

**JOETTE S. DORAN**  
**ATTORNEY AT LAW**  
**JOETTE S. DORAN & ASSOCIATES, P.C.**  
2300 N. BARRINGTON RD., SUITE 400  
HOFFMAN ESTATES, IL 60169  
TEL: (847) 490-5309  
Fax: (847) 462-5994

EMAIL: [JOETTE@JOETTEDORAN.COM](mailto:JOETTE@JOETTEDORAN.COM)

WEBSITE: [www.JOETTEDORAN.COM](http://www.JOETTEDORAN.COM)

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**ANTI-DISCRIMINATION STATUES;** See attached Agency Listing for where to file, time limitations, who can be sued and available damages.

The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment. The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

**Title VII of the Civil Rights Act of 1964 (Title VII)**

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.

**Race/Color Discrimination**

Race discrimination involves treating someone (an applicant or employee) unfavorably because he/she is of a certain race or because of personal characteristics associated with race (such as hair texture, skin color, or certain facial features). Color discrimination involves treating someone unfavorably because of skin color complexion.

Race/color discrimination also can involve treating someone unfavorably because the person is married to (or associated with) a person of a certain race or color or because of a person's connection with a race-based organization or group, or an organization or group that is generally associated with people of a certain color. Discrimination can occur when the victim and the person who inflicted the discrimination are the same race or color.

**National Origin Discrimination**

National origin discrimination involves treating people (applicants or employees) unfavorably because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background (even if they are not). National origin discrimination also

can involve treating people unfavorably because they are married to (or associated with) a person of a certain national origin or because of their connection with an ethnic organization or group. Discrimination can occur when the victim and the person who inflicted the discrimination are the same national origin.

## **Religious Discrimination**

Religious discrimination involves treating a person (an applicant or employee) unfavorably because of his or her religious beliefs. The law protects not only people who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have sincerely held religious, ethical or moral beliefs. Religious discrimination can also involve treating someone differently because that person is married to (or associated with) an individual of a particular religion or because of his or her connection with a religious organization or group.

## **Sex-Based Discrimination**

Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex. Sex discrimination also can involve treating someone less favorably because of his or her connection with an organization or group that is generally associated with people of a certain sex.

Discrimination against an individual because that person is transgender is discrimination because of sex in violation of Title VII. This is also known as gender identity discrimination. In addition, lesbian, gay, and bisexual individuals may bring sex discrimination claims. These may include, for example, allegations of sexual harassment or other kinds of sex discrimination, such as adverse actions taken because of the person's non-conformance with sex-stereotypes.

## **Sex Discrimination Harassment**

It is unlawful to harass a person because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general. Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

## **The Pregnancy Discrimination Act**

The Pregnancy Discrimination Act (PDA) forbids discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment.

This law amended Title VII to make it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

## **Pregnancy Discrimination & Temporary Disability**

If a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer or other covered entity must treat her in the same way as it treats any other temporarily disabled employee. For example, the employer may have to provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant employees if it does so for other temporarily disabled employees.

Additionally, impairments resulting from pregnancy (for example, gestational diabetes or preeclampsia, a condition characterized by pregnancy-induced hypertension and protein in the urine) may be disabilities under the Americans with Disabilities Act (ADA). An employer may have to provide a reasonable accommodation (such as leave or modifications that enable an employee to perform her job) for a disability related to pregnancy, absent undue hardship (significant difficulty or expense). The ADA Amendments Act of 2008 makes it much easier to show that a medical condition is a covered disability.

## **The Age Discrimination in Employment Act of 1967 (ADEA)**

Age discrimination involves treating someone (an applicant or employee) less favorably because of his age. The Age Discrimination in Employment Act (ADEA) only forbids age discrimination against people who are age 40 or older. It does not protect workers under the age of 40, although some states do have laws that protect younger workers from age discrimination. It is not illegal for an employer or other covered entity to favor an older worker over a younger one, even if both workers are age 40 or older. Discrimination can occur when the victim and the person who inflicted the discrimination are both over 40.

## **Title I of the Americans with Disabilities Act of 1990 (ADA)**

This law makes it illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments. The law also requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of the employer's business.

Disability discrimination occurs when an employer or other entity covered by the Americans with Disabilities Act, as amended, or the Rehabilitation Act, as amended, treats a qualified individual with a disability who is an employee or applicant unfavorably because she has a disability.

Disability discrimination also occurs when a covered employer or other entity treats an applicant or employee less favorably because she has a history of a disability (such as cancer that is controlled or in remission) or because she is believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if she does not have such an impairment).

The law requires an employer to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer ("undue hardship").

The law also protects people from discrimination based on their relationship with a person with a disability (even if they do not themselves have a disability). For example, it is illegal to discriminate against an employee because her husband has a disability.

*Note: Federal employees and applicants are covered by the Rehabilitation Act of 1973, instead of the Americans with Disabilities Act. The protections are mostly the same.*

## **The Equal Pay Act of 1963 (EPA)**

This law makes it illegal to pay different wages to men and women if they perform equal work in the same workplace. 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.

## **Equal Pay/Compensation Discrimination**

The Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work. The jobs need not be identical, but they must be substantially equal. Job content (not job titles) determines whether jobs are substantially equal. All forms of pay are covered by this law, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits. If there is an inequality in wages between men and women, employers may not reduce the wages of either sex to equalize their pay.

An individual alleging a violation of the EPA may go directly to court and is not required to file an EEOC charge beforehand. The time limit for filing an EPA charge with the EEOC and the time limit for going to court are the same: within two years of the alleged unlawful compensation practice or, in the case of a willful violation, within three years. The filing of an EEOC charge under the EPA does not extend the time frame for going to court. Title VII also makes it illegal to discriminate based on sex in pay and benefits. Therefore, someone who has an Equal Pay Act claim may also have a claim under Title VII.

## **The Genetic Information Nondiscrimination Act of 2008 (GINA) Effective - November 21, 2009.**

This law makes it illegal to discriminate against employees or applicants because of genetic information. Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder or condition of an individual's family members (i.e. an individual's family medical history). 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.

## **Genetic Information Discrimination**

Under Title II of 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.

The EEOC enforces Title II of GINA (dealing with genetic discrimination in employment). The Departments of Labor, Health and Human Services and the Treasury have responsibility for issuing regulations for Title I of GINA, which addresses the use of genetic information in health insurance.

### **Definition of “Genetic Information”**

Genetic information includes information about an individual’s genetic tests and the genetic tests of an individual’s family members, as well as information about the manifestation of a disease or disorder in an individual’s family members (i.e. family medical history). Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future. Genetic information also includes an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual, and the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

### **Hostile Work Environment Harassment**

A hostile work environment is one that interferes with employee’s ability to do their work. Although the law doesn’t prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

### **Retaliation**

All of the laws make it illegal to fire, demote, harass, or otherwise “retaliate” against people (applicants or employees) because they filed a charge of discrimination, because they complained to their employer or other covered entity about discrimination on the job, or because they participated in an employment discrimination proceeding (such as an investigation or lawsuit). For example, it is illegal for an employer to refuse to promote an employee because she filed a charge of discrimination with the EEOC, even if EEOC later determined no discrimination occurred.

## **Illinois Department of Human Rights**

The Department of Human Rights administers the Illinois Human Rights Act. The Illinois Human Rights Act ("Act") prohibits discrimination in Illinois with respect to employment, financial credit, public accommodations and real estate transactions on the bases of race, color, religion, sex (including sexual harassment), national origin, ancestry, military status, age (40 and over), order of protection status, marital status, sexual orientation (which includes gender-related identity), unfavorable military discharge and physical and mental disability. The Act also prohibits sexual harassment in education, discrimination because of citizenship status and arrest record in employment, and discrimination based on familial status in real estate transactions.

### **Social Media and Discrimination Claims**

#### **Illinois Law Prohibits Request of Passwords**

Illinois was the second state after Maryland to pass legislation that prohibits employers from requesting employee passwords to social media sites from potential and current employees. See Right to Privacy in the Workplace Act, 820 ILCS 55/10. Signed on August 1, 2012, the law took effect on January 1, 2013 and provides in part: "It shall be unlawful for any employer to request or require any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website or to demand access in any manner to an employee's or prospective employee's account or profile on a social networking website." The law applies to Illinois employers of all sizes, is enforced by the Illinois Department of Labor, and ultimately provides a private right of action for individuals to sue employers in state court.

Illinois social media law was amended to allow employer access to "professional" accounts. Effective on January 1, 2014 the law amends the Right to Privacy in the Workplace Act which allows employers to access "professional" social media accounts where the employer has a duty to screen employees or applicants or monitor or retain employee communications under Illinois insurance law, federal law or the rules of a self-regulatory organization. Professional accounts are those "created, maintained, used, or accessed by a current or prospective employee for business purposes of the employer." Employers are still prohibited from requesting or requiring that an employee or applicant provide the log-in information for a personal social media account.

#### **Implications for Employers**

The Equal Employment Opportunity Commission has also considered the issues related to workplace use of social media. Edward Loughlin, a trial attorney with the Equal Employment Opportunity Commission's Washington, D.C., field office, told attorneys attending a workshop sponsored by the EEOC Training Institute and the Washington field office on August 24, 2012, "[I]f you don't watch yourself, you can really create a giant problem down the road," Loughlin said the use of social media in the employment context has "been on the radar screen of the commission for several years now." "Although it might not be obvious, he said, navigating issues that arise from social media use in the workplace involves EEOC-related topics and "can create an absolute legal mine field for employers."

While Illinois law prohibits accessing private accounts subject to password protection, even if the employee or job applicant has a public account, an employer will likely be privy to information that is not job-related which could provide the individual with a basis for a legal claim based on protected class status or protected activity. By accessing photos or postings, social media sites may reveal an individual's protected attributes such as, race, religion, national origin, age, disability, pregnancy, genetic information, sexual orientation, marital status and other protected characteristics protected under state and federal laws. As such, viewing employee or applicant personal information on social media sites may trigger protections under state and federal anti-discrimination laws such as Title VII, the Age Discrimination in Employment and The Americans with Disabilities Act.

Moreover, reliance on such information in making an employment decision could give rise to a claim under the Right to Privacy in the Workplace Act, 820 ILCS 55/1, which prohibits the refusal to hire, terminate employment, or otherwise disadvantage any person because he or she uses alcohol and/or tobacco away from the job site on non-working time. The law applies to Illinois employers of all sizes, is enforced by the Illinois Department of Labor and ultimately provides a private right of action for individuals to sue employers in state court.

### **Considerations for Employers:**

It is very important for an employer to have equal employment and anti-harassment policy in place to be used as a defense in the applicable state or federal action. The employer should have the employee acknowledge the policy in writing and keep in their personnel file. It is also very helpful for avoidance of claims and defense if the employer has its employees and managers informed and trained properly regarding these policies.

If an employee makes a protected complaint of discrimination, the employer must be sure to take the complaint seriously and investigate reasonably promptly. Again, the individual investigating should be properly trained in the manner and method of investigation. The goal is to stop the behavior.

The employer is prohibited from retaliating against the individual making the complaint by treating them adversely. Even if the employee's underlying discrimination claim is unwarranted the employee can still have a successful retaliation claim.

Before making a termination decision, employer should have a clear reason for the decision and document the decision. The employer should conduct an analysis of all legal issues before making the decision. Often there is interplay of issues that should be considered i.e.: pregnancy, disability, FMLA.

If employer has any concern regarding an employee suit, consider a general release and confidentiality agreement at the time of termination. The employer must be sure to draft the agreement in accordance with the OWBPA and consider the appropriate language for claims that cannot be waived. If OWBPA language is not included, the employer can still be sued under the ADEA for age discrimination. Employers should now be very careful regarding the language used in the separation agreement. Recently, the Equal Employment Opportunity Commission filed suit against CVS Pharmacy in the Northern District of Illinois alleging CVS standard separation agreement unlawfully deters employees from exercising their right to file charges of discrimination and participate in EEOC investigations.

The employer should carefully consider whether to protest a claim of unemployment. Employers who protest often find themselves with other claims since the disgruntled employee will seek legal counsel and may discover other causes of action.

The employer should consider the forum of the lawsuit when deciding whether to resolve matter. In any discrimination claim, an employee must exhaust their administrative remedies by filing a Charge of Discrimination with a state or federal agency such as the EEOC or IDHR. If filed with the EEOC, employer may consider mediation to resolve case early on or settlement conference with the IDHR (less effective). If filed with the EEOC, the matter may ultimately be litigated in federal court either privately or by the EEOC should they decide to pursue the matter (very rare). In federal court, cases move relatively fast and the Judges are very familiar with discrimination cases. The judge will grant summary judgment in the appropriate case. Of course, getting to that point is expensive and time consuming. Federal magistrates and Judges are often effective mediators for these matters. In matters filed with the IDHR the matter may either be filed in the Illinois Human Rights Commission or state court. In either venue the employer can expect a very lengthy process, especially if filed in Cook County. Judges are less familiar with discrimination claims and infrequently grant summary judgment which means the claim may go to a jury.

Employers should be counseled that with all litigation of this kind, the matter will be disruptive, time consuming and expensive for the employer. Also, the employer should keep in mind that if the plaintiff prevails they are entitled to reasonable attorney's fees and costs. As such, the employer may also want to consider having the employee consent to a mandatory arbitration provision such as consenting to the jurisdiction of American Arbitration Association or similar organization so the matter will not be subject to state or federal litigation. There are pros and cons to such a decision so it should be carefully considered.

The employer may also want to consider purchasing an Employment Practices Liability Policy (EPLI). The cost of purchasing the policy against the claim history of the employer should be considered.

This article offers general advice which may or may not be appropriate to your particular situation. Please obtain particular professional advice as it relates to your situation before implementing any of the suggestions stated herein. © 1997-2014 Joette S. Doran & Associates, P.C. All rights reserved.