instead, work collaboratively with your clients to develop an effective, streamlined, cohesive strategy.

### Behavior-Based Interviews

Behavior-based interviews require the candidate to describe past experiences that demonstrate the degree to which he possesses the knowledge, skills, and behavioral characteristics that are required to successfully perform the position for which the candidate is applying.

Behavior-based questions ask the candidate to describe a specific situation in which he demonstrated a particular job requirement. In his responses, the candidate should describe the situation, the specific way in which he behaved in the situation, and the outcome that resulted from his actions.

#### NOTE

Behavior-based questions are effective only if the candidate provides a thorough and complete answer. Candidates, however, often are not conditioned to respond in this way, so it's incumbent upon the interviewer to ask probing follow-up questions. Probing follow-up questions must focus on the original question and not allow the candidate to stray into a different area about which the candidate might prefer to speak. Probing questions must also be asked with the intention of getting the information the interviewer needs (the information that the original question sought to obtain), even if the interviewer doesn't get the information she wants.

## Stress Interviews

During stress interviews, the interviewer (or interviewers) deliberately creates a high-stress environment in an effort to ascertain how the candidate would respond in a high-stress work situation.

### Concerns Regarding Stress Interviews

There are (at least) two primary concerns with respect to stress interviews. First, interviewers run the risk of jeopardizing the degree to which they can ascertain all the other KSAs required for the position. In some jobs, where the ability to handle extreme levels of stress is essential and foundational (such as homeland security), this may be wholly appropriate. In other situations where extreme stress is a factor—but is not a constant, immutable, or defining element of a position—stress interviews may not be the most effective choice.

A second area of potential concern with respect to stress interviews is consistency. The interviewer must be certain that a consistent level of stress is created in each employment interview, that the stress that is created in different interviews is of a consistent nature, and that it is created in a consistent manner. Otherwise, the “stress test” element of the interview could be found to be inconsistent and, therefore, unreliable. This could, in turn, increase the possibility of a legal challenge or allegations of unlawful discrimination.

## One-on-One Versus Panel/Team Interviews

Sometimes, for a variety of reasons, organizations choose to conduct panel or team interviews—interviews in which more than one interviewer interviews a candidate at the same time. Panel interviews can save time and money. They can also backfire. To help ensure that panel interviews are successful and productive, keep the following ideas in mind:

- ▶ Let the candidate know ahead of time that she will be participating in a panel interview. Eliminating the element of surprise will help prevent additional unnecessary anxiety.
- ▶ Plan—even choreograph—the interview in advance. Make sure all participants know their respective responsibilities. Plan who will ask which questions and how probing follow-up questions will be handled. Arrange for “hand-offs” from one interviewer to another, much the same way as is done during a team-based television newscast.
- ▶ Consider the seating arrangements. If possible, interview in a room that has a round table. If you must interview in a room with an oval or rectangular table, position the chairs in a way that creates the feeling of a round table. At all costs, avoid placing all the interviewers on one side of the table and the candidate on the other side of the table. It is also best to avoid placing the candidate at the head of the table when there are multiple interviewers, as this can lead to a “tennis match” need to continually look from one side of the table to the other.

## Key Components of Selection Interviews

An interview is part science, part art, and part architecture. The interview process must be carefully structured to support its overall purpose: to provide the interviewer and the candidate with information that can be used to make accurate assessments and, ultimately, sound decisions. The interviewer needs to assess the degree to which the candidate possesses the qualifications for the position. The candidate needs information to make an informed decision about whether to join the organization in the event that an offer of employment is extended.

And, throughout all of this, interviewers have to be careful not to give away the answers before they even ask the questions. (This becomes particularly important when an organization uses a sequential interview process.)

Although there is no single best way to structure an interview, the following presents one effective approach.

### 1. Establish Rapport

It's important to help the candidate feel welcome at the beginning of the interview. Establishing rapport through a warm greeting, an offer of a glass of water, or brief "chit chat" about the weather can help the candidate to relax—and, in turn, hopefully summon more candid, honest responses.

#### CAUTION

Rapport-building is a way of breaking the ice—just be careful that you don't fall though. Don't let your chit chat stray into areas about which you should not be conversing with candidates. Avoid, for instance, discussions about children, hobbies, mode of transportation, world events, or political happenings. Don't allow the conversation to stray into small talk that would reveal information that is unrelated to the position.

In addition, recognize and remember that you will (hopefully) be interviewing a diverse pool of candidates and may encounter individuals who dress, speak, behave, or interact in ways that are different from your own. A candidate, for instance, may choose not to shake your hand or may choose not to make eye contact with you. Don't inappropriately read into these or any other potentially unexpected behaviors. Be open and inclusive of these differences, and make sure you base your assessments solely on job-related factors.

### 2. Ask Primary and Probing Questions

Primary questions are asked of all candidates for a particular position during a particular interview process. They are designed to elicit relevant information about how well the candidate possesses and can demonstrate the skills, knowledge, and behavioral characteristics required to perform the position successfully.

Probing questions are the follow-up questions to those primary questions. Because they are asked in response to each candidate's initial response to a primary question, probing questions will vary from interview to interview. Interviewers can still ensure consistency, however, by only asking probing questions that relate to the original primary question. Don't get derailed by an evasive candidate, an interesting tangent, or a candidate's inability to answer the original primary question.

#### NOTE

Probing is a double-edged sword. We need to probe until we get what we need, not until we get what we want. Make sure that your probing stays focused on the original primary question, and don't get distracted or derailed. Furthermore, after you get the answer to your primary question, stop probing. Be particularly careful not to let your curiosity get you to probe too deeply.

### 3. Invite the Candidate to Ask Questions

*After* you have finished asking your primary and probing questions, invite the candidate to ask you any questions she might have. It is important to provide this opportunity only after you have asked your questions to ensure that the candidate does not obtain information from you that will enable her to better answer your questions. In other words, as already mentioned, interviewers need to be careful not to give away the answers before they even ask the questions.

**NOTE**

A candidate's questions can also provide insight into his motivations, professional interests, or the seriousness with which he is approaching the job search. Pay careful attention to what you hear. Be equally careful not to be overly impressed by well-developed questions; many candidates understand that one of the rules of interviewing is to have good questions prepared in advance. Remember that there can be a vast difference between a candidate's ability to interview well for a job and a candidate's ability to perform the job for which he is interviewing.

**4. Realistically Describe the Position and the Organization**

Provide each candidate with complete, honest, realistic, and consistent information about the position and the organization. Ensure that you share information in a consistent manner with all candidates—those in whom you preliminarily think you might be more interested, as well as those in whom you think you might be less interested. “Pitching” the position more positively or enthusiastically to one candidate over another could raise questions later about why you did not share information in a consistent manner and why you chose to encourage or discourage particular candidates.

**TIP**

The interview is a time to collect information—assessment comes later. Maintain an open mind about all candidates at this point, and focus on what is taking place in the actual interview. Evaluate the information you collect during the interview after it's over. During the interview, make a conscious effort not to be distracted by anything that might cause you to make a snap judgment about the candidate or about her qualifications for the position. Recognize any such items/distractions and set them aside to think about later—after the interview is over. Remaining nonjudgmental and remaining “in the moment” are two of the most important keys to being an effective interviewer.

**5. Close the Interview**

In that same spirit, end all your interviews in a consistent and nonjudgmental manner. Let the candidate know what will happen next in the process, and provide the candidate with a reasonable time frame during which he can expect to hear back from you. Make no promises, offer no assessments, and provide no “feedback” relative to how the candidate performed during the interview. An interviewer's role is one of information gatherer, not career counselor (at least with respect to external candidates). And any career counseling for internal candidates should take place after the interview/selection process is completed—not during the actual process.

**Essential Intrapersonal/Interpersonal Skills Required to Conduct an Effective Interview**

Within this structure, interviewers must bring the interview to life. They must use their skills—interpersonal and otherwise—to attain a variety of goals, including ensuring the following:

- ▶ All needed information is obtained.
- ▶ All interviews are conducted in a consistent manner and yield consistent information.
- ▶ The interview is positive, upbeat, and affirming and does not assume a robotic tone.
- ▶ The rapport that was established at the beginning of the interview is maintained—or, as necessary, rebuilt—throughout the interview.

- ▶ They do not allow personal feelings or biases that are unrelated to the position to enter into the interview process.
- ▶ They remain within both the letter and the spirit of the law.

The following section highlights some of the skills essential for conducting an effective interview.

### **Intrapersonal/Interpersonal Skills**

Listen carefully, attentively, and effectively. Paraphrase what you hear the candidate saying. When you do, preface your statements with phrases like these:

- ▶ “What I think I hear you saying, and please feel free to correct me if I am mistaken, is...”
- ▶ “So what I’m getting from you on this point, and please let me know if I’m on track with this, is...”
- ▶ “Let me know if I’ve heard this correctly... ..”

In this way, you actually give the candidate permission to correct your understanding (something that most candidates are probably reluctant to do). You invite them, essentially, to tell you if you’re wrong. This approach—and any clarifying information that you elicit from candidates—will help you attain your objective of ensuring that you leave the interview with an accurate understanding of each candidate’s qualifications for the position.

### **Nonverbal Communication Cues (“Nonverbals”)**

Observe each candidate’s nonverbal behavior. When you notice a significant change in that behavior, pay attention and consider probing for more information around whatever question the candidate was answering when that change occurred. Be careful not to assign specific meaning to any specific gesture. For instance, folding one’s arms across one’s chest may not necessarily mean that a candidate is distant, aloof, or “hiding something.” In reality, it may simply indicate that the candidate is cold (literally, not figuratively). And be careful that any probing questions you ask remain strictly job related. Curiosity has the potential to land an employment interview in hot water.

It’s also important to be aware of the messages that you may be transmitting to candidates through your own nonverbal behavior. Try to convey openness through your posture and movements. Deliberately use your nonverbal communication cues to encourage the candidate’s engagement. Make sure you do not unintentionally communicate any sort of judgment—either positive (for example, through nodding) or negative (for example, through a frown or furrowed brow).

### **Take Notes**

During the interview, jot down keywords or phrases that the candidate offers in response to your primary and probing questions. If you leave whitespace in between your list of questions, you’ll have a convenient place where you can jot down keywords that pertain to the specific questions you are asking. Be careful not to take too many notes—this could detract from your connection with the candidate. You can—and should—go back after the interview is complete to fill in any gaps and details that will provide a more complete picture around the key words that you already wrote down.

**NOTE**

It's important to let the candidate know at the beginning of the interview that you will be taking notes. Otherwise, the minute you jot something down, the candidate may assume that she said something "wrong" and may spend time and energy trying to determine what that was and how she can back her way out of whatever she shouldn't have said. When you let the candidate know you will be taking notes, you can use it as a rapport-building opportunity. Let the candidate know, in your own words, that what she'll be telling you during the interview is important, and you want to be sure that you accurately capture, and remember, what she says.

**NOTE**

All notes must be strictly job related. Do not use any sort of code that will help you recognize individual candidates. In addition, do not take any notes on the résumé; instead, use the whitespace that you have left between each of the primary questions you prepared (including two or three questions on each 8-1/2 by 11 sheet of paper serves as a good starting point).

**Manage Your Biases: Individual, Organizational, and Societal**

Although we each have the right to think or feel however we choose, we don't always have the right to act on those feelings. This is particularly true in an employment context and with respect to interviewing. Interviewers are human beings, and, like all human beings, we have biases. However, we should not make—and are often barred by law from making—assessments or decisions that are based on those biases rather than on predetermined job-related factors.

As interviewers, it is incumbent upon us to vigilantly recognize how our individual biases could taint our assessments and decisions. Biases at the organizational level—and even at the societal level—could also affect our assessments and must be recognized, managed, and set aside.

Interviewers must develop the ability to recognize and eliminate from consideration factors that are not job related when making employment-related recommendations and decisions. These factors can relate to legally protected classes, such as a person's race or religion, or could relate to things that are (for the most part) generally unrelated to the law, such as a candidate's appearance, personal mannerisms, name, or even cologne.

**Manage Your Biases: Interviewer Errors**

Another category of interviewer bias warrants attention. These biases essentially constitute "errors"—meaning "errors in judgment"—that are sometimes made by interviewers. Interestingly, these errors are similar to those that are sometimes made by HR professionals or managers during the performance management and appraisal process. Learning to address and prevent these errors up front, therefore, can yield benefits throughout the entire employment life cycle. Table 2.2 describes some types of interviewing bias.

**TABLE 2.2 Interviewing Bias or Errors**

<b>Types of Interviewing Bias or Errors</b>	<b>How It Manifests Itself in the Interviewing Process</b>
Contrast	<p>The interviewer compares candidates to each other instead of comparing them to the requirements of the position.</p> <p>Although it is essential to eventually compare candidates to each other, this comparison—by itself—can be misleading. Even the “best-qualified candidate” won’t necessarily meet the requirements of the position. Becoming professionally enamored with a candidate because he is “the best of the bunch” could result in a substandard hire, and, ultimately, an unsatisfactory hiring decision. Before comparing candidates to each other, therefore, interviewers should compare each candidate’s qualifications to the requirements of the position.</p>
First impression	<p>The interviewer places an inordinate level of emphasis on the impression that the candidate makes on her during the first few minutes or even seconds of the interview.</p> <p>It has been said that “first impressions last.” Although the impression may last, that impression may be incorrect. At best, it is incomplete. Interviewers need to remind themselves that good candidates, at times, get off to a slow start during the interview. So, too, poor candidates may initially appear quite polished and impressive.</p>
Halo	<p>The interviewer evaluates the candidate disproportionately positively on the basis of one outstanding and impressive qualification or characteristic.</p> <p>This evaluation, however, is often incomplete and inaccurate. One positive quality or qualification—no matter how impressive it may be—is not reflective of all of the KSAs required to perform a position successfully.</p>
Horns	<p>The interviewer evaluates the candidate disproportionately negatively on the basis of one poor qualification or characteristic.</p> <p>This evaluation, however, is often incomplete and inaccurate. One negative quality or qualification—no matter how unimpressive it may be—is not necessarily reflective of all of the KSAs required to perform a position successfully.</p>
Leniency	<p>The interviewer applies an inappropriately lenient standard to one or more candidates resulting in a higher overall assessment of the candidate.</p> <p>Being “nice” to one or more candidates doesn’t help the organization and is unfair to the candidate.</p> <p>Instead, an organization needs to hire qualified candidates to fulfill its mission and attain its overarching objectives. Extending offers to unqualified or less qualified candidates as a way of being “nice” undermines those efforts.</p> <p>In addition, it’s important to keep in mind that a candidate who is invited to accept a position for which she is not truly qualified is, in one sense, being set up to fail.</p>
Strictness	<p>The interviewer applies an inappropriately harsh and demanding standard to one or more candidates, resulting in a lower overall assessment of the candidate.</p> <p>Being “strict” with one or more candidates doesn’t help the organization and is unfair to the candidate.</p> <p>An organization needs to hire qualified candidates to fulfill its mission and attain its overarching objectives. Eliminating qualified candidates from consideration because of unrealistically high standards undermines those efforts.</p> <p>A candidate who is denied the opportunity to join the organization and perform a position for which he or she is truly qualified can end up with a negative impression of the organization. If enough candidates have an experience such as this and share it with enough individuals, the organization’s reputation in the labor market could ultimately end up being damaged.</p>



Recency	<p>The interviewer recalls the most recently interviewed candidates more vividly than candidates who were interviewed earlier in the process.</p> <p>Again, this error allows unfairness to enter into the process. The random scheduling of candidate interviews should not result in any candidate being unduly favored or discounted.</p>
Similar-to-me	<p>The interviewer evaluates a candidate on the basis of how much that candidate is similar to, or different from, the interviewer.</p> <p>If interviewers recognize characteristics or attributes in candidates that they dislike about themselves, this recognition—whether conscious or unconscious—can have a negative impact on how the interviewer evaluates the candidate. Conversely, if interviewers recognize characteristics or attributes in candidates that they like about themselves, this recognition—whether conscious or unconscious—can have a positive impact upon how the interviewer evaluates the candidate. Either way, the impression is personal in nature, unrelated to the candidate’s qualifications, and is therefore inappropriate.</p>

### Showing Respect Throughout the Recruiting and Selection Processes

Sometimes, in the heat of the recruiting and selection process, HR professionals overlook the reality that candidates are not the only ones being assessed or interviewed. At every stage of the recruitment and selection processes, candidates are paying careful attention to how they are treated by the employees with whom they come into contact. As such, professionalism is essential—as is discretion and respect. It might be helpful to remember the “golden rule” when it comes to how you treat a candidate.

Throughout the recruiting and selection processes, try to empathize with the candidate. For instance, ask yourself—if you were a candidate, what kind of voice-mail message would you like a potential employer to leave for you? Would you want a telephone interviewer to just jump into her questions, or would you prefer her to set up a time that is mutually convenient? And always remember that when you participate in the recruiting and selection process, you are representing more than just yourself individually. To candidates, you represent and define—to a significant degree—the entire organization.)

### Legal Considerations for Interviewing and Selection

Interviewers need to be cautious not to wander intentionally or unintentionally into areas that present potential legal pitfalls.

The following tables (Tables 2.3 through 2.6) provide examples of questions you might consider asking during an interview and why they’re permissible or not. It also suggests some questions you might want to ask instead.

For all the tables, the Color column corresponds to the following definitions:

- ▶ **Red:** STOP! Do not ask this question/make this statement. It is just generally not advisable, and which is likely to invite significant legal risk/exposure.
- ▶ **Yellow:** Proceed with caution. You may be asking a question/making a statement that could expose you to legal risk/exposure. Ask yourself, what do you really need to know, or what do you really want to say? If what you want to know or to say poses acceptable legal risk to you and to your organization, proceed. If not, ask the question in a different way.
- ▶ **Green:** Look both ways first, then ask the question or make the statement, as it is unlikely to raise significant legal risk/exposure.

**TABLE 2.3 Rapport-Building**

<b>Question</b>	<b>Color</b>	<b>Potential Considerations/Concerns</b>	<b>Possible Alternative Phrasing</b>
Your last name, Doe-Soprano-Rodriguez, is interesting. I've never seen a double-hyphenated last name before.	Red	<p><b>Legal</b></p> <p>May elicit information about national origin. Depending upon state/ local laws, may elicit information about marital status.</p> <p><b>Nonlegal</b></p> <p>Likely to elicit information that is not job related. May allow the interview to get "off track." Less-than-optimal use of time.</p>	There is no lawful way to rephrase this question. Instead, ask a different rapport-building question.
What a unique and interesting tie/pin. Is there a story or some special meaning behind it?	Yellow	<p><b>Legal</b></p> <p>May elicit information that could reveal membership in a protected class, including (but not limited to) national origin, race, disability, marital status.</p> <p><b>Nonlegal</b></p> <p>Likely to elicit information that is not job related. May allow the interview to get "off track." Less-than-optimal use of time.</p>	There is no lawful way to rephrase this question so that it is more appropriate. Instead, consider asking a different rapport-building question.
How was your trip here today? Were the directions okay?	Green	This is a permissible question.	(None)
The weather has been so warm lately, hasn't it? Maybe there really is something to this "global warming."	Yellow	<p><b>Legal</b></p> <p>Speaking about weather is fine. Speaking about the climate, climate patterns, or global warming, however, introduces an issue that is more charged —politically, as well as emotionally.</p> <p><b>Nonlegal</b></p> <p>Likely to encourage conversation that is not job related and that may touch on strongly held beliefs that are irrelevant to the job.</p>	"Is it still as humid outside as it was this morning?"
So, tell me a little bit about yourself.	Yellow	<p><b>Legal</b></p> <p>Open-ended and nondirected, the question may unintentionally invite self-disclosures that could reveal membership in a protected class.</p> <p><b>Nonlegal</b></p> <p>Likely to elicit information that is not job related. May allow the interview to get "off track." Less-than-optimal use of time. Potential for "halo effect."</p>	Think about what types of job-related "broad-based" questions might be more effective.

TABLE 2.4 Job Qualifications

Question	Color	Potential Considerations/Concerns	Possible Alternative Phrasing
What type of military discharge did you receive?	Red	<p><b>Legal</b></p> <p>Unlawful to ask about the type or condition of military discharge.</p>	<p>There is no lawful way to rephrase this question.</p> <p>Candidates, however, can incorporate relevant skills and knowledge that they have gleaned from their military experience as they answer primary questions (that are being asked of all candidates for the position).</p>
We strongly encourage associates to maintain work/life balance. To that end, what was the title of the last book you read that was unrelated to your work?	Yellow	<p><b>Legal</b></p> <p>The titles —and contents —of books that a candidate reads could reveal information relative to membership in almost any protected class.</p> <p><b>Nonlegal</b></p> <p>Likely to elicit information that is not job related.</p> <p>May allow the interview to get “off track.”</p> <p>Less-than-optimal use of time.</p> <p>Potential for “halo effect.”</p>	<p>If the interviewer is concerned about ascertaining whether candidates for employment have maintained professional currency, ask a primary question like this, “Based on your review of current literature, what do you see as the top three challenges facing our industry/profession?”</p>
I see that your name is Garcia-Menendez. Do you speak Spanish? Some of our clients are Spanish speaking.	Red	<p><b>Legal</b></p> <p>Likely to elicit information related to national origin.</p> <p><b>Nonlegal</b></p> <p>If fluency in Spanish is required for the position, all candidates should be asked the same primary question about their proficiency in this area.</p>	<p>“This job requires the ability to read, speak, and write Spanish fluently. Can you meet this requirement of the position?”</p> <p>(Ask of all candidates at the same point in the interview process.)</p>
I noticed that you are on the Board of the American Cancer Society. What skills have you developed from that role that could enhance your qualifications for this job?	Yellow	<p><b>Legal</b></p> <p>The interviewer “opens the door” for the candidate to share information that could reveal membership in a protected class.</p> <p><b>Nonlegal</b></p> <p>Does not maintain a level playing field, as a question such as this does not give all candidates the opportunity to showcase relevant skills and qualifications (regardless of the volunteer activities that a candidate chooses to put on a résumé).</p> <p>Likely to elicit information that isn’t job related.</p> <p>May allow the interview to get “off track.”</p> <p>Less-than-optimal use of time.</p> <p>Potential for “halo effect.”</p>	<p>Candidates can incorporate relevant skills and knowledge that they have gleaned from volunteer or community experience as they answer the primary questions that are being asked of all candidates for the position.</p> <p>It is more advisable to avoid asking specifically about any particular job or organization listed on a résumé —instead, consider allowing candidates to make their own meaningful, relevant connections.</p>

Question	Color	Potential Considerations/Concerns	Possible Alternative Phrasing
Are you prevented from becoming legally employed because of visa or immigration status?	Red	<p><b>Legal</b></p> <p>May reveal information relative to national origin (on a preemployment basis).</p> <p><b>Nonlegal</b></p> <p>Framed in a negative way.</p>	“If hired, would you be able to prove your identity and eligibility to work in the United States?”

**TABLE 2.5 Job Requirements**

Question	Color	Potential Considerations/Concerns	Possible Alternative Phrasing
This job can require up to 30 hours of mandatory overtime each week, after regular business hours. Can you meet this requirement of the position?	Green	This is a permissible question.	(None)
This job requires some unplanned, but mandatory, overtime. To be quite candid, we’ve found that some associates with child or elder care responsibilities find this difficult. So, can you meet this requirement of the job?	Red	<p><b>Legal</b></p> <p>Specifically links the job requirement to child/elder care responsibilities, which could elicit information revealing membership in a protected class (and that is unrelated to the job). That, in turn, could subsequently lead to an allegation of discrimination on the basis of gender or some other protected class.</p>	“This job requires some unplanned, mandatory overtime. Can you meet this requirement of the position?”
This position requires periodic unplanned overtime. What would you do if you were called at home on the weekend and told to be at work within one hour to work the overnight shift?	Yellow	<p><b>Legal</b></p> <p>The interviewer “opens the door” for the candidate to share information that could reveal membership in a protected class.</p> <p><b>Nonlegal</b></p> <p>Likely to elicit information that isn’t job related.</p> <p>Hypothetical questions are less effective than behavior-based questions at predicting how a candidate will behave in this actual work situation. Behavioral characteristics play a key role in this job requirement.</p>	<p>First, be clear about what information you are trying to gather from the candidate. If you simply want to know if the candidate is available for periodic, unplanned overtime, ask: “This position requires periodic unplanned OT. Can you meet this requirement of the job?”</p> <p>However, if you are trying to get at a different behavioral characteristic (such as commitment or loyalty), be more direct with the question you choose to ask: “Tell me about a time when you went above and beyond your routine job requirements in response to a workplace situation.”</p>

Question	Color	Potential Considerations/Concerns	Possible Alternative Phrasing
This job requires lifting 10-pound boxes of paper about four hours each day. Do you have any conditions that would restrict you from meeting this requirement of the job?	Red	<p><b>Legal</b></p> <p>May reveal a disability or a condition that could be regarded as a disability.</p> <p><b>Nonlegal</b></p> <p>“Conditions” that a candidate may have aren’t important. What is important is whether the candidate can perform the essential functions of the position for which she is applying (with or without reasonable accommodation).</p>	<p>“This job requires lifting 10-pound boxes of paper about four hours each day. Can you meet this requirement of the position, with or without reasonable accommodation?”</p> <p>*Please note that an assessment should be made relative to whether the candidate could meet this requirement of the position “with or without reasonable accommodation.” Seek additional assistance/input when making such determinations.</p>
We operate 24/7 with frequent shift assignment changes. Do you have any obligations that would prevent you from working this type of variable schedule?	Yellow	<p><b>Legal</b></p> <p>Likely to elicit information relative to membership in protected classes (such as disability or marital status).</p> <p><b>Nonlegal</b></p> <p>Likely to elicit information that is not job related and which could taint the interviewer’s assessment of the candidate’s overall ability to perform the job.</p> <p>May elicit information that, although not directly covered by law, could be related or linked to membership in a protected class.</p>	<p>“We operate 24/7 with frequent shift assignment changes, with little or no notice. Can you meet this requirement of the position?”</p>

**TABLE 2.6 Marketing the Position**

Question	Color	Potential Considerations/Concerns	Possible Alternative Phrasing
Our company is committed to providing associates with the resources they need to grow and cultivates an environment where each associate can reach his full potential.	Green	The language used in this question is factual, appropriate, descriptive, and neither makes nor implies any promises relative to the length or nature of the employment relationship.	(None)
Our company makes a significant commitment to providing associates with ongoing learning and development opportunities, enabling them to add breadth and depth to their contributions.	Green	The language used in this question is factual, appropriate, descriptive, and neither makes nor implies any promises relative to the length or nature of the employment relationship.	(None)
Our company believes in maintaining a healthy work–life balance, and we offer a wide variety of programs to support that commitment.	Green	The language used in this question is factual, appropriate, descriptive, and neither makes nor implies any promises relative to the length or nature of the employment relationship, nor does it invite self-disclosures that could be unrelated to the job.	(None)

**NOTE**

Any preemployment conversations that candidates have must adhere to all legal guidelines—regardless of whether the conversations were held with HR professionals, managers, or potential colleagues. This includes any casual conversations that take place over meals, walking through hallways, or as part of rapport-building.

## Realistic Job Previews

At some (consistent) point in the interview process, it is critical that candidates be given—and, perhaps more important, process and understand—a realistic picture of the position and the organization. This, in turn, will help the candidate make a realistic and accurate assessment of whether he will be willing and able to function effectively within the day-to-day realities of the position, the department or unit, and the organization. (In other words, it will help the candidate determine whether he is likely to “fit.”)

**NOTE**

Different methods of communicating a realistic job preview (RJP) can be used at different phases of the interview process. Whatever techniques are used, however, must be used at a consistent point in the interview process, and in a consistent manner.

RJPs can be conveyed and communicated in a number of ways, including through

- ▶ Verbal descriptions of the work, the work environment, and the work conditions
- ▶ Facility tours
- ▶ The opportunity to read the employee handbook
- ▶ Opportunities to speak with current employees, particularly those who would be the incumbent’s peers or colleagues

**NOTE**

Any and all employees who are involved in the interview process must be fully trained in how to conduct/participate in preemployment interviews (and conversations) in a legally sound manner.

## Background Checks

After the interview process is complete and any appropriate and relevant tests have been successfully completed, the final candidate(s) should be subjected to a rigorous background-checking process.

In a sense, conducting a background check is almost like starting the interviewing process all over again. This is sometimes easier said than done, especially because managers (and HR professionals) have invested a great deal of time, energy, and interest in the final candidate by this point in the process. It can be most challenging to open-mindedly embark upon a journey that might disprove what one believes one has already learned about the specifics of a candidate’s employment history.

The person conducting a reference check must maintain—or regain, if necessary—a wholly objective perspective on the candidate. This person must be completely open to the fact that a reference check can yield a variety of possible outcomes. It could confirm, for instance, that the information that was collected through the interview (and testing processes, if relevant) was accurate. This is, of course, a good thing. Alternatively, the background check may reveal previously unidentified problems or concerns with the candidate’s past performance or credentials. Because past performance is, in many ways, the best predictor of future performance, obtaining such information at any point before an offer of employment is extended is also a good thing.

Background checks can explore any or all of the following areas:

- ▶ **Work history:** Employers, dates of employment, titles, salaries, and performance records.
- ▶ **Academic records:** Degrees, diplomas, certificates, certifications, and the dates when they were earned.
- ▶ **Criminal background checks:** Many employers seek information relative to whether the final candidate(s) has been convicted of, pled guilty to, or pled no contest to a crime. In addition to identifying potentially serious performance issues, the organization may discover convictions related to prior instances of workplace violence.

**TIP**

In the event that you learn of a conviction at any point in the selection process, consult with senior HR leadership and counsel, as appropriate, before making any assessments, judgments, or decisions.

**CAUTION**

Remember, though, that an arrest is not a conviction and cannot be treated as such. In our justice system, individuals are innocent until proven guilty. Discriminating on the basis of arrest record could lead to adverse impact on the basis of race. From a nonlegal perspective, it could also lead to losing a really good candidate.

- ▶ **Driving history:** Employers may—and should—choose to review the motor vehicle reports for candidates who are applying for positions for which driving is an essential job function.
- ▶ **Credit history:** Employees who will have access to financial resources or who are entrusted with certain types of financial responsibility may be required to permit the potential employer to review their credit report.

**CAUTION**

Some organizations assert that there is a connection between a candidate’s integrity and the candidate’s credit rating. Other organizations assert that a candidate’s individual financial habits provide insight into how that person would handle the organization’s financial resources. Before implementing credit-checking procedures, consult with senior HR leadership and counsel, as appropriate, to ensure that these assumptions—along with all other reasons for requiring candidates to submit to a review of their credit report—are accurate and defensible in the event of a challenge. It is also critical to ensure that all activities relating to credit checks are conducted in a manner consistent with the Fair Credit Reporting Act.

**RESPONSIBILITY****WPE Responsibility 12**

Develop and extend employment offers and conduct negotiations as necessary.

**RESPONSIBILITY****WPE Responsibility 13**

Administer post-offer employment activities (for example, execute employment agreements, complete I-9/e-Verify process, coordinate relocations, and immigration).

**RESPONSIBILITY****WPE Responsibility 14**

Develop, implement, and evaluate orientation and onboarding processes for new hires, rehires, and transfers.

**KNOWLEDGE****Knowledge 24**

Employment policies, practices, and procedures (for example, orientation, on-boarding, and retention).

**KNOWLEDGE****Knowledge 26**

Negotiation skills and techniques.

## Employment: Extending the Offer

The story doesn't end when you decide whom you want to hire—you still need to extend the offer. And then, of course, the candidate needs to decide whether to accept it. The way you extend the offer will say a lot to the candidate about the organization—not just about you. (One of the exciting and challenging things about interviewing allows us to be a part of something that is bigger than any of us individually. “You” represent more than just “you.”) The way you extend an offer will also have a big impact on whether the candidate accepts the offer.

### Tips for Extending an Employment Offer

Many organizations extend a verbal offer of employment over the phone and then follow that up with a formal written offer of employment. Other organizations meet with candidates personally and hand them an offer letter immediately upon extending an offer of employment.

Whichever method your organization uses, the manner in which an offer of employment is extended is important and must be approached with the same degree of care that has been infused into the rest of the preemployment process. The following are some particular considerations to keep in mind:

- ▶ Avoid expressing earnings in annual terms. Some organizations choose to indicate what the candidate would earn each pay period, whereas others choose to express earnings in monthly, daily, weekly, or even hourly rates.



- ▶ Be sure to take any potential FLSA-status ramifications into consideration when calculating “breakdowns” that are shorter than one week in duration.
- ▶ Avoid language that alludes to guarantees or assurances of earnings or ongoing employment or dates through which the employee will be paid.
- ▶ Avoid language that hints of any sort of a long-term employment relationship or that speaks of the employer as a “family.” (Although not impossible, it’s a lot harder to fire a family member than it should be to fire a noncontracted, “at will” employee. Don’t make things more challenging by mixing metaphors. Work is work. Family is family. And, to that point, be careful not to hire anyone whom you cannot fire—especially if that person is a family member.)
- ▶ Use the offer letter as an opportunity to reaffirm that the employment relationship is “at-will,” and—if counsel agrees—define what that means.
- ▶ State that the only agreements or promises that are valid are those that are included in the offer letter.
- ▶ State the date by which the candidate must either accept or decline the offer of employment. Ensure that you permit a reasonable period of time—not too much time and not too little.

In short, an overly exuberant offer of employment can cause more harm than good. Such letters must be carefully crafted, and counsel should review and approve the template for such letters before implementation.

## Employment Contracts

Some organizations use employment contracts for individuals in certain (often “higher-level”) positions. The contract addresses and outlines different aspects of the employment relationship and is binding on the organization as well as the employee.

Here are some of the boilerplate items that are likely to appear in an employment contract :

- ▶ Identifying information and contact information for the employer and the employee
- ▶ Position title, as well as the duties and responsibilities of the position
- ▶ Duration of the contract, or a specific statement that the contract is indefinite
- ▶ Type of compensation (salary, commission, and so on), frequency of compensation, and formulas for calculating compensation (if appropriate)
- ▶ Benefits, including vacation allotment
- ▶ Clauses covering terms of noncompete agreements, confidentiality, nonsolicitation of clients or customers, and so on
- ▶ Termination clause, which could include conditions under which the employee could be terminated, as well as any mandatory notice requirements that would apply

### NOTE

Familiarize yourself with oral, written, implied, and express contracts as they pertain to the employment relationship.

## Onboarding

Onboarding, formerly referred to as “employee orientation,” refers to the process by which an employee is supported as she transitions into the organization. This support can—and should—be provided by HR as well as by the hiring manager, and it can encompass a number of different components including the following:

- ▶ Introduction (or, assuming the interview process was conducted effectively, “reintroduction”) to the mission and overarching objectives of the organization, as well as how this position contributes to the fulfillment of that mission and the attainment of those objectives.
- ▶ Introduction (or, ideally, reintroduction) of the values of the organization.
- ▶ Discussion of the performance management system, in a macro as well as a micro sense. Macro would refer, for instance, to the structure and design of the performance management system, as well as expectations relative to how the employee will actively engage in the system. Micro might refer to each employee’s specific goals or the competencies against which he will be evaluated.
- ▶ Personal introductions to coworkers and peers.
- ▶ A tour of the facilities. Be sure not to forget the rest room, copy machine, printers, and fax machine (if your organization still uses one) —the little things can make a big difference, especially at the beginning of the employment relationship.
- ▶ Review of safety guidelines.
- ▶ Review of “rules and regulations.”
- ▶ Completion of required paperwork.

Unfortunately, many organizations still focus primarily or even exclusively on the completion of required paperwork rather than on critical nonadministrative elements, such as those inventoried here. This is not to imply that paperwork is not important. It is. But it’s not enough. Work with managers to build an onboarding program that will capture and channel the nervous excitement that new employees often experience during their first days and weeks in a new job. Get the employee started in the right way. Make sure the employee’s first days, weeks, and months on the job are positive, memorable, and meaningful.

## The Importance of New Hire Paperwork

New-hire paperwork is very important—strategically, administratively, and even (potentially) legally.

Although the paperwork that newly hired employers are required to complete will vary from organization to organization, all employers are required to complete the I-9 form as part of IRCA requirements. A full and proper I-9 verifies identity, as well as eligibility to work in the United States.

Closely related to the I-9 form is E-verify, “an Internet-based system that compares information from an employee’s Form I-9, Employment Eligibility Verification, to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility” ([www.uscis.gov](http://www.uscis.gov)). E-Verify is a voluntary program for some employers and a mandatory one for others, such as federal contractors.

Wise employers—and HR professionals—will ensure that employees somehow acknowledge that their employment relationship is “at will.” Employment-at-will is a common-law tort doctrine under which the employer and the employee are both granted broad rights, most of which focus on the right of either party to terminate the employment relationship at any time for any lawful reason. A number of important exceptions to the employment-at-will doctrine exist, including lawful reasons, public policy exceptions, wrongful terminations, and implied contracts.

Although everyone involved in the hiring /employment/termination process shares in this responsibility, HR must be particularly diligent about ensuring that a lawful, legitimate, nondiscriminatory reason exists and can be articulated when a decision to terminate an employee is being contemplated.

## **Noncompete Agreements**

Many employers require newly hired employees to sign noncompete agreements, which prohibit current and (within stated limitations) former employees from competing against the employer. “Competing” can manifest itself in a number of ways and must be defined within the agreement, with language similar to this:

The term “not compete” as used herein shall mean that the employee shall not own, manage, operate, consult, or be employed in a business substantially similar to or competitive with the present business of the company or such other business activity in which the company may substantially engage during the term of employment.

In return for signing the noncompete agreement, the employee is given the opportunity to work for the organization.

The strength, enforceability, and even legality of noncompete agreements depends on state and local laws, precedents that have been set by court cases, and a variety of other factors, such as these:

- ▶ Whether there is a time frame established in the agreement, and, if so, how long it is in effect
- ▶ The existence (and reasonableness) of any geographic limitation within which the employee cannot compete
- ▶ Whether there is anything in the agreement that would preclude the employee from earning a living in her chosen field
- ▶ Whether the employee is fairly compensated for signing the noncompete agreement, particularly if the employee was already employed at the time that he was asked to sign the agreement

## **Confidentiality Agreements**

Newly hired employees are often required to sign confidentiality agreements. Confidentiality agreements prohibit employees from revealing any confidential information to which they might be exposed during the course of their employment. This could include trade secrets, patent information, and the like. It also prohibits employees from using confidential information in any way other than the purposes for which it was intended and is necessary within the context of the employee’s job.

## Relocation

As part of the employment/promotion process, some employers will move a current or existing (or, less frequently, newly hired) employee's primary residence from one location to another. Relocation happens more frequently in some organizations than in others. Organizations, and the HR professionals who work within them, must be familiar with relevant laws, policies, and past practices to ensure sound decision-making and consistent, nondiscriminatory treatment of employees.

Organizations may decide to outsource the administrative dimensions of relocation. This is often a strategic decision, and one that would be addressed more frequently at the SPHR level.

### RESPONSIBILITY

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#### WPE Responsibility 17

Develop and implement the organization exit/off-boarding process for both voluntary and involuntary terminations, including planning for reductions in force (RIFs).

### KNOWLEDGE

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#### Knowledge 22

Voluntary and involuntary terminations, downsizing, restructuring, and outplacement strategies and practices.

## Termination: The End of the Employment Life Cycle...or Is It?

Terminations reside at the other end of the spectrum of the employment life cycle. They are often not given the degree of attention they deserve and require. Knowing how to effectively facilitate the process of employee terminations—whether voluntary or involuntary — is just as critical as knowing how to effectively facilitate the process of bringing employees into the organization. Whatever the reason or cause, an employee's exit from the organization should be just as positive and respectful as the onboarding process for that employee's replacement will be.

## Involuntary Terminations

Involuntary terminations—regardless of the specific reasons for the terminations—are challenging. There are several types of involuntary terminations.

### Layoffs

Most HR professionals—at one time or another in their careers—will participate in the process of laying off employees. No matter what you call them—downsizing, rightsizing, RIFs, or any of the other monikers in use these days—layoffs are never easy. The decision to lay off one or more employees should not be made lightly, and the manner in which the layoff is conducted is absolutely critical.

### Determining Who Will Be Laid Off

Layoffs are handled differently in different organizations and under different conditions. When the employment relationship is governed by a collective bargaining agreement, the terms and conditions governing who will be selected for layoff will likely be clearly spelled out and are

usually heavily weighted toward seniority (“last in, first out,” or LIFO). In the absence of a collective bargaining agreement, decisions relative to who will stay and who will go may be based less on seniority and more on skills, past performance, job function, or perceived potential.

#### NOTE

Before choosing to rely on performance appraisal information or ratings when making employment decisions, it is critical to ensure the integrity and accuracy of the performance system. Any number of rater or process errors could significantly skew performance ratings and could therefore diminish the legitimacy and defensibility of layoff decisions made under these assumptions. Don't assume that performance ratings are meaningfully and accurately calibrated across the organization—or even within a particular department. Instead, take a closer—and open-minded—look.

### The Role of HR in the Layoff Process

HR's role in the layoff process can vary greatly from organization to organization. Often, HR professionals help prepare for the layoff in an administrative (transactional or “paperwork”) capacity. This may include calculating severance pay or vacation entitlements or preparing COBRA paperwork. In addition, HR is often a primary source within the organization for information about outplacement services, in the event those services are being provided to assist employees as they transition out of the organization and as they begin the process of seeking new employment. (Outplacement support consists of resources and assistance provided to employees who are being involuntarily terminated for reasons unrelated to cause. The purpose of this assistance is to empower departing employees to find new employment. This could include résumé preparation, mock interviewing, networking assistance, coaching, and more.)

HR's role often extends beyond administrative responsibilities such as these. Sometimes HR professionals participate in meetings that are held with employees who will be terminated as part of the layoff. These meetings must be conducted with respect, consideration, empathy, integrity, and alacrity. This is a difficult situation for the employees who are leaving the organization as well as for the employees who are staying. It is also a difficult process for the managers and HR professionals who are involved in the process.

#### NOTE

As difficult as it may be, HR professionals cannot allow themselves to become lost in the emotional dimensions of the layoff process. Ultimately, all layoffs should occur because of business necessity, and only after all other viable options have been considered. As strategic business partners, however, HR professionals are called upon to participate in even the most difficult parts of carrying out that business strategy. We can, however, commit ourselves to performing this role in a compassionate and professional manner.

### Those Who Remain

It's critical not to overlook those employees who are still employed after the layoff. Although these individuals have not been laid off, they did witness the layoff and are significantly affected by it. The impact on these individuals can be tangible as well as intangible. In a tangible sense, employees who are left behind may now face heavier workloads. They may also be concerned about their former colleagues and about what the future—both short term and long term—holds in store for them. Their fear of the unknown can be distracting and can significantly diminish morale. Also, employees who remain after a layoff may feel some degree of uncertainty and may even begin looking for employment elsewhere. If decisions relative to whom to lay off and whom to retain were made in part or in whole on the basis of performance, the organization risks losing its most valuable talent.

There is no single roadmap for handling this situation. Two tenets, however, should always be observed:

- ▶ Communicate clearly, frequently, and in a truthful manner. Credible communication about the layoff and its impact on the organization is essential to rebuilding some sense of comfort and security.
- ▶ No matter how much you might want to, and no matter how much you believe it, do not offer assurances or make promises to the effect that the layoffs are over or that no one else will be laid off. The reality of an employment-at-will relationship—particularly one that is not governed by a contract or other agreement—is that anyone can be let go at any time for any lawful reason. Make no promises that you cannot keep—and make no statements that could unintentionally create an implied contract.

You also might want to consider eliminating the term “survivor” when referring to “employees who remain.” The term “survivor” implies that some did not “survive.” Such language can serve to unintentionally escalate an already negative situation by overlaying unnecessarily dramatic language.

### CAUTION

There aren't many “nevers” or “no brainers” when it comes to HR, but here's one: Never, under any circumstances, reveal the names of individuals who are on a layoff list unless and until you are explicitly directed to do so within the context of the overall communication strategy that has been developed. First and foremost, HR professionals cannot, under any circumstances, break the commitment to confidentiality with which they have been entrusted. Second, on a more practical note, such lists often change multiple times before the actual layoffs occur.

## Other Involuntary Terminations

Many, if not most, employers have the legal right to terminate an employee at any time, for any lawful reason—or for no reason at all. In reality, however, using employment-at-will principles in a “willy-nilly” manner can seriously damage morale, diminish loyalty, increase turnover, and damage the employer's reputation in the labor market. It could also increase the likelihood of litigation.

Most of the time, the decision to terminate an employee is well thought out, carefully scrutinized, and based on legitimate performance-related issues. It should also be made only after whatever progressive discipline process is in place within the organization has been followed—and followed with the expectation, hope, and intention of empowering employees to bring about a positive outcome, rather than with the sole intention of creating a paper trail that will let you terminate an employee with a greater degree of comfort. ( Although that is one possible outcome, it shouldn't be the initial objective.)

Managers—HR's clients—make termination decisions. Sometimes (and ideally) they make these decisions in conjunction with HR. At other times, they make these decisions independently and bring HR into the process only when it comes time to execute the decision. In either scenario, HR can add value to this process. Sometimes, when it appropriate to do so, HR can suggest alternative approaches. HR can also ensure that the termination has been made in accordance with the organization's policies and practices and that it is nondiscriminatory. At times, HR can also point out information that has been unintentionally overlooked, such as consistently positive performance appraisals in the file of a person who is being terminated for poor performance. In short, HR can provide a “second set of eyes” and can help managers think through this all-important business decision. Perhaps most importantly, HR can remind clients that counsel must be consulted before any layoff is implemented.

## Voluntary Terminations

There are a number of reasons why an employee might decide to voluntarily terminate her employment with the organization. Among these could be the following:

- ▶ Acceptance of employment elsewhere (“other” or “different” employment, not necessarily “better” employment)
- ▶ Return to school
- ▶ Retirement, whether at an expected point in time, or earlier
- ▶ Avoidance of an anticipated involuntary termination
- ▶ Dissatisfaction with the current employer, manager, or job
- ▶ Health- or disability-related reasons
- ▶ Enrollment in the military
- ▶ Personal reasons (birth or adoption of a child, illness of a family member)

### CAUTION

Early retirement can present a positive alternative to involuntary layoffs. Early retirement, however, presents multiple risks—in particular, the possibility of allegations of age discrimination. Consult with counsel before implementing any retirement program to ensure that the program is lawful and defensible in the event of a challenge.

## Constructive Discharge

Constructive discharge does not fit neatly into either “voluntary” or “involuntary” terminations. It may, however, constitute wrongful discharge. (Wrongful termination happens when an employer discharges or dismisses an employee in violation of federal, state, or local laws or statutes. Wrongful termination/discharge is a tort doctrine that speaks to the employer having ended the employment relationship for wrongful reasons. One possible basis for wrongful termination could exist if an employee was terminated in violation of an individual employment contract. Others could apply as well and would vary from state to state. Wrongful termination can be related to discrimination, contract considerations, or other common law/tort violations.)

An employee who alleges constructive discharge asserts that she was subjected to such intolerable working conditions that remaining employed with the organization had become an impossibility. Essentially, the employee is saying that she was forced to quit. Claiming constructive discharge, however, does not make it so—instead, this must be proven.

## Exit Interviews

HR’s responsibility extends beyond replacing an employee who has been terminated, whether voluntarily or involuntary.

**NOTE**

Replacing an employee should not be a knee-jerk reaction in the wake of a termination. HR professionals are not order takers or order fillers and should not behave as such. Partner with your clients to explore creative options. Determine whether a position truly needs to be replaced. If it does, explore whether it should be replaced in its current form. Use terminations as an opportunity to revisit old assumptions and to support your clients by exploring new and creative approaches.

HR professionals are often called on to participate in the exit interview process. Exit interviews provide employers with an invaluable opportunity. If departing employees are assured—and if they believe—that their comments will not be attributed personally to them in any way, they will be more likely to provide candid and valuable feedback relative to their employment experiences with your organization.

Exit interviews should focus on job-related factors rather than feelings. An exit interviewer may want to ask for feedback relative to myriad topics, just a few of which could include the following:

- ▶ The interview and selection process and whether it provided a realistic and accurate depiction of the job
- ▶ The degree to which the employee felt as though he was making a valuable contribution that ultimately furthered, in some way, the mission of the organization
- ▶ The nature of the supervision received and the employee's relationship with her supervisor
- ▶ Training opportunities, and the degree to which the employee was truly encouraged (and permitted) to take advantage of those opportunities

**CAUTION**

Although some organizations conduct exit interviews using forms that the employee is asked to complete, many organizations find that in-person exit interviews yield more valuable results. The quality and the information provided will also be enhanced if the exit interviewer maintains a neutral and nonjudgmental demeanor during the interview—regardless of what the departing employee might say. In fact, many of the same intra personal and interpersonal skills that enhance the preemployment interview process can enhance the exit interview process.

## Severance Packages

HR might also be called upon to create, and inform employees about, their severance packages. A severance package consists of monies (and, in some cases, other benefits) granted to an involuntarily terminated employee for reasons unrelated to individual performance in recognition of the end of the employment relationship and of the years that the employee worked for her employer.

**RESPONSIBILITY****WPE Responsibility 18**

Develop, implement, and evaluate an AAP as required.



# Affirmative Action Plans

AAPs refer to programs created to overcome the effects of past societal discrimination by identifying areas of underutilization. AAPs may be required for Executive Order 11246, the Rehabilitation Act of 1973 (covered earlier in the chapter), and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) of 1974.

AAPs set forth (and require documentation of) good faith efforts to address and resolve that underutilization.

Any and all nonconstruction federal contractors and subcontractors are required to design and maintain formal AAPs for each of their establishments if they have 50 or more employees and any of the following is true:

- (i) They have a subcontract of \$50,000 or more.
- (ii) They have government bills of lading which, in any 12-month period, total or can reasonably be expected to total \$50,000 or more.
- (iii) They serve as a depository of government funds in any amount.
- (iv) They are a financial institution that is an issuing and paying agent for U.S. savings bonds and savings notes in any amount ([www.dol.gov](http://www.dol.gov)).

## NOTE

In 1967, EO 11375 was enacted, adding sex to the list of protected classes. In 1969, EO 11478 was enacted, adding age and people with a "handicap" to the list of protected classes. In 1998, EO 13087 was enacted, adding sexual orientation to the list of protected classes. Parental status was added as a protected class in 2000 through EO 13152.

## Executive Order 11246

A good place to start your review is with the fact sheet that the DOL has developed: [www.dol.gov/ofccp/regs/compliance/aa.htm](http://www.dol.gov/ofccp/regs/compliance/aa.htm).

It's important to familiarize yourself with all the elements of an AAP and, specifically, with how to prepare each of them. Some of the elements that are required to be in an AAP are detailed in the following sections.

### Designation of Responsibility

This person—identified by name—is often an HR professional. He must have the necessary authority and resources to implement the AAP successfully. This must include the support of, and access to, top management. This is particularly important because the DOL is quite direct in its position that commitment to affirmative action should be an integral part of the organization's functioning rather than an administrative add-on.

### Organizational Display or Workforce Analysis

Nonconstruction contractors must prepare an organizational profile, which can be presented as either the new "organizational display" or the older workforce analysis. The proposed organizational profile is a shorter, simpler format, which in most cases would be based on the contractor's existing organizational chart(s) to provide a depiction of the contractor's

workforce. This profile is essentially an organizational chart that includes summary information about incumbents' race, gender, and wages. As per the DOL:

“The Organizational Display is a detailed chart of the contractor's organizational structure. For each organizational unit, the display must indicate the following:

- ▶ The name of the unit and the job title, race and gender of the unit supervisor
- ▶ The total number of male and female incumbents and the total number of male and female incumbents in each of the following groups: Blacks, American Indians, Asians, Hispanics, and whites other than Hispanics”

### **Job Group Analysis**

Nonconstruction contractors must also prepare a “job group analysis” intended to begin the process of comparing the employer's representation of women and minorities to the estimated availability of qualified women and minorities who are available to be employed.

### **Availability Analysis**

The new regulations still require contractors to determine the availability of minorities and women for jobs in their establishments, compare incumbency to availability, declare underutilization, and establish goals to eliminate the underutilization.

### **Utilization Analysis**

Availability is then compared to incumbency, and if the percentage of minorities or women is lower than the availability—“less than would reasonably be expected given their availability percentage in that particular job group”—the contractor must establish a “placement goal” (41 C.F.R. §60-2.15); that is, the contractor must set goals to correct the underutilization.

### **Placement Goals**

Placement goals are established for areas in which underutilization exists. Placement goals must be pursued through good faith efforts—not through the establishment of quotas. The “bottom line” is that, when underutilization exists, the placement goal must be set at an annual percentage rate equal to the availability figure for women or minorities. ( It may be necessary, at times, to set goals for particular minority groups where significant underutilization exists.)

### **Action-Oriented Programs**

The employer must develop and execute action-oriented programs that are specifically designed to correct any problem areas and to attain established placement goals. These action-oriented programs cannot just be “more of the same” less than fully effective procedures that resulted in these problem areas in the first place. Instead, the employer must demonstrate good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results.

### **Identification of Problem Areas**

The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist.

## Internal Audit and Reporting System

The contractor must develop and implement an auditing system that periodically measures the effectiveness of its total affirmative action program. The following actions are identified by the DOL as key to a successful affirmative action program:

1. Monitor records of all personnel activity—including referrals, placements, transfers, promotions, terminations, and compensation—at all levels to ensure the nondiscriminatory policy is carried out.
2. Require internal reporting on a scheduled basis as to the degree to which equal employment opportunity and organizational objectives are attained.
3. Review report results with all levels of management.
4. Advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

## Vietnam Era Veterans' Readjustment Assistance Act, 1974

Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) requires employers with federal contracts or subcontracts of \$25,000 or more to provide equal opportunity and affirmative action for Vietnam-era veterans, special disabled veterans, and veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.

### NOTE

Don't let the name mislead you—VEVRAA affords protection to veterans from other than the Vietnam era. Be familiar with the definitions of "special disabled veteran," Vietnam era veterans, and all other veterans covered by VEVRAA.

For purposes of VEVRAA, a Vietnam era veteran is a person who (1) served on active duty for a period of more than 180 days, any part of which occurred between August 5, 1964 and May 7, 1975, and was discharged or released with other than a dishonorable discharge; (2) was discharged or released from active duty for a service connected disability if any part of such active duty was performed between August 5, 1964 and May 7, 1975; or (3) served on active duty for more than 180 days and served in the Republic of Vietnam between February 28, 1961 and May 7, 1975.

VEVRAA requires employees with federal contracts or subcontracts of \$100,000 or more must file a VETS-100A report by September 30 each year. The DOL has published the following information on the VETS-100 and VETS-100A forms.

## Background

The U.S. DOL Veterans' Employment and Training Service (VETS) is responsible for administering the requirement under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), 38 U.S.C. 4212(d), that federal contractors and subcontractors track and report annually to the Secretary of Labor the number of employees in their workforces who belong to the categories of veterans covered under the affirmative action provisions of the Act.

VETS has published implementing regulations at 41 CFR Part 61-250 that require federal contractors with a federal contract or subcontract of \$25,000 or more that was entered into prior to December 1, 2003 to file a completed Federal Contractor Veterans' Employment VETS-100 Report form ("VETS-100 Report") annually.

The VETS-100 Report calls for federal contractors and subcontractors to report the number of employees and the number of new hires during the reporting period who are

- (1) Special disabled veterans
- (2) Veterans of the Vietnam era
- (3) Veterans who served on active duty in the U.S. military during a war or a campaign or expedition for which a campaign badge has been authorized
- (4) Recently separated veterans (veterans within one year from discharge or release from active duty)

The Jobs for Veterans Act (JVA), enacted in 2000, amended the reporting requirements under VEVRAA by increasing the dollar amount of the Federal contract and subcontract that triggers coverage and changing the categories of veterans that contractors and subcontractors are to track and report. The regulations at 41 CFR Part 61-300 implement the JVA amendments to the reporting requirements under VEVRAA and require federal contractors and subcontractors with a contract or subcontract of \$100,000 or more awarded or modified on or after December 1, 2003, to file a VETS-100A Report.

Federal contractors and subcontractors completing the VETS-100A Report are to provide information on the number of employees and new hires during the reporting period who are

- (1) Disabled veterans
- (2) Veterans who served on active duty in the U.S. military during a war or campaign or expedition for which a campaign badge is awarded
- (3) Veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985
- (4) Recently separated veterans (veterans within 36 months from discharge or release from active duty)

### **Mandatory Job Listings**

The OFCCP administers and enforces the affirmative action provisions of VEVRAA, which require federal contractors and subcontractors to employ and advance in employment qualified covered veterans. To implement the affirmative action requirement, VEVRAA and the implementing regulations at 41 CFR Part 60-250 and Part 60-300 issued by OFCCP require federal contractors and subcontractors to list most employment openings with the appropriate employment service delivery system, and each such employment service delivery system is required to give covered veterans priority in referrals to such openings. Executive and senior management positions, positions to be filled from within the contractor's organization, and positions lasting three days or fewer are exempt from the mandatory job listing requirement. Listing jobs with the state workforce agency job bank or with the local employment service delivery system where the opening occurs will satisfy the requirement to list job openings with

the appropriate employment service delivery system. Additional information on the mandatory job listing requirement is available on the OFCCP website.

### **Affirmative Action**

OFCCP regulations implementing VEVRAA also require certain federal contractors and subcontractors to develop and maintain a written AAP. The AAP sets forth the policies and practices the contractor has in place to ensure that its personnel policies and practices do not limit employment opportunities for covered veterans. The AAP also spells out the steps the contractor will take to recruit, train, and promote covered veterans. Additional information about the written AAP is also available on the OFCCP website.

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### **Knowledge 20**

Impact of compensation and benefits on recruitment and retention

### **KNOWLEDGE**

## **Compensation and Benefits**

HR professionals need to be familiar with how compensation and benefits relate to recruitment and retention. As with many areas we have explored, there are legal and nonlegal dimensions to this discussion.

### **Sherman Antitrust Act, 1890**

The Sherman Antitrust Act of 1890 was a law that was passed in an effort to curb the growth of monopolies. Under the Act, any business combination that sought to restrain trade or commerce would from that time forward be illegal. Specifically, the Act states that

- ▶ **Section 1:** “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”
- ▶ **Section 2:** “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”

The Sherman Antitrust Act is relevant to compensation’s impact on recruitment and retention because an improperly conducted salary survey (or even information attempts to gather data on competitor’s wage rates) can constitute a violation of this Act.

### **Equal Pay Act, 1963**

The Equal Pay Act of 1963 prohibits discrimination on the basis of sex in the payment of wages or benefits to men and women who perform substantially equal (but not identical) work, for the same employer, in the same establishment, and under similar working conditions. (An establishment generally refers to one specific physical location.) Similar to the way in which the Fair Labor Standards Act (FLSA) status is determined, substantial equality is determined by job content, not job titles.

## Compensation Strategies

An often-embraced “default” position is that an organization “should” pay more than any other labor market competitor. This is not, however, the only option, nor is it necessarily the best option. Rather, there are three potentially valid strategies to consider, as discussed in this section.

### Lag the Market

This is a compensation strategy in which an organization chooses, by design, or simply because of budgetary constraints, to offer total compensation packages that are less competitive than the total compensation packages that are being offered by their labor market competitors. Organizations that lag the market might offset this potential disadvantage by reinforcing and maximizing the intrinsic rewards that it offers—long-term potential growth opportunities, the ability to contribute to a particularly significant organizational mission, and so on.

### Lead the Market

This is a compensation strategy in which an organization offers total compensation packages that are better than packages being offered by their labor market competitors. Organizations that lead the market may believe that higher compensation packages will attract higher-performing employees who will, in turn, pay for themselves, and then some. In short, these organizations want the best of the best and are willing to pay for it.

### Match the Market

This is a compensation strategy in which an organization chooses to offer total compensation packages that are comparable to the total compensation packages being offered by their labor market competitors. Organizations that match the market make a conscious choice to be “externally competitive” with respect to total compensation.

## RESPONSIBILITY

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### WPE Responsibility 19

Develop and implement a record retention process for handling documents and employee files (for example: pre-employment files, medical files, and benefits files).

## Documentation Strategies for HR Professionals

This particular responsibility, perhaps more than any other responsibility addressed in this chapter, takes a high-level overview of this portion of our function. By this, we mean that the records that must be maintained will vary—by law, by industry, by state, by jurisdiction—and by a dozen other factors.

Within an organization, maintaining documentation is dreaded by many, postponed by most, enjoyed by few, and viewed suspiciously by others. HR’s role in establishing and maintaining legal and effective documentation practices is particularly pivotal.

With respect to WPE-related record keeping, HR is responsible for maintaining much of the information and documentation required to ensure compliance with federal, state, and local laws. A few examples of some of these record-keeping requirements stemming from this functional area include, but are in no way limited to, applicant flow data, veteran status, AAP-related data, and I-9 reporting.

A primary takeaway for this responsibility is that HR professionals must take great care in ensuring that they learn, know, and follow the unique retention requirements to which they are subject. This is not a responsibility that can be performed intuitively, nor is it one that can be adequately addressed within a book of this scope.

Also, keep in mind that maintaining documentation means more than just “being organized.” In a sense, this responsibility can be a “Catch-22” for HR professionals. By definition, the actions associated with maintaining documentation are transactional. They are not strategic in nature. They are also driven, in large part, by compliance requirements. But if we don’t perform this portion of our job well, it is unlikely that we will be given the opportunity to perform functions that are more strategic in nature. Why? One reason is fairly self-evident: if we cannot demonstrate the ability to successfully execute tasks of a more mundane and administrative nature, it is unlikely that we will be entrusted with initiatives that are more strategic or visible. The second reason can become painfully obvious: documentation, when mishandled, can lead to very real and tangible costs (human, as well as monetary) to the organization. These costs can, and often do, have a strategic impact.

Some documentation basics that HR professionals need to think about include these:

- ▶ **Know what needs to be documented:** This includes federal, state, and local requirements—as well as documentation mandated by collective bargaining agreements, employment contracts, and performance management programs.
- ▶ **Know how to document:** Many forms must be completed in accordance with specific, detailed, and mandatory guidelines. Those specific requirements can also impact the ways in which documents are maintained, stored, retrieved, and distributed.
- ▶ **Know what not to document:** Documentation takes two main forms—documentation that pertains to collecting and maintaining legally mandated record keeping, and documentation that pertains to performance management (in the broadest sense of that term). For purposes of this discussion, our focus will remain on the first type of documentation.

Here are some hands-on ideas to consider:

- ▶ Set up streamlined processes and procedures for handling routine and repetitive documentation requirements.
- ▶ Utilize technological tools, as appropriate and helpful.
- ▶ Maintain ongoing awareness of evolving laws and regulations to ensure they maintain continual compliance with potentially changing regulations.
- ▶ Incorporate fail-safe mechanisms into those processes. Even in the best-designed systems, it’s inevitable that things will go wrong. Make sure there is a way to identify and resolve insufficient or noncompliant documentation.
- ▶ Look for ways to use existing documentation more strategically. Ascertain how you can turn data into information and how you can use that information as you work to earn, or maintain, a seat at the table.

## Employment Litigation Is No Laughing Matter

There's an old joke that goes something like this:

**Question:** "What's the difference between true love and employment litigation?"

**Answer:** "Employment litigation lasts forever."

In truth, there is nothing funny about employment litigation. However, there's a valuable reminder that can be taken away from this quip: any written or electronic communication you create, in any form, is—for all intents and purposes—forever subject (potentially) to subpoena. This is particularly true for electronic communications—emails and even instant messages. Our most contemporary communications are, in some ways, even more permanent than the stone tablets of ages gone by—so be extremely prudent and careful about the documentation you maintain. You may one day have the opportunity to review it again—in a courtroom, in front of a jury, or on the front page of a newspaper.)

### NOTE

The following WPE Responsibilities/Areas of Knowledge—WPE Responsibility 16 and Knowledge 21—are not covered in this book because they are covered in Pearson's SPHR Exam Prep.

### RESPONSIBILITY

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#### WPE Responsibility 16

Develop, implement, and evaluate the succession planning process.

### KNOWLEDGE

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#### Knowledge 21

International HR and implications of global workforce for workforce planning and employment.



## Chapter Summary

Responsibilities relating to workforce planning and employment provide HR professionals with the opportunity to have a lasting impact on the organization. Whether this impact is positive, however, depends in large part on the way in which HR professionals execute these responsibilities.

To function successfully with respect to the functional area of workforce planning and employment, HR professionals must develop an understanding of and an appreciation for equal employment opportunity (EEO).

It's also critical for HR professionals to understand the many laws and cases that shape this functional area and to commit to maintaining currency with respect to emerging cases that offer additional interpretation, and reinterpretation, of these laws. In addition, HR professionals must be prepared to contribute meaningfully to ensuring that the organization will be able to meet its future goals by making sure the right people, with the right skills, are in the right places at the right times.

The ability to execute this functional area effectively is also predicated on knowing and understanding the organization's strategic plan. HR professionals who have already earned a "seat at the table" in their organization are likely to have a good grasp of where the organization is going. HR professionals must proactively seek opportunities for learning about the organization's long-term objectives. Unless we do, our efforts may be less productive, less relevant, less valued, and less impactful.

Ultimately, the choice of how we will perform in this area rests with us. The choices that we make will go a long way toward defining how we are perceived by the organization, our overall effectiveness in the organization, and the degree to which we will participate in a transformational manner within the organization.

## Key Terms

- ▶ Workforce planning and employment (WPE)
- ▶ Executive orders
- ▶ Title VII of the Civil Rights Act, 1964
- ▶ Bona fide occupational qualification (BFOQ)
- ▶ Seniority systems
- ▶ Piece-rate systems
- ▶ Protected classes
- ▶ Equal Employment Opportunity Commission (EEOC)
- ▶ Executive Order 11246, 1965
- ▶ Office of Federal Contract Compliance Programs (OFCCP)
- ▶ Uniform Guidelines on Employee Selection Procedures (UGESP), 1978
- ▶ Adverse impact (also known as "disparate impact")
- ▶ Reliability
- ▶ Validity
  - ▶ Content validity
  - ▶ Criterion-related validity
  - ▶ Construct validity
  - ▶ Predictive validity
- ▶ Age Discrimination in Employment Act (ADEA), 1967
- ▶ Fair Credit Reporting Act (FCRA), 1970
- ▶ Equal Employment Opportunity Act, 1972
- ▶ Rehabilitation Act, 1973
  - ▶ Section 503

- ▶ Section 504
- ▶ Section 508
- ▶ Pregnancy Discrimination Act, 1978
- ▶ Immigration Reform and Control Act (IRCA), 1986
  - ▶ I-9 form
- ▶ Drug-Free Workplace Act, 1988
- ▶ Department of Labor (DOL)
- ▶ Worker Adjustment and Retraining Notification Act (WARN), 1988
  - ▶ Mass layoff
  - ▶ Plant closing
- ▶ Americans with Disabilities Act (ADA), 1990
  - ▶ Individual with a disability
  - ▶ Qualified person
  - ▶ Reasonable accommodation
  - ▶ Undue hardship
  - ▶ Major life activities
- ▶ Civil Rights Act of 1991
  - ▶ Compensatory damages
  - ▶ Punitive damages
- ▶ Family and Medical Leave Act (FMLA), 1993
  - ▶ Covered employers
  - ▶ Eligible employees
  - ▶ Leave entitlement
  - ▶ Serious health condition
- ▶ Uniformed Services Employment and Reemployment Rights Act (USERRA), 1994
- ▶ Department of Justice
- ▶ Congressional Accountability Act (CAA), 1995
- ▶ Americans with Disabilities Act Amendments Act (ADAAA), 2008
  - ▶ Qualified exigency leave
  - ▶ Military caregiver leave
- ▶ Genetic Information Nondiscrimination Act (GINA), 2008
- ▶ Lilly Ledbetter Fair Pay Act, 2009
- ▶ *Griggs v. Duke Power*, 1971
- ▶ *McDonnell Douglas Corp v. Green*, 1973
- ▶ *Albemarle Paper v. Moody*, 1975
- ▶ *Washington v. Davis*, 1976
- ▶ *Regents of California v. Bakke*, 1978
- ▶ *United Steelworkers v. Weber*, 1979
- ▶ *Meritor Savings Bank v. Vinson*, 1986
- ▶ *Johnson v. Santa Clara County Transportation Agency*, 1987
- ▶ *Martin v. Wilks*, 1988
- ▶ *Automobile Workers v. Johnson Controls*, 1990
- ▶ *Harris v. Forklift Systems*, 1993
- ▶ *Taxman v. Board of Education of Piscataway*, 1993
- ▶ *St. Mary's Honor Center v. Hicks*, 1993
- ▶ *McKennon v. Nashville Banner Publishing Co.*, 1995
- ▶ *Faragher v. City of Boca Raton*, 1998, and *Ellerth v. Burlington Northern Industries*, 1998
- ▶ *Kolstad v. American Dental Association*, 1999
- ▶ *Grutter v. Bollinger* and *Gratz v. Bollinger*, 2003
- ▶ *Circuit City Stores, Inc. v. Adams*, 2001
- ▶ *General Dynamics Land Systems v. Cline*, 2004
- ▶ *Ricci v. DeStefano*, 2009
- ▶ Protected class
- ▶ Discrimination
  - ▶ Disparate (or “adverse”) treatment
  - ▶ Disparate (or “adverse”) impact
  - ▶ Bottom-line approach
  - ▶ “Four-fifths” rule:
  - ▶ Perpetuating past discrimination
- ▶ Harassment:
  - ▶ Sexual harassment
  - ▶ Quid pro quo sexual harassment
  - ▶ Hostile work environment sexual harassment
- ▶ Equal Employment Opportunity (EEO)

- ▶ Charge
- ▶ Charging party
- ▶ Complainant
- ▶ Plaintiff
- ▶ Respondent
- ▶ Fair Employment Practices Agencies (FEPAs)
- ▶ Reasonable cause
- ▶ Right to sue letter
- ▶ Relief
- ▶ Remedies
- ▶ Back pay
- ▶ Front pay
- ▶ Job analysis
- ▶ Job description
- ▶ Job specifications
- ▶ Job competencies
- ▶ Knowledge
- ▶ Skills
- ▶ Abilities
- ▶ KSAs
- ▶ Essential and nonessential job functions
- ▶ Job specifications (or “specs”)
- ▶ Credentials
- ▶ Recruiting
- ▶ Selection
- ▶ Employer branding
- ▶ Relevant labor market
- ▶ Selection criteria
- ▶ Internal and external recruiting
- ▶ Job posting
- ▶ Job bidding
- ▶ Succession planning
- ▶ Social media
- ▶ Employment agencies
  - ▶ Employment agencies — state
  - ▶ Employment agencies —temporary
  - ▶ Private employment agencies (also known as private search firms)
  - ▶ Contingency employment agencies/ search firms
  - ▶ Retained employment agencies/ search firms
- ▶ Employee referral
- ▶ Nontraditional staffing alternatives
- ▶ Outsourcing
- ▶ Request for Proposal (RFP)
- ▶ Preemployment testing
  - ▶ Agility tests
  - ▶ Aptitude tests
  - ▶ Assessment center
  - ▶ Cognitive ability tests
  - ▶ Integrity, or honesty, tests
  - ▶ Medical tests
  - ▶ Personality tests
  - ▶ Preemployment drug testing
  - ▶ Prepromotion drug testing
- ▶ Yield ratio
- ▶ Cost per hire
- ▶ Turnover analysis
- ▶ Employment application
- ▶ Résumés
- ▶ Short- form employment applications
- ▶ Long- form employment applications
- ▶ Job- specific employment applications
- ▶ Weighted employment applications
- ▶ Interview
  - ▶ Directive interviews
  - ▶ Nondirective interviews
  - ▶ Phone interviews
  - ▶ Prescreen interviews
  - ▶ Behavior-based interviews
  - ▶ Stress interviews
  - ▶ One-on-one versus panel/team interviews
- ▶ Nonverbal communication cues (“non-verbals”)
- ▶ Interviewer errors
  - ▶ Contrast error

- ▶ First impression error
- ▶ Halo error
- ▶ Horns error
- ▶ Leniency error
- ▶ Strictness error
- ▶ Recency error
- ▶ Similar-to-me error
- ▶ Realistic job previews (RJP)
- ▶ Background checks
- ▶ Employment contracts
- ▶ Onboarding (also referred to as “employee orientation”)
- ▶ Relocation
- ▶ Involuntary terminations
- ▶ Layoffs
- ▶ Voluntary terminations
- ▶ Constructive discharge
- ▶ Wrongful termination/ discharge
- ▶ Exit interviews
- ▶ Severance packages
- ▶ EAP
- ▶ Outplacement support
- ▶ Severance package
- ▶ Affirmative Action Plan (AAP)
  - ▶ Designation of responsibility
  - ▶ Organizational display or work-force analysis
  - ▶ Job group analysis
  - ▶ Availability analysis
  - ▶ Utilization analysis
  - ▶ Placement goals
  - ▶ Action- oriented programs
  - ▶ Identification of problem areas
  - ▶ Internal audit and reporting system
- ▶ Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA), 1974
- ▶ VETS-100/VETS 100A
- ▶ Sherman Antitrust Act, 1890
- ▶ Equal Pay Act, 1963
- ▶ Lag the market
- ▶ Lead the market
- ▶ Match the market

## Apply Your Knowledge

This chapter focuses on issues relating to workforce planning and employment. Complete the following review questions and exam questions as a way of reviewing and reinforcing the knowledge and skills you’ll need to perform your responsibilities as an HR professional and to increase the likelihood that you will pass the PHR examination.

## Review Questions

1. Describe directive and nondirective interviews. In general, which is the preferred approach?
2. What are some of the factors that need to be considered when using performance as a criterion for determining who will be let go in a layoff situation?
3. What are some best practices with respect to taking notes during an interview?
4. Describe sexual harassment that takes the form of a hostile work environment.
5. Define and describe the differences between a mass layoff and a plant closing (according to WARN Act).

## Exam Questions

1. Which of the following forms of discrimination is not covered by Title VII of the Civil Rights Act of 1964?
  - A. Age
  - B. Color
  - C. Race
  - D. National origin
  
2. Which of the following statements is true about quid pro quo sexual harassment?
  - A. It can be exacted by any employee on any other employee.
  - B. It creates a hostile work environment that can ultimately lead to constructive discharge.
  - C. It creates a situation in which an employee's terms and conditions of employment are affected by acceptance or rejection of sexual advances.
  - D. It cannot occur during the preemployment selection process because it refers to tangible or economic work-related consequences that, by definition, can be experienced only by current employees.
  
3. Which of the following employers would be required to prepare formal affirmative action plans?
  - A. Federal contractors who receive federal grants of any amount
  - B. Federal contractors with \$50,000 or more in federal contracts
  - C. Federal contractors with at least 50 employees who have federal contracts of at least \$50,000 per year
  - D. All federal contractors, regardless of the size or scope of the contract
  
4. In the event of a mass layoff or plant closing, WARN Act requires employers to notify all the following individuals or entities except
  - A. Affected employees or their representatives (such as a collective bargaining unit)
  - B. The State Dislocated Worker Unit
  - C. The appropriate local government unit
  - D. The EEOC, which will conduct an adverse impact analysis before layoffs are implemented
  
5. A defining Supreme Court case for interpreting the Civil Rights Act of 1991 was
  - A. *Kolstad v. American Dental Association*, 1991
  - B. *Grutter v. Bollinger and Gratz v. Bollinger*, 2003
  - C. *St. Mary's Honor Center v. Hicks*, 1993
  - D. *United Steelworkers v. Weber*, 1979

6. A manager with whom you have not previously worked comes to you for help with implementing two different solutions she has come up with to fix a turnover problem in her department. This manager is highly regarded—and highly visible—in the organization. You are eager to perform well on this project because you are confident it will help you strengthen your relationship with her. You are also certain that the manager will tell her peers about her experience with you, which makes it particularly critical that you handle yourself well. Your first response should be to
- A. Communicate your commitment to implementing the manager's solutions.
  - B. Offer alternative solutions based on experience you have had with similar situations.
  - C. Ask questions to obtain more information about the problems the manager is experiencing.
  - D. Ask questions to obtain information that will help you implement the manager's solution more effectively.
7. A properly conducted job analysis will produce all of the following except:
- A. Job competencies
  - B. Job postings
  - C. Job specifications
  - D. Job description
8. Which of the following is not one of the main elements in a job description?
- A. Scope information
  - B. Physical work conditions and physical demands
  - C. Compensation rates
  - D. Minimum requirements
9. Which of the following would be least likely to be considered a job competency?
- A. Communication skills
  - B. Reading skills
  - C. Teamwork skills
  - D. Interpersonal skills
10. All of the following represent benefits of employee referral programs except
- A. Highly cost-effective recruiting
  - B. Employees who are more likely to succeed
  - C. Demonstration of good faith efforts to remedy underutilization
  - D. Increased candidate familiarity with the organization

## Answers to Review Questions

1. Directive interviews take a more structured approach. The interviewer(s) asks the same questions of all candidates and maintains control of the interview. Conversely, nondirective interviews are more conversational and relatively unstructured. In a nondirective interview, the candidate—not the interviewer—ends up controlling the interview and primarily determines what will be discussed.

Generally speaking, a directive style is more effective and appropriate than a nondirective style because it yields more consistent results, facilitates the process of comparing candidates to the job requirements and to each other, and generally provides greater defensibility in the event of a legal challenge. Although the directive approach is the better one, the interview must still remain dynamic and interactive.

2. Before choosing to rely solely on employees' prior performance ratings to determine who should be laid off and who should be retained, the organization needs to carefully examine its performance appraisal system and assess its validity and overall worth. The system itself could be flawed, or—even if it is sound—there could be problems with the way in which individual raters have applied it over time. Either factor could result in misguided assessments, which could consequently diminish the legitimacy (and defensibility) of layoff decisions made on the basis of employees' past performance.
3. At the beginning of the interview—perhaps at the end of the formal “rapport- building” process—let the candidate know that you will be taking notes. The candidate may otherwise assume that she has said something wrong the minute your pen hits the paper. Letting the candidate know you will be taking notes can actually constitute another element of rapport- building: you are interested in and care about what she is going to tell you and want to be certain that you remember it correctly.

Note taking should not interfere in any way with the interview process. It also should not diminish the personal connectedness that the interviewer establishes with the candidate during the initial rapport- building portion of the interview. Jotting down key words and phrases that the candidate offers in response to the interviewer's questions will help the interviewer remember the candidate's responses after the interview is over. Interviewers can then go back after the interview is done and “flesh out” more details around each of the candidate's answers.

4. Sexual harassment that manifests itself as a hostile work environment exists when unwelcome sexual conduct unreasonably interferes with an employee's job performance or creates a hostile, intimidating, or offensive work environment. A hostile work environment can be found to exist whether or not the employee experiences (or runs the risk of experiencing) tangible or economic work-related consequences.

Hostile work environment harassment is unrelated to any decisions that are made relative to the employee's employment. As such, hostile work environments can be created by virtually anyone with whom an employee might come in contact in the workplace or “workspace.”

5. According to WARNA, a “mass layoff” occurs under the following sets of circumstances:

- ▶ **Mass layoff:** A covered employer must give notice if there is to be a mass layoff that does not result from a plant closing but that will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50–499 employees if they make up at least 33% of the employer's active workforce. Again, this does not count employees who have worked less than 6 months in the past 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice.

An employer also must give notice if the number of employment losses that occur during a 30-day period fails to meet the threshold requirements of a plant closing or mass layoff, but the number of employment losses for 2 or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period, of either a plant closing or mass layoff. Job losses within any 90-day period

will count toward WARNA threshold levels unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

WARNA defines a “plant closing” as follows:

- ▶ Plant closing: A covered employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an employment loss (as defined later) for 50 or more employees during any 30-day period. This does not count employees who have worked less than 6 months in the past 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice.

## Answers to Exam Questions

1. Answer A is the best answer. Title VII of the Civil Rights Act of 1964 established five protected classes: color (answer B), race (answer C), national origin (answer D), religion, and sex. Age did not become a protected class until 1967, with the passage of the Age Discrimination in Employment Act (ADEA).
2. Answer C is the best answer. Quid pro quo harassment occurs when an individual’s submission to or rejection of sexual advances or conduct of a sexual nature is used as the basis for employment-related decisions. Because this sort of impact can usually only be brought about by a supervisor or someone else in a position of authority in the organization, answer A is not the best answer. Answer B is not the best answer; quid pro quo harassment is a separate concept from hostile work environment harassment (although both types of harassment could potentially lead to constructive discharge). Answer D is not the best answer; either quid pro quo or hostile work environment harassment could occur during the recruiting or selection processes.
3. Answer B is the best answer. Federal contractors with \$50,000 or more in federal contracts would be required to prepare formal affirmative action plans. Answer A is not the best answer; Executive Order 11246 does not specifically use the awarding of federal grants as a factor that determines whether an organization needs to prepare a formal affirmative action plan. Answer C is not the best answer; this threshold refers to an organization’s obligation to file annual EEO reports, not to the organization’s obligation to prepare a formal affirmative action plan. Answer D is not the best answer; not all contractors are required to prepare formal affirmative action plans.
4. Answer D is the best answer. There is no WARNA requirement to notify the EEOC of impending mass layoffs or plant closings. The organization should, however, conduct an adverse impact analysis before making any layoff decisions. Answers A, B, and C are not the best answers; each one indicates individuals or entities who are required to be notified in the event that WARNA is triggered.
5. Answer A is the best answer. In *Kolstad v. American Dental Association, 1991*, the court ruled that punitive damages can be awarded only when the employer has acted with malice and reckless indifference to “the employee’s federally protected rights.” Answers B, C, and D each address different legal principles.
6. Answer C is the best answer. HR adds value to this process by asking questions that help to ascertain the underlying problems—and that help distinguish problems from symptoms. Answer A is not the best answer; although a manager may be convinced of the true nature of a problem and what the solution should be, the manager’s assessment is not necessarily correct, so you shouldn’t unthinkingly commit to implementing it. Answer B is not the best answer for a related reason; you don’t really know what the problem is, so it is not possible to suggest a solution. Additionally, if you use this approach, you are dismissing the manager’s opinions and experience—and you risk damaging your relationship with the manager. Answer D is not the best answer; it assumes that the manager’s assessment of the problem is correct and that the proposed solution is the best possible intervention.



7. Answer B is the best answer. A properly conducted job analysis will produce job competencies (answer A), job specifications (answer C), and a job description (answer D). Although information generated through the job analysis should be used to write a job posting, this is not one of the specific outputs of the job analysis process.
8. Answer C is the best answer. Compensation rates are generally not included in a job description. Scope information (answer A), physical work conditions and physical demands (answer B), and minimum requirements (answer C) do constitute important parts of the job description for each position.
9. Answer B is the best answer. Job competencies speak to broad categories of skills that are required to perform successfully in a particular position, department, or organization. Of the four answers, “reading skills” is least likely to be defined in this way because it is more of a discrete, observable, and measurable skill. Communication skills (answer A), teamwork skills (answer B), and interpersonal skills (answer D) are all more likely to be considered “key success factors” or “performance factors.”
10. Answer C is the best answer. If underutilization exists within an organization, employee referral programs are not likely to remedy that problem. Answers A and D are not the best possible answers; “highly cost-effective recruiting” and “increased candidate familiarity with the organization” both represent benefits of employee referral programs. Answer B is not the best answer; although the employee who makes the referral may believe that the candidate whom they refer will succeed, that assessment is not necessarily accurate.

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