# Public Sector

Individual Liability of Public Employees • Right to Privacy
First Amendment Expression • Diversity & Affirmative Action


Experience the Difference

## MVP Law Seminars • 2019

www.mvplaw.com

# TABLE OF CONTENTS
## MVP Law Municipal Law Seminar

# INDIVIDUAL LIABILITY OF PUBLIC EMPLOYEES, OFFICIALS AND SUPERVISORS – ARE THE RULES CHANGING?

## 42 U.S.C § 1983

Under 42 U.S.C. § 1983, "every person who under color of statute, ordinance, regulation, custom or usage, of any State…subjects or causes to be subjected" any persons "to the deprivation of any rights, privileges, or immunities" protected by the Constitution and law, shall be civilly liable to the party injured."

## Section 1983 As an Enforcement Mechanism

Section 1983 is not a source of substantive rights, but rather provides a remedy to those deprived of any rights, privileges, or immunities secured by the Constitution. *Jones v. City & County of Denver*, 854 F.2d 1206, 1209 (10th Cir. 1988). Examples include unreasonable search and seizure and excessive use of force violations under the Fourth Amendment.

## Supervisory Liability Under Section 1983

An individual may be liable for a subordinate's constitutional violations under Section 1983. To establish a § 1983 claim against an individual based upon his supervisory responsibilities, such as training, the plaintiff must demonstrate that the defendant supervisor's subordinates violated the constitution. *Sigg v. Allen Cnty, Kan.,* No. 15-CV-01007-EFM, 15-CV-01012-RFM, 2016 WL 6716085, at *7 (D.Kan. Nov. 15, 2016). Then, the plaintiff must demonstrate an "'affirmative link' between the supervisor and the constitutional violation committed by a subordinate." *Id.* This requires more than mere knowledge. *Id*. In fact, to establish the "affirmative link," the plaintiff must establish the following (3) elements: (1) personal involvement, (2) causation, and (3) state of mind. *Id.* Specifically, the state of mind element requires a showing that the defendant "supervisor acted knowingly or with 'deliberate indifference' that a constitutional violation would occur." *Serna v. Colo. Dept. of Corrections*, 455 F.3d 1146, 1151 (10th Cir. 2006).

## What is qualified immunity?

Qualified Immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). According to the U.S. Supreme Court, the purpose of qualified immunity is to not only shield defendants from liability, but to shield

them from participation in litigation. Federal, state, and local governmental officials when sued in their *individual* capacities enjoy qualified immunity from damages (including punitive damages). Qualified immunity only applies to cases for damages and does not apply to cases where the plaintiff seeks equitable relief. *Grantham v. Trickery*, 21 F.3d 289, 295 (8th Cir. 1994); *Stanley v. Magrat*h, 719 F.2d 279, 284 n. 9 (8th Cir. 1983).

In analyzing whether or not a government official's conduct is reasonable, courts engage in a two-prong inquiry. First the court determines whether the facts alleged or shown establish that the defendant's conduct violated a constitutional right. Second, the court determines whether the right in question was "clearly established" at the time of the defendant's alleged violation. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). "The salient question ... is whether the state of the law" at the time of an incident provided "fair warning" to the defendants that their alleged conduct was unconstitutional. *Id*. (internal citations and quotations omitted). Whether an official is entitled to qualified immunity is extremely fact specific.

**"Clearly established" right**

A defendant must have fair notice that his conduct was unlawful. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). In order to be a "clearly established" right, the right's contours must be "sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018). Further, the clearly established law cannot be a general statement of law. *Id.* "Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *Id*.

A plaintiff must be able to point to factually similar U.S. Supreme Court or circuit court precedent to show that the right at issue was clearly established such that a reasonable officer could have known about it. However, the more egregious the alleged conduct is, the less similar a prior case must be.

**Qualified Immunity: A Crucial Defense**

Based on the heavy burden that a plaintiff must overcome to defeat the qualified immunity defense, it is a crucial tool in the government employee's toolbox. As a practical matter, so long as government employees are acting in a reasonable manner, they will be entitled to a defense of qualified immunity should they unintentionally violate a plaintiff's constitutional rights.

## Current Movement Against Qualified Immunity

Recently there has been a large bipartisan movement to reconsider the doctrine of qualified immunity, in large part due to the national publication of fatal police encounters. In the last couple of years, civil rights activist groups have stepped in to challenge the doctrine of qualified immunity as they feel that it is too high of a burden to overcome. Jay Schweikert, a Policy Analyst with Cato Institute's Project on Criminal Justice, stated, "[t]his doctrine, invented by the Court out of whole cloth, immunizes public officials even when they commit legal misconduct unless they violated 'clearly established law.' That standard is incredibly difficult for civil rights plaintiffs to overcome because the courts have required not just a clear legal *rule,* but a prior case on the books with functionally identical ***facts.****"*

The doctrine of qualified immunity is one that will need to be closely monitored in the coming years as it is a crucial defense for government employees being sued in their individual capacity.

## Individual Liability Under Federal Employment Statutes

Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, all prohibit discrimination by employers on a variety of grounds. Further, Title VII, the ADA, and the ADEA all have similar definitions of what constitutes an "employer" under the statutes. These vary between requiring 15 to 20 employees. Based upon these statutory definitions of employers, courts in the Eighth and Tenth Circuits have held that suits against individuals outside of their official capacity are inappropriate. *See Haynes v. Williams*, 88 F.3d 898, 901 (10th Cir. 1996) ("[P]ersonal capacity suits against individual supervisors are inappropriate under Title VII."); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) ("Under Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate."); *Joritz v. Univ. of Kan.*, No. 17-4002-SAC, 2018 WL 4906306, at *2 (D.Kan. Sep. 11, 2018) (denying a plaintiff's motion to amend her petition to add Title VII claims against individual defendants); *Fears v. Unified Govt. of Wyandotte Cnty.*, No. 17-1668-KHV, 2018 WL 3348881, at *3 (D.Kan. July 9, 2018) ("the ADA do[es] not impose personal liability against individual supervisors."); *Collier v. AT&T, Inc.,* No. 17-2341-JAR-GLR, 2017 WL 4284868, at *3 (D.Kan. Sep. 27, 2017) (dismissing plaintiff's ADA claims against individual defendants); *Ledbetter v. City of Topeka, Kan.*, 112 F.Supp.2d 1239, 1244 (D.Kan. 2000) (Individual supervisory liability is not proper under the ADEA.); *Spencer v. Ripley Cnty. State Bank*, 123 F.3d 690, 691 (8th Cir. 1997) (individuals are not covered employers under Title VII); *Lyons v. Drew*, No. 14-0510-CV-W-ODS, 2015 EL 1198081, at *2 (W.D. Mo Mar. 16, 2015) ("an individual is not subject to liability under the ADEA or the ADA").

## Individual Liability Under the Family Medical Leave Act

Tenth Circuit

- Individual Liability under the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* is an interesting question as it has not yet been addressed by the Tenth Circuit. Further, the case law in the District of Kansas is conflicting. In *Arbogast v. Kan.*, the court stated that it found the statutory interpretation found in *Mitchell v. Chapman*, 343 F.3d 811, 832–33 (6th Cir.2003) *cert. den.,* 542 U.S. 937 (2004) to be persuasive and ultimately determined that "public officials are not 'employers' subject to liability under the FMLA." *Arbogast*, No. 13–CV–4007–JAR/KMH, 2014 WL 1304939, at *4 (D.Kan. Mar. 31, 2014).
- However, in *Miles v. Unified. Sch. Dist. No. 500, Kan. City, Kan.*, the court found the opinion in *Cordova v. New Mexico*, 283 F.Supp.3d 1028, 1039 (D.N.M. 2017) to be persuasive in applying the "economic-reality test" to determine whether an individual should be considered an employer under the FMLA. *Miles*, 347 F.Supp.3d 626, 630 (D.Kan. 2018) (quoting *Cordova* that "courts [should] ask whether the alleged employer possessed the power to control the worker in question, with an eye to the economic reality presented by the facts of each case."). Ultimately, the court determined that at the dismissal stage, the plaintiff had pled enough facts to support a finding that the principal of the plaintiff's school was an "employer" under the FMLA when applying the economic-reality test. *Id.* at 632. Additionally, in *Richards v. Schoen*, the District of Kansas stated that after weighing the authority on the issue, it would side with the "majority of the courts" in "hold[ing] that the FMLA allows for suits against public officials in their individual capacity." No. 17-4080-SAC, 2018 WL 447731, at *5 (D.Kan. Jan. 17, 2018).
- Clearly, the case law is trending towards holding supervisors individually liable

Eighth Circuit

- The Eighth Circuit has held that individual employees can be held liable under the FMLA if they satisfy the definition of an employer under the statute.
- The FMLA defines an employer as "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer [.]" 29 U.S.C. § 2611(4)(A)(ii)(I).
- Therefore, in the Eighth Circuit, supervisors can be held liable under the FMLA in their individual capacity.

# Notes Pages

# Notes Pages

# PUBLIC EMPLOYEES AND THE RIGHT TO PRIVACY IN THE WORKPLACE

## The Right to Privacy

Starting at the very beginning, as Julie Andrews sang, is a very good place to start. The Constitution and Bill of Rights outlines many of the basic rights that are enjoyed in daily life: freedom of speech and religion, freedom from unreasonable searches and seizures, the right to bear arms, due process, and so on. The right to privacy, which is exceedingly important in the digital age, is not so enumerated. Nevertheless, the United States Supreme Court has recognized a constitutional right to privacy, not from any one specific provision or Amendment of the Constitution, but from many of them working together.[1] In recognizing the radiating effect the Bill of Rights' guarantees, the Court recognized that the "penumbras" of multiple Amendments create zones of privacy.[2] Since then, the right to privacy, especially the right to privacy from the government, has been explored in countless new ways.

Here, we will discuss the rights of privacy for a uniquely situated set of individuals – employees of the very government from whom they demand this privacy. Because the Bill of Rights restricts what the government can do, private employees cannot necessarily sue their boss for a violation of the warrant requirement. If a bank supervisor searches a teller's desk without a warrant, there is no Fourth Amendment violation because there is no government action. If the chief of police searches one of their officers' lockers without a warrant, there is now government action, which at first glance creates a Fourth Amendment violation. But does the government have less rights when wearing the employer hat than other employers? Do its employees have less rights than the rest of the citizens simply because of who signs their paychecks? Ultimately, courts have recognized that while acting as an employer, the government has significantly broader power than it does otherwise.[3]

## The Right to be Free from Unreasonable Searches

The Fourth Amendment provides "[t]he right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures ...."[4] The restrictions outlined by the Fourth Amendment are effective against the federal government; however, the Fourteenth Amendment imposes the same restrictions on state and local governments.

The protections afforded to public employees for a work-related search and seizure are minimal. The foundational case regarding a public employee's right to privacy is O'Connor v. Ortega, 480 U.S. 709 (1987). There, the Court maintained that employees

[1] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[2] Id. at 484.
[3] *Waters v. Churchill*, 511 U.S. 661 (1994).
[4] U.S. Const. amend. IV.

have a reasonable expectation of privacy against being searched by the police.[5] Nonetheless, due to the "operational realities of the workplace", an employee's expectation of privacy may be unreasonable when the search is done by a supervisor as opposed to a law enforcement officer.[6] Needs arise in the business context that require supervisors to search through an employee's space such as looking for documents, and requiring a warrant would seriously disrupt the routine conduct of business.[7] As such, when determining the reasonableness of a search by a government employer, the employee's expectation of privacy must be balanced against the employer's need for supervision, control and efficiency.[8] In other words, public employers are given wide latitude to enter employee offices "for legitimate work-related, non-investigatory reasons as well as investigations of work-related misconduct.[9]

Subsequent decisions, such as Schowengerdt v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1991) and City of Ontario v Quon, 560 U.S. 746 (2010) have followed Ortega and further weakened an employee's right to privacy in the workplace. In Schowengerdt, the court held an employee has a reasonable expectation to privacy in work areas of exclusive use to the employee, such as the employee's office, unless the employer has previously notified the employee that the employee's office is subject to a work-related search on a regular basis.[10] In Quon, the Court held that the City of Ontario, California did not violate the constitutional rights of an employee when the city received and reviewed transcripts of the employee's text messages on a city supplied pager.[11] Reasons supporting the decision were that Quon had been informed that the messages were not private and that the City had a computer policy that informed users that they should not expect any level of privacy when using City computers.

Closer to home, a court upheld the termination of an assistant attorney general who alleged breach of his right to privacy in Haynes v. Attorney General of Kansas, No. 03-4209-RDR, 2005 WL 2794956 (D. Kan, Aug 26, 2005). Haynes complained that a post-termination search of his computer that revealed personal information and personal e-mails was inappropriate. The State prevailed on summary judgement when the court found there was no "search" of Haynes' computer[12] and said he had no objectively reasonable expectation of privacy, using four factors outlined by the 10th Circuit Court of Appeals in United States v. Angevine.[13] In Angevine a professor at Oklahoma State University sought to suppress child pornography that was found on his university computer, but the 10th Circuit found no reasonable expectation of privacy, leaning heavily on four factors: (1) the university's policy that allowed the university to audit and monitor Internet use and warned that information flowing through the university network was not confidential; (2) the university owned the computer and explicitly reserved ownership of

[5] 480 U.S. at 716.
[6] Id.
[7] Id. at 722.
[8] Id. at 720.
[9] Id. at 725.
[10] 823 F.2d at 1335.
[11] 560 U.S. at 764-65.
[12] Id.
[13] 281 F.3d 1130 (10th Cir., 2002).

data stored within; (3) the defendant did not have access to the pornography because he had previously sought to delete it; and (4) the defendant did not take actions consistent with maintaining private access to the pornography.[14]

In Haynes, the District of Kansas found that a warning on the computer that popped up every time Haynes used it was an "overwhelming factor" against a reasonable expectation of privacy.[15] In fact, the warning specifically stated, "[t]here shall be no expectation of privacy in using this system" and that "[p]ersonal data on the system may be subject to removal."[16] As in Quon, then, an effective warning regarding expectations of privacy is an important defense for the government as an employer in such cases.

Of note, the court noted that even if Haynes' Fourth Amendment rights had been violated, the government supervisors' actions were not clearly unlawful under qualified immunity doctrine.[17] To prevail under that doctrine, Haynes had to demonstrate through relevant case law that a supervisor's particular actions clearly violated a constitutional right.[18] The court found that the "law concerning the expectation of privacy in an employee's work computer … is in a state of flux with the outcome heavily dependent upon the particular facts of each case."[19] Given the facts of this case, especially the warning every time the computer was used, the court did not find a clear violation of any constitutional right.[20]

Accordingly, public employers should ensure that their employment policies clearly inform employees that their offices and personal items are subject to being searched and specifically disavow any expectation of privacy. To provide a real-world example of how this plays out, an anecdote from a school here in Kansas may be effective. A teacher brought methamphetamine to school in her purse and locked the purse in her desk. The school conducted a search of the teacher's desk and purse and found the illegal substances. While the employee prevailed against criminal charges as the search was conducted without a warrant (and possibly the requisite standard for probable cause) the employee was still subject to administrative proceedings in which her teaching license was revoked.

## Disclosure of Electronic Communications and Open Records Acts

The main restrictions on workplace monitoring are the Electronic Communications Privacy Act of 1986 (ECPA) (18 U.S.C. Section 2511 et seq.) and common-law protections against invasion of privacy. The ECPA is the only federal law that directly governs the monitoring of electronic communications in the workplace. Title II of the Electronic Communications Privacy Act (ECPA), the Stored Communications Act (SCA),

[14] Haynes, 2005 WL 2794956 at *3.
[15] Id. at *4.
[16] Id.
[17] Id.
[18] Id.
[19] Id.
[20] Id.

protects communications and messages held or stored on computers. The SCA prohibits accessing or obtaining electronic information or communications without authorization. This federal privacy law has been used to hold Employers liable for using illegally accessed computer messages in making adverse employment decisions.

At first glance, the ECPA appears to prohibit an employer from intentionally intercepting its employees' oral, wire and electronic communications. However, the ECPA contains several exceptions to this prohibition, and two of these exceptions are of particular importance to employers. The first is commonly known as the *business purpose exception*, which permits employers to monitor oral and electronic communications as long as the company can show a legitimate business purpose for doing so. The second is the *consent exception*, which allows employers to monitor employee communications provided that they have their employees' consent to do so. An important and often overlooked distinction between the two exceptions is that the consent exception is not limited to business communications, and, therefore, a company arguably can monitor personal electronic communications if it can show employee consent.

On top of what supervisors may be able to access, government employees must also consider what work product may not be private from the general public.

As recent political discourse has demonstrated, there is an increased public interest in what happens behind closed doors in our government. One of the tools available to the public (and the media) is the Freedom of Information Act and corresponding state-level Sunshine laws. These laws allow individuals to request information and documents from the government, and the laws require that they be interpreted liberally, in favor of disclosure. Thus, the communications of and between public employees may not just be reviewable by their supervisors, but also by the public for whom they serve.

The Freedom of Information Act specifically exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[21] While this seemingly protects the privacy of public employees, the burden is on the government to show that this exception applies, and if the balance between the employee's privacy interest and the public's right to know is close, the scale tilts in favor of disclosure.[22] For example, courts have ordered disclosure under FOIA of information such as IRS records used to select employees for promotions[23] and records of an agency's inquiry into alleged employee misconduct.[24]

[21] 5 U.S.C. 552(b)(6).
[22] Getman v. NLRB, 450 F.2d 670, 674 n.11 (D.D.C. 1971).
[23] Celmins v. U.S. Dep't of Treasure, Internal Revenue Servv, 457 F.Supp 13 (D.D.C. 1977).
[24] Kassel v. U.S. Veterans' Admin., 709 F.Supp 1194 (D.N.H. 1989).

Further, FOIA has even been interpreted to apply to records of private construction works who were merely hired by the federal government.[25]

Beyond FOIA, each state has its own open records law.

A. **Kansas Open Records Act** (KORA) KSA 45-215 *et. Seq.*
   1. "Public Records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be *liberally construed* and applied to promote such policy" § 45-216.
   2. Public Records is defined in §45-217 "as any recorded information, regardless of from or characteristics, which is made, maintained or kept by or is in the possession of any public agency"
   3. Exceptions to KOMA and KORA are to be narrowly construed. Memorial Hospital Association v. Knutson, 239 Kan. 663, 669 (1986).
   4. The Kansas Attorney General has investigative authority related to Kansas Open Records Laws.
   5. Kansas' only specific mention of Digital records is found in K.S.A. § 45-501
      a. Section (a) of this statute says that digital records qualify as records in Kansas. "The making of such record on computer disk, tape or other electronically accessed media, in accordance with this section, shall be deemed to be recording or the making of the record as required by law." *Id.* at a.
      b. Section (b) of the statute clarifies that the digital records need to be available to anyone lawfully entitled to them as if they were a physical record. Records can be seen by either setting up terminals for viewing the records or printing off physical copies and charging appropriate fees.
      c. Section (b) concludes requiring the public entities to "include adequate security procedures" over their digital records.
      d. Section (c) spells out how just because something is saved on a computer at a public entity does not make it a public record available to the public. No … electronically accessed media shall be required to satisfy [KS open records laws] unless such records and information are records required by law" §45-501(c)

B. **Missouri** additionally goes into more detail defining Public Record, "any record, whether written or electronically stored, retained by or of any public governing body including any report, survey, memorandum, or other document or study prepared for the public governmental by a consultant or other professional service paid for in whole or in part by public funds, including records created or **maintained by private contractors** under an agreement with a public governmental body." Mo. Rev. Stat. §610.010(6). A public record does not include: "any internal memorandum or letter received or prepared by or on behalf of a member of a public governmental body consisting of advice, opinions and recommendations in connection with the deliberative decision-making process of said body, unless such records are retained

[25] Sheet Metal Workers' Int'l Ass'n Local 19 v. U.S. Dep't of Veterans Affairs, 940 F.Supp 712 (E.D. Pa. 1995).

by the public governmental body or presented at a public meeting. Any document or study prepared for a public governmental body by a consultant or other professional service as described in this subdivision shall be retained by the public governmental body in the same manner as any other public record." Id.

Practical Implications:

- Employer can monitor employee email communications that are conducted on the employee's work email under the business purposes exception.
- Employers should require employees to sign employment agreements that contain acknowledgements that any electronic communications conducted on company equipment are subject to being searched.
- Attorney-client communications conducted on work email or even personal email/texts/etc. while on work computers/phones/tablets lose their privilege

## Social Media

Employers using social media to gain information about potential or current employees are most likely to be faced with a claim for unreasonable intrusion upon the seclusion of another. While the government has little control over what private citizens post on social media, it does have some rights as an employer to limit employee speech or discipline employees for their speech.

Statements by public officials on matters of public concern are protected by the First Amendment, but there is no protection if the speech does not pertain to a matter of public concern.[26] The protection of speech by public employees requires striking a balance between the interest of public employees as citizens commenting upon matters of public concern against the interest of the government in promoting the efficiency of public services its employees perform.[27] More recently, in 2006, the United States Supreme Court held that speech by a public official is protected if it is engaged in as a private citizen, and that it is not protected if expressed as part of the official's public duties.[28] These cases establish two main questions to determine constitutional protections for public employs speech. First, is the employee speaking as a citizen on a matter of public concern – if not, there is no constitutional protection. If yes, then the question turns to whether the government has an adequate justification for treating the employee differently from another member of the general public.

This guidance by the Supreme Court was largely provided prior to the advent of Facebook, Twitter, and Instagram. Because the government may actually have the right

[26] Connick v. Myers, 461 U.S. 138 (1983).
[27] Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois, 391 U.S. 563 (1977).
[28] Garcetti v. Ceballos, 547 U.S. 410 (2006).

to restrict the speech of its employees on social media, public employees should expect a diminished expectation of privacy for their social media presence.

In 2015, the Fifth Circuit dealt with a public employee's critical comments on Facebook made about and to her employer.[29] In Graziosi v. City of Greenville, Mississippi, a police officer made critical comments about her superior officer on her Facebook page and then posted the same critical comments to the town mayor's page followed by additional criticism.[30] As a result of these comments, an internal investigation resulted in the police officer's termination, for which she filed suit.[31] The Fifth Circuit found that the officer did not speak as a public employee despite invoking her status as a police officer because her statements were not made within the ordinary scope of her job duties.[32] Next, the court determined that the speech did not address a matter of public concern, but rather involved a dispute over an intra-departmental decision with which she disagreed.[33] Lastly, the court found that the city's substantial interests in maintaining discipline and preventing insubordination outweighed the officer's minimal interest in speaking on a matter of public concern.[34]

As Graziosi demonstrates, public employees should be well aware that disparaging posts on social media are not necessarily afforded complete protection under the First Amendment. Just like a private employer may discipline an employee for an improper Facebook post, the government as an employer can see those posts and take disciplinary action accordingly. Public employees should not expect that the government – their boss – cannot see or respond to their social media presence.

However, while public employees' posts are certainly not private speech and can result in discipline, public employers must be careful not to step into the realm of prior restraint on speech, which is heavily disfavored.[35] Indeed, in 2016 the Fourth Circuit struck down a social media policy that precluded "any information that would tend to discredit or reflect unfavorably upon the [department] or any other [city department] or its employees."[36] The court recognized a governmental interest in maintaining camaraderie between employees but found no disruption from comments by police officers on social media.[37] However, even though the government was warned against prior restraints, there has been no such warning about seeing or monitoring the social media posts of public employees.

---

[29][29] Graziosi v. City of Greenville, 775 F.3d 731 (5th Cir. 2015).
[30] Id. at 733-34.
[31] Id. at 734-35.
[32] Id. at 737.
[33] Id. at 738.
[34] Id. at 741.
[35] Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).
[36] Liverman v. City of Petersburg, 844 F.3d 400, 408-09 (4th Cir. 2016).
[37] Id.

Ultimately, public employees should not expect much privacy regarding social media posts. This is true primarily as a matter of common sense – outlets such as Twitter or Instagram may allow one to make a profile public, but there are myriad ways for a private post to be spread to those not following that account. Public employers can observe the social media footprint of their employees, and can discipline them for violating workplace policies. Those policies, however, should not be so broad that they constitute a prior restraint on free speech.

# Notes Pages

# Notes Pages

# FIRST AMENDMENT ISSUES

## I. First Amendment

"**Congress shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

**A. The First Amendment covers:**

1. **Speech**
   a. Freedom of speech
   b. Freedom of the press
   c. Right to peaceably assemble, and to petition the government for redress of grievances
2. **Religious Freedom**
   a. Establishment Clause "respecting an establishment of religion"
   b. Free Exercise Clause "prohibiting the free exercise thereof"

## II. Free Speech of Public Employees in the Workplace

**A. Free speech of public employees**

1. Traditionally, government employers may regulate its employees' speech.
2. In *Waters v. Churchill*, 511 U.S. 661 (1994), the Supreme Court recognized that a government employer must have more control over its employees' speech than the government has over citizens' speech.

**B. *Pickering* – a seminal case on the free speech of public employees**

1. In *Pickering v. Board of Education*, 391 U.S. 138, 168 (1968), Marvin Pickering, a high school teacher, sent a letter to the editor of the local newspaper complaining about the recent defeat of a school board proposal to increase school taxes.
2. The letter was critical of the School Board and the Superintendent with regard to their use of school taxes. Mr. Pickering urged that such money would be better put to use towards teachers' salaries, school lunches for non-athletes and other education needs.
3. The Board terminated Pickering's employment after concluding his letter was "detrimental to the efficient operation and administration of the schools".
4. Pickering then filed suit asserting that his letter was protected speech under the First Amendment.
5. In an 8-1 decision authored by Justice Thurgood Marshall, the Supreme Court held that Pickering's termination violated his right to free speech under the First Amendment.

6. The Court cautioned that similar speech would not be protected where it knowingly or recklessly made false statements.
7. Pickering prevailed even though he spoke out on a matter of public concern regarding the operation of the public schools in which he worked.
8. As a result of this case the Court gave plaintiffs a mechanism to freely speak out as citizens on matters which relate to their job.

**C. *Pickering*'s Two-Part Test**

1. **Part 1:** A government employee's speech is protected by the First Amendment when he or she speaks:
   a. As a **citizen** (not as an employee); and
   b. **On a matter of public concern** (not on matter solely related to a work concern).
2. **Part 2:** If the first part of the test is met (as the employee has rights under the First Amendment), then the employee's First Amendment rights must be balanced against the employer's interest in an efficient, orderly administration.

**D. Matters of Public Concern**

1. "Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community." *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).
2. **Examples of matters of public concern:**
   a. Public policy
   b. Public corruption and fraud
   c. Public health and safety
   d. Elections
   e. Pending legislation
   f. Racial discrimination or other illegal acts
   g. Sexual harassment
   h. Use of public funds and assets
   i. Ethics and professional responsibility
   j. Duties of governmental entities and its employees
3. An employee may speak out on a matter of public concern either inside or outside of its workplace.
4. In *Connick v. Myers*, 461 U.S. 138, 147-148 (1983), the Court noted that "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."

5. If the speech touches on a matter of "private concern" or if the speech is part of the employee's duties as a public employee, then the government can do as it pleases.
6. Similarly, if the government prevails on application of the *Pickering* balance, then it can also do as it pleases.

**E. Five Elements to a First Amendment Retaliation Claim**

a. Is the speech *not* part of the employee's public duties? *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
b. Is the speech a matter of public concern? *Connick v. Myers*, 461 U.S. 138 (1983); *Gardetto v. Mason*, 100 F.3d 803, 811 (10th Cir. 1968).
c. On balance, does the employee's right to speak out outweigh the government's need to promote the efficiency of its operations? *Pickering v. Board of Education*, 391 U.S. 138, 168 (1968) (The *Pickering* balance); *Gardetto*, *Id*. at 811.
d. If the balance favors the employee, was the speech a substantial or motivating factor in the detrimental employment decision? *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977).
e. Assuming the first four elements are met, the employer must show by a preponderance of the evidence that it would have rendered the same adverse employment decision. *Id*. at 287.

**F. When does a public employee speak out as a citizen?**

1. ***Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)**
   a. Richard Ceballos, a deputy district attorney of Los Angeles County, California, filed a Section 1983 claim under the First Amendment against the county and his supervisors alleging that he was subjected to retaliatory adverse employment action for engaging in protected speech.
   b. Ceballos alleged that defense counsel for a criminal defendant asked him to evaluate an affidavit for the search warrant containing "serious misrepresentations".
   c. Ceballos then prepared and submitted a memorandum to his supervisors recommending dismissal of the case, however, the case continued to be prosecuted. Ceballos later testified on behalf of the defense recounting his concerns about the affidavit at a hearing challenging the search warrant.
   d. Ceballos alleged that he was improperly transferred and denied a promotion based upon his statements in a memorandum to his supervisor which criticized the credibility of a deputy sheriff.
   e. After applying the *Pickering* balancing test, the Supreme Court concluded that, "The controlling factor in Ceballos' case is that his [**statements] were**

**made pursuant to his duties as a calendar deputy**…[and t]he significant point is that the memo was written pursuant to Ceballos' official duties."

f. In a 5-4 decision by Justice Kennedy, the Court held that when employees engage in speech "pursuant to their official [work] duties", they speak out as employees and not as citizens.
g. The Court further explained that the "Constitution does not insulate their communications from employer discipline" and that there is no "a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job."
h. Simply put, when public employees are carrying out their job duties they do not speak out as citizens.
i. The Court refrained from conducting a *Pickering* balance after concluding Ceballos did not enjoy any protections under the First Amendment.

2. ***Lane v. Franks,* 134 S. Ct 2369 (2014)**
   a. Edward Lane was the director of a community college's youth program, who discovered that one of the program's employees, Suzanne Schmitz, was receiving a salary despite not working.
   b. Lane fired Schmitz and later testified against her during the federal grand jury and public corruption trials.
   c. Lane later filed a Section 1983 suit against his former employer alleging that he was fired in retaliation for his testimony in violation of the First Amendment.
   d. The Supreme Court held that, "the First Amendment…protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities."
   e. The Court further explained that testimony is a citizen performed duty:
      i. "Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth…When the person testifying is a public employee, he may bear separate obligations to his employer – for example, an obligation not to show up to court dressed in an unprofessional manner. But any such obligations as an employee are distinct and independent from the obligation, as a citizen, to speak the truth. That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee."

f. However, the Court's holding in *Lane* does not translate into all testimony being constitutionally protected.
g. The Court also did not discuss whether truthful testimony constitutes citizen speech under *Garcetti*, if made part of the public employee's ordinary job duties.

3. ***Munroe v. Cent. Bucks. Sch. Dist.,* 805 F.3d 454 (3d Cir. 2015).**
   a. Former high school teacher brought action against school district alleging First Amendment retaliation after she was fired for a blog in which she made derogatory comments about her students.
   b. Court held that the speech was not protected by the First Amendment.
4. ***McCullars v. Maloy,* 369 F. Supp. 3d 1230 (M.D. Fla. 2019)**
   a. McCullars was the Asst. Financial Director for the Clerk and Court. The State Attorney announced at a press conference that her office would not seek the death penalty for an individual who committed a crime spree that resulted in the deaths of a pregnant woman and two police officers. McCullars took to Facebook at 10:30 p.m. from his home and using his personal computer and he publicly made known his disagreement with the State Attorney's decision. He posted that "maybe she should get the death penalty" and "she should be tarred and feathered if not hung from a tree." The State Attorney was African American. The posts went viral and the Clerk's office was inundated with phone calls complaining that McCullars' post was racist. McCullars was terminated.
   b. McCullars argued that he was fired in retaliation for protected speech on a matter of public concern.
   c. The Court found that McCullars's comments were made as a private citizen but about a matter of public concern. And applying the *Pickering* balancing test, it concluded that McCullar's speech was not entitled to First Amendment protection.

## G. Employee's Expressive Associations

As a general rule, the government cannot discriminate in employment or contracting based upon an employee's membership in an expressive association.

1. **Political Party Affiliation / Patronage**
   a. In *Branti v. Finkel,* 445 U.S. 507 (1980), the Court held that two Republican public defenders could not be terminated from employment on party-affiliation grounds when a Democrat was selected to lead the Public Defender's Office.

b. Established the test of "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."
c. The *Branti* Court determined the issue was not of policy-making, but the effective performance of the job. For example, in order to be effective, a governor's speech writer must have political beliefs which are comparable to the governor's. In that instance, the writer's party affiliation may be considered even if he is not in a policy-making role.

2. **Independent Contractors**
   a. An independent contractor's political party affiliation may only be considered if it is an appropriate requirement for the effective performance of the job. This standard is used where an independent contractor is performing government work rather than by an employee. *O'Hare Truck Services, Inc. v. City of Northlake,* 518 U.S. 712 (1996).
   b. In *O'Hare*, a private towing company filed a Section 1983 action against the city challenging its removal of the company from its rotation list of available towing service contractors.
   c. The Court applied the holdings from governmental employee cases and in turn held that the protections generally afforded to public employees were also extended to independent contractors.
   d. The impact of the *O'Hare* decision made inroads concerning traditional issues of patronage (helping your friends) in construction, legal work, cable franchises and architectural contracts.
   e. After *O'Hare*, government employers must show that they would have reached the same contracting decision despite the plaintiff's party affiliations.

## III. Free Speech – Corporations

Bill of Rights doesn't protect workers in the private sector from being fired over speech in or outside the workplace

### A. The application of the First Amendment to corporations

1. ***First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778, n. 14 (1978)**
   a. Banking associations and business corporations challenged the constitutionality of a Massachusetts criminal statute that prohibited them from making expenditures or contributions to influence the vote on a voter question that materially affected the property, assets or business of the corporation.

b. The Court held that corporations, like people, can influence the outcome of political elections as a primary right the First Amendment was intended to protect.
c. The Court upheld prior decisions which emphasized the rights of corporation's speech factors into public discussion.

2. ***NAACP v. Button*, 371 U.S. 415, 428-29, 433 (1963)**
   a. The Court held that the First Amendment protects the vigorous advocacy against government intrusion by extending the protection of corporations to political speech.
   b. The Court struck down a Virginia statute for infringing the First Amendment Rights of NAACP members and its attorneys as the statute banned the solicitation of legal businesses.
3. ***Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)**
   a. Citizens United, a nonprofit corporation, filed suit against the Federal Election Commission (FEC) for declaratory and injunctive relief, alleging it could be subject to criminal and civil penalties following its release of a documentary titled Hillary.
   b. The film was critical of then Senator Hillary Clinton, a candidate seeking a political party nomination in the next Presidential election.
   c. After the film's release in January 2008, Citizens United produced television ads to air the documentary on cable and broadcast television.
   d. Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibits corporations and unions from using general treasury funding to pay for "electioneering communication" or speech that expressly advocates for or against a political candidate. Formerly 2 U.S.C. § 441b, now 52 U.S.C § 30118.
   e. An electioneering communication is "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary election, § 434(f)(3)(A), and that is "publicly distributed," 11 CFR § 100.29(a)(2),which in "the case of a candidate for nomination for President ... means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election ... is being held within 30 days," § 100.29(b)(3)(ii).
   f. The Supreme Court held that under the First Amendment, the government may not suppress political speech based upon the speaker's corporate identity, thus overruling, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).
   g. The Court held that political spending is a form of protected speech under the First Amendment. Also, the government cannot not prevent

corporations and unions from spending money to either support or renounce individual candidates in elections. Provided that the spending is done independent of a political party or candidate.

## IV. Religious Speech

### A. Two Main Clauses:

1. **Establishment Clause "respecting an establishment of religion"**
2. **Free Exercise Clause "prohibiting the free exercise thereof**"

### B. Establishment Clause - Landmark Cases

1. ***Engel v. Vitale,* 82 S. Ct. 1261 (1962)**
   a. The Court struck down a New York requirement for state-composed prayer to start the day in public school districts. The Court held that even a non-denominational prayer violated the Establishment clause as government sponsorship of religion.
2. ***Stone v. Graham,* 449 U.S. 39 (1980)**
   The Court struck down state laws as violating the Establishment Clause which mandated the display of the Ten Commandments in public school classrooms.
3. ***Lynch v. Donnelly,* 465 U.S. 668, 681, 687 (1984)**
   The Court found no violation of the Establishment Clause and upheld a nativity display and other symbols in a public park "to celebrate the Christmas holiday and to depict the origins of that holiday." The Court concluded that the display had "legitimate secular purposes" and that such symbols did not pose a danger of establishing a state church.
4. ***Lee v. Weisman*, 505 U.S. 577, 588, 600-01 (1992)**
   a. The Court held that clergy-led prayer at public school graduations violated the Establishment Clausen as leading to subtle religious coercion.
   b. The Court noted that, "Neither a State nor the Federal Government can pass laws which aid one religion, aid all religions, or prefer one religion over another."
5. ***Hein v. Freedom from Religion Foundation*, 551 U.S. 587, 594 (2007)**
   a. President Bush executed an executive order creating the Office of Faith-Based and Community Initiative, a program targeted at permitting religious charitable organizations to compete with non-religious ones for federal funding.
   b. The Court ruled that citizens lack standing as taxpayers under the Establishment Clause to challenge programs of the Executive Branch that are funded through appropriations for general administrative expenses.
6. ***Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067 (2019)**
   a. Organization brought action against Maryland-National Capital Park and Planning Commission, arguing that a display of a 32-foot tall Latin cross

on public land erected as a memorial to soldiers who died serving WWI violated the First Amendment Establishment Clause.

b. Court held cross did not violate the Establishment Clause. The Court cited four considerations in reaching its decision: 1. The original purpose of aged monuments can be difficult to ascertain; 2. Even if the original intent was religiously motivated, the passage of time may obscure that sentiment and a monument may be retained for its historical significance or for its common cultural heritage; 3. The monument's message can evolve; and 4. When considering an aged monument, removing it may no longer appear religiously neutral, especially to the local community.

## C. Free Exercise Clause - Landmark Cases

1. ***Reynolds v. United States*, 98 U.S. 145 (1879)**
   The court upheld a federal law banning polygamy after determining the Free Exercise Clause forbade the government from regulating such a belief, but did allow the government to regulate marriage.
2. ***Sherbert v. Verner,* 374 U.S. 398 (1963)**
   The Court held that states could not deny unemployment benefits to a person who turned down a job because it required him/her to work on the Sabbath. The Court found that this violated the Free Exercise Clause when it required a person to abandon one's religious beliefs in order to receive government benefits.
3. ***Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n,* 138 S.Ct. 1719 (2018)**
   The Court held that the Commission did not comply with the Free Exercise Clause's requirement of religious neutrality when it penalized a baker for refusing to sale a cake to a same-sex couple.

# Notes Pages

# Notes Pages

# Notes Pages

# DIVERSITY IN THE WORKPLACE & AFFIRMATIVE ACTION

## Introduction

While somewhat similar, Affirmative Action Plans ("AAPs") and Equal Employment Opportunity ("EEO") policies differ. EEO policies typically integrate systems to ensure compliance with Title VII of the 1964 Civil Rights Act, as well as other federal laws. Such systems include posting federal notices of employees' rights, reasonable accommodation policies for employees' religious beliefs, and policies regarding family leave and sexual harassment. AAPs, on the other hand, seek to increase the number of minority and female employees in an employer's workforce. EEO policies tend to be adaptable frameworks, while AAPs must comply with rigid standards established by the EEOC and the Supreme Court.

## Equal Employment Opportunity & Affirmative Action

- What is EEO?
  - Equal employment opportunity is "the goal of laws which make some types of discrimination in employment illegal. Equal employment opportunity will become a reality when each US citizen has an equal chance to enjoy the benefits of employment. EEO is not a guarantee of employment for anyone. Under EEO laws only *job-related factors* can be used to determine if an individual is qualified for a particular job. Ideally, EEO laws and Affirmative Action programs combine to achieve equal employment opportunities."[1]
- What is Affirmative Action?
  - Affirmative action "means those actions appropriate to overcome the effects of past or present practices, policies or other barriers to equal employment opportunity."[2]

## EEO Strategies to Increase Diversity

- Employers' General EEO Responsibilities[3]:
  - Ensure that employment decisions are not based on race, color, religion, sex, national origin, disability, age, or genetic information.
  - Assure that work practices and policies relate to the job and do not improperly exclude persons of a particular race, religion, color, national origin, sex, disability, or age.
  - Protect employees from workplace harassment due to an employee's race, religion, color, national origin, sex, disability, or age.

---

[1]Nat'l Archives, *Equal Employment Opportunity Program: EEO Terminology*, NAT'L ARCHIVES (last modified Aug. 15, 2016), https://www.archives.gov/eeo/terminology.html.
[2]29 C.F.R. §§ 1608 et seq.
[3]U.S. Equal Employment Opportunity Comm'n, *Preventing Discrimination is Good Business*, https://www.eeoc.gov/eeoc/publications/upload/small_business_english.pdf.

- Pay male and female employees who perform the same work equally, unless the pay discrepancy is justifiable by law.
- Promptly and effectively address employees' discrimination complaints.
- Inform employees of federal employment discrimination laws (i.e., display an EEOC poster).
- Maintain accurate and adequate employment records in accordance with federal and state law.

- Adopt an EEO Policy Statement
  - This statement should be disseminated to employees through handbooks, new-hire informational materials, and other workplace communications. An abbreviated version of the statement should be used for recruitment and job advertisements to demonstrate the employer's commitment to equal opportunities to potential employees.
    - *Example Statement*: "It is the policy of this company to select, train, and promote employees based on their ability and job performance and to provide equal opportunities in all aspects of employment without regard to race, color, religion, gender, national origin, citizenship, age, or physical or mental disability. It is the company's policy to maintain a work environment free of racial and sexual harassment and intimidation. It is the company's policy to comply with the letter and spirit of all local, state, and federal laws concerning equal employment opportunity."[4]
- Personnel Practices that Align with Policy Statement
  - Personnel actions (i.e., decisions regarding compensation, promotions, terminations, layoffs, etc.) must be made in a nondiscriminatory manner that focuses on qualifications, job performance, and seniority, among other objective factors. Fringe benefits (i.e. vacation, health insurance, pensions, etc.) and child-care leave must also be offered in a nondiscriminatory manner.
- Recruitment/Hiring
  - Job advertisements and recruitment tools should show an employer's commitment to its EEO policy, but should avoid language indicating biases in favor of a particular gender, race, national origin, or age group. Thus, job advertisements and pre-employment inquiries should focus on objective, job-related criterion and qualifications, such as education, certification, and previous employment. Employers should avoid questioning an applicant's national origin, age, citizenship, or disabilities.[5]

[4] § 5:2. Policy statement, 1 Fair Employment Practices § 5:2
[5] § 5:3.Other aspects of EEO policies, 1 Fair Employment Practices § 5:3. "Information that is required for government reporting purposes, such as race, should be on a detachable portion of the application form that is not seen by the person making hiring decisions." *Id.*

- Evaluations
    - An employer should periodically evaluate the effectiveness of its EEO strategies and policies, such as a statistical analysis to search for and remedy underrepresentation of females and/or minorities.

**Increasing Diversity for Particular Groups**

- Overview
    - While increasing workplace diversity is not necessarily unlawful, preferential hiring of minorities in lieu of equally or more qualified non-minorities may cause "reverse discrimination." Moreover, the solution to create a diverse workplace should not be achieved by a mere "by the numbers" preferential hiring approach. Rather, hiring pools with greater minority and women representation more effectively allows employers to lawfully increase diversity.
- Increasing an Employer's Minority Workforce
    - Employers may begin increasing the diversity of its incoming workforce by recruiting potential employees from high schools, trade schools, colleges, and other institutions with considerable minority populations. Additionally, employment advertising and recruitment strategies should discuss an employer's commitment to EEO.
    - A workplace that emphasizes EEO and diversity will also assist employers in garnering more minority employees through traditional advertisement strategies, such as "word of mouth" by its own employees.
    - Bolstering an employer's reputation for EEO will improve the efficacy of the employer's recruitment diversity strategies. Improving the employer's reputation requires that the current workplace culture encourages EEO through *equal* treatment of all employees in employment decisions.
- Increasing an Employer's Female Workforce
    - Women face particular obstacles in the workplace thanks to archaic stereotyping. Such stereotyping may lead to toxic workplace attitudes toward women and must be dispelled to institute real change in the workplace.
    - Employers may advance hiring opportunities for women by having more flexible work hours, eliminating unnecessary physical requirements that may deter female applicants, and promoting mentorship opportunities for new female employees. Further, employers should ensure that employment advertisements and other company literature portray women working in a variety of jobs within the workforce.
    - Employers should also encourage equal promotional opportunities for women by including women in management-training functions, but not at the expense of similarly qualified men.
    - Although women today have a greater presence in the American working population than in the past, many women continue to carry the responsibility

of maintaining the home for their families. To retain and attract more female employees, employers should offer greater flexibility at work, such as time off during the day to care for a child or proper maternity leave policies. Employers should be wary, though, of the need to offer this flexibility equally to men and women.

**Things to Avoid When Increasing Diversity**

- While increasing diversity in an employer's workforce is certainly a valid objective, an employer must do so with due care to ensure that it does not violate discrimination laws. For instance, employers must not offer benefits, opportunities, workplace flexibility, or other work "perks" to minorities or women, but not non-minorities and men.
- Moreover, workforce recruitment policies must not explicitly or implicitly favor or give preferential treatment to minorities and women over non-minorities and men – otherwise known as reverse discrimination. The goal is not to favor minorities and women, but rather to promote **equality** in the workforce. Programs and policies that are shown to favor minorities over non-minorities may be found unlawful.

**Affirmative Action Plans**

- <u>When Should an Employer Institute an AAP?</u>
    - According to the EEOC, Title VII of the Civil Rights Act of 1964 allow the institution of voluntary AAPs, and some federal laws require mandatory AAPs in the context of federal contractors. AAPs may also be required when a court orders the implementation of an AAP as a remedy to an employment discrimination case, or an AAP is part of a settlement agreement. *See* 29 C.F.R. § 1608 et seq.
- <u>Appropriate Circumstances Warranting a Voluntary AAP – 29 C.F.R. § 1608.3</u>
    - Generally, Title VII prohibits the deprivation of equal employment opportunities. However, employers may take affirmative action:
        - "based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices";
        - "to correct the effects of prior discriminatory practices"; or
        - when there are circumstances in which the available pool for employment or promotion of qualified minorities and women is artificially limited because of historic restrictions by the employer.
    - **<u>NOTE:</u>** Merely aiming to maintain a diverse workforce is likely **<u>not</u>** a legally valid reason for using racial preferences in the absence of remedial action to counteract past provable discrimination.
- <u>Establishing an AAP – 29 C.F.R. § 1608.4</u>
    - An AAP should be dated an in writing and must contain three (3) elements:
        - A Reasonable Self Analysis;

- A Reasonable Basis for Concluding Action is Appropriate; and
- Reasonable Action.

- Reasonable Self Analysis – 29 C.F.R. § 1608.4(a)
  - An employer's self analysis must "determine whether [its] employment practices . . . disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination."
  - If the employer determines that its employment practices are doing so, it must attempt to determine why.
  - In conducting it's self analysis, an employer "should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions." *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
- Reasonable Basis – 29 C.F.R. § 1608.4(b)
  - A reasonable basis for an appropriate AAP exists if the self analysis indicates that one or more of an employer's practices:
    - "have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited";
    - "leave uncorrected the effects of prior discrimination"; or
    - "result in disparate treatment."
- Reasonable Action – 29 C.F.R. § 1608.4(c)
  - Once it is determined by the self analysis that there is a reasonable basis to implement an AAP, the action taken pursuant to the AAP must be "reasonable in relation to the problems disclosed by the self analysis." For example, reasonable action may include:
    - "goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees";
    - "the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect or past discrimination by providing opportunities for members of groups which have been excluded."
  - Examples of Appropriate AAP Policies - 29 C.F.R. § 1608.4(c)(1)[6]
    - Establishing a long-term goal and short-term, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

[6]*See also* Equal Employment Opportunity coordinating Council "Policy Statement on Affirmative Action Programs for State and Local Government Agencies," 41 FR 38814 (Sept. 13, 1976), reaffirmed and extended to all persons subject to Federal EEO laws and orders in the "Uniform Guidelines on Employment Selection Procedures (1978) 43 FR 38290; 38300 (Aug. 28, 1978).

- Recruiting programs designed to attract qualified members of the minority group in question;
- Revamping selection procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular minority groups in particular job classifications;
- Systematically organizing work and jobs in a manner that provides equal opportunities for persons lacking "journeyman" level knowledge or skills to enter and, with appropriate training, progress in a career field;
- Initiating measures designed to assure that members of minority groups who are qualified to perform a job are included within the pool of persons from which new employees are selected;
- A systematic effort to provide classroom and on-the-job career-advancement training for employees locked into "dead end" jobs; and
- Establishing a system for regular monitoring of the effectiveness of the AAP and timely adjusting the program in areas that appear ineffective.

▪ Standards Regarding the Reasonableness of an AAP – 29 C.F.R. § 1608.4(c)(2)

- The plan must be tailored to solve the particular problems identified in the self analysis and must "ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole." An AAP must be maintained *only* as long as is necessary to achieve the AAP's objective.
- Goals and timetables should be reasonably related to:
  - the effects of past discrimination;
  - the need for prompt elimination of adverse impact or disparate treatment;
  - the availability of qualified or qualifiable applicants; and
  - the number of employment opportunities.

- Limitations on Voluntary AAPs
  - A voluntary AAP must: (1) have a valid remedial purpose; (2) not unduly restrict the employment opportunities of persons who are not the intended beneficiaries of the plan; and (3) last only temporarily, and have a firm termination date by which any preference for minorities or women must end. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).
  - When implementing AAPs, private employers are subject to limitations imposed by Title VII, while public employers are limited by Title VII *and* the Equal Protection Clause of U.S. Constitution.

- Further, the AAP must not unduly burden the legitimate expectations of other workers. *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267 (1986).
- Even if an employer makes an employment decision based on race or gender in accordance with a lawful voluntary AAP, the decision may nevertheless subject the employer to a discrimination charge or lawsuit. *See* Gilligan v. Dep't of Labor, 81 F.3d 835 (9th Cir. 1996).

**Conclusion**

As the general population becomes increasingly diverse, so too does the potential employment pool, as well as an employer's current workforce. To increase diversity and promote equal employment opportunity, employers must ensure that they institute policies and procedures that not only achieve such goals, but do so within the confines of the law.

***Before* implementing an Affirmative Action Plan, please consult an attorney.** *Failure to create a written, legally-informed, and adequate Affirmative Action Plan may subject your business to discrimination-related litigation.*

# Notes Pages

# Notes Pages

# Notes Pages


**KANSAS CITY, KS**
10 E. Cambridge Circle Dr.
Suite 300
Kansas City, KS 66103
ph. 913.371.3838

**ST. LOUIS, MO**
505 N. 7th St.
Suite 2100
St. Louis, MO 63101
ph. 314.621.1133

**SPRINGFIELD, MO**
4730 S. National Ave.
Suite A-1
Springfield, MO 65810
PH. 417.865.0007

**DES MOINES, IA**
4400 Westown Pkwy
Suite 490
West Des Moines, IA 50266
ph. 515.823.0800

**SPRINGFIELD, IL**
3201 W. White Oaks Dr.
Suite 200
Springfield, IL 62704
ph. 217.606.0900

**OMAHA, NE**
10665 Bedford Ave.
Suite 101
Omaha, NE 68134
ph. 402.408.1340

**TULSA, OK**
2021 S. Lewis
Suite 225
Tulsa, OK 74104
ph. 918.771.4465

**KANSAS CITY, MO**
2700 Bi-State Dr.
Suite 400
Kansas City, MO 64105
ph. 816.912.4446

**Kansas • Missouri • Illinois • Iowa • Oklahoma • Nebraska • Arkansas**

**www.mvplaw.com**