WHITEPAPER

J. J. Keller®
COMPLIANCE NETWORK

AN ONLINE RESOURCE SHARING
SAFETY & COMPLIANCE EXPERTISE

TOP 5 WAYS TO AVOID DISCRIMINATION CLAIMS

72075-123 Copyright 2023 J. J. Keller & Associates, Inc.

TOP 5 WAYS TO AVOID DISCRIMINATION CLAIMS

While there's been some ebb and flow over the last two decades, discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) have remained consistently high, warranting your attention.

In fiscal year 2022, employees and applicants filed 73,485 charges of discrimination with the EEOC[1]. In many of those charges, employees and applicants alleged that they were retaliated against for engaging in protected activity. Note that these figures do not include charges filed by applicants and employees under state discrimination laws, so the actual number of charges filed is considerably higher.

The motivation to avoid discrimination in the workplace is considerable. Employee morale and productivity as well as your company's time and reputation are all at stake if you find yourself defending against allegations that your company engaged in illegal discrimination.

Of course, the financial incentives to avoid discrimination are also significant. According to a report compiled by insurance carrier Hiscox, you can expect to spend an average of $160,000 and 318 days on a claim resulting in a settlement.[2] Also according to Hiscox, for charges that see the inside of a courtroom, the median judgment is about $200,000 (in addition to legal fees), and about 25 percent of cases come with a judgment of $500,000 or more.[3]

While there's no failsafe approach to avoiding all discrimination charges, you can take steps toward reducing the risk. Our top five strategies to avoid discrimination (and discrimination claims) follow.

[1] https://www.eeoc.gov/2022-annual-performance-report-apr

[2] The 2017 Hiscox Guide to Employee Lawsuits," Hiscox.com, https://www.hiscox.com/documents/2017-Hiscox-Guide-to-Employee-Lawsuits.pdf

[3] The 2015 Hiscox Guide to Employee Lawsuits," Hiscox.com, http://www.hiscox.com/shared-documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf

NO ADVERSE ACTION FOR PROTECTED INDIVIDUALS?

Employees and applicants who belong to a protected class may still face adverse employment actions, as long as it is clear that the actions were not taken because of those protected characteristics.

This is one reason that most companies are careful to document their business reasons for any adverse actions. That way, if an employee or applicant were to allege that illegal discrimination motivated the employer's decision, the employer would be able to defend against the claim by showing the nondiscriminatory reason(s) for the action.

1. UNDERSTAND WHAT DISCRIMINATION IS

One definition of the word "discriminate" is "to distinguish by discerning or exposing differences."[4] The fact is that all employers discriminate, probably on a daily basis. They not only distinguish employees by discerning or exposing their differences, they use those apparent differences to make employment decisions.

For instance, employers discriminate by giving seasoned employees more challenging assignments, by granting the most reliable employees more flexibility in their daily schedules, and by paying high performers more than lower performers. These are all discriminatory acts, but as they are not based on an employee's membership in a protected class, they do not create the foundation for a claim of illegal discrimination under employment laws.

This is an important distinction, because a common misconception among some employers (and perhaps even more employees) is that any perceived unequal treatment is illegal discrimination. This is simply not true. For discrimination to be illegal, your actions must be based on an employee's membership in one or more of many protected classes defined by state and federal employment laws.

CONTRARY TO POPULAR BELIEF, NOT ALL UNEQUAL TREATMENT IS ILLEGAL DISCRIMINATION.

For instance, on the federal level:

- Title VII of the Civil Rights Act forbids you from treating employees and applicants differently because of their race, color, religion, sex (including sexual orientation and gender identity), or national origin.
- The Age Discrimination in Employment Act (ADEA) bans discrimination against individuals who are 40 years old or older.
- The Americans with Disabilities Act (ADA) prohibits discrimination against (and requires reasonable accommodations for) individuals with disabilities.
- The Genetic Information Nondiscrimination Act (GINA) makes it illegal for you to discriminate based on an individual's genetic information.

[4] "Discriminate," Merriam-webster.com accessed October 4, 2022, http://www.merriam-webster.com/dictionary/discriminate

YOU MAY NOT DISCRIMINATE BASED ON AGE (40 OR OLDER) WITH RESPECT TO ANY TERM, CONDITION, OR PRIVILEGE OF EMPLOYMENT.

The first step in avoiding illegal discrimination is to become familiar with these protections. From there, you must be careful to ensure that no adverse employment actions (such as a refusal to hire, denial of a promotion, discipline, or termination) are taken based on an individual's membership in a protected class.

2. RECOGNIZE SITUATIONS THAT MAY INVOLVE DISCRIMINATION

Both HR and management must be able to actually recognize situations which could result in a discrimination claim. This involves both understanding what discrimination is, and being constantly alert to what's going on in the workplace.

Discrimination may be most common when employment decisions are based on stereotypes or assumptions of an individual's qualifications or abilities based on membership in a protected class. Consider the examples that follow.

AGE DISCRIMINATION

A company is undergoing a change to its production process that requires employees to learn a new computer system. The employer has selected a group of new employees to be the first trainees on the new system. George, a 58-year-old, tenured employee, asked to be included in the first training group. However, the company explains that it prefers to have George on the production floor troubleshooting issues that may occur while the first set of employees is trained. George is upset and says the decision is age discrimination, pointing out that all of the new employees in the training group are under 40.

You may not discriminate based on age (40 years old or older) with respect to any term, condition, or privilege of employment (which includes training). However, that doesn't stop you from making decisions based on reasonable factors other than age, including experience and demonstrated ability. In this example, the employer's reasoning for wanting George on the production floor — that it relies on George's experience and demonstrated ability to troubleshoot — is not age discrimination. If, on the other hand, the employer excluded George from the training based on the belief that age would prevent George from learning a new computer system, the decision would be problematic and could support George's claim.

J. J. Keller®
COMPLIANCE NETWORK

BEST-IN-CLASS REGULATORY CONTENT - CUSTOMIZED TO YOU!

The J. J. Keller® **COMPLIANCE NETWORK** delivers our renowned brand of compliance knowledge and expertise, personalized to your exact regulatory needs. **Just add key details to your profile like your professional focus, area(s) of operation, and more.**

BUILD YOUR PROFILE

In this situation, the employer may want to reiterate that its decision to keep George on the production floor during the first round of training was because of experience, not age. The employer might also want to issue a reminder that George will still receive the training in a later session.

DISPARATE IMPACT AND SEX DISCRIMINATION

An employer hiring for an individual to pick and pack orders on its warehouse floor asks all applicants if they can lift up to 70 pounds, a criterion that rules out significantly more female applicants than male. Ultimately, a male is hired and, upon hearing (through a friend that works at the company) that the heaviest parcel individuals are required to lift is actually 25 pounds, a female applicant (who was not selected) calls the company alleging discrimination.

The company may believe that it acted within its rights, since all applicants were considered based on the same criteria. However, the 70-pound criterion disproportionately ruled out female applicants from consideration.

WHEN A JOB REQUIREMENT AFFECTS MEMBERS OF A PROTECTED CLASS DIFFERENTLY, IT COULD BE DISCRIMINATORY IF IT ISN'T TRULY JOB-RELATED.

That is, if employees in the job truly need to be able to lift 70 pounds, the fact that the requirement rules out more women than men would not be problematic.

However, if what the female applicant heard proved to be true, and the requirement is considerably higher than what is actually required by the job, the fact that more women were excluded from consideration on this basis could be deemed discrimination.

DISABILITY DISCRIMINATION

An employee exhausted the available 12 weeks of leave taken for a shoulder injury under the Family and Medical Leave Act (FMLA), but still could not return to work. The employer, believing that it had no more obligations once it provided the full 12 weeks of FMLA leave, did not consider providing additional leave as an accommodation under the Americans with Disabilities Act (ADA) and told the employee to resign or be terminated. The employee chose to resign since that option allowed the employee to be rehired after recovering.

An employer's ADA obligations do not stop because an employee exhausts FMLA leave. On the contrary, that is often when the ADA obligations pick up. In ignoring its reasonable accommodation responsibilities, the employer violated the employee's ADA protections; the employee lost the job because of the need for more leave due to a disability.

Failure to provide an accommodation is one way you could discriminate against an employee on the basis of a disability.

Other types of disability discrimination include not promoting an employee because of a perceived disability, or asking employees medical questions when doing so is not job related and consistent with business necessity.

3. UNDERSTAND THE RELATIONSHIP BETWEEN DISCRIMINATION AND RETALIATION

Over the past several years, retaliation claims have consistently been the most common discrimination charge filed with the EEOC. In 2021, these charges made up 56 percent of all discrimination charges.[5] Avoiding discrimination charges necessarily includes understanding and avoiding retaliation.

https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021

J. J. Keller®
COMPLIANCE NETWORK

KEEP UP WITH THE LATEST REGULATORY NEWS

The J. J. Keller® **COMPLIANCE NETWORK** provides up-to-date news, industry highlights, and regulatory developments directly affecting your business.

DON'T MISS TOP STORIES

Retaliation refers to claims which assert that an employer took action — such as discipline or harassment — against an employee because that employee made a claim against the employer, supported a claim, or more generally, opposed an illegal practice.

RETALIATION CLAIMS HAVE CONSISTENTLY BEEN THE MOST COMMON DISCRIMINATION CHARGE FILED WITH THE EEOC.

Note that the manner of opposition from an employee or applicant must be reasonable for the activity to be protected. Protected opposition might include:

- Complaining to coworkers about alleged discrimination against oneself or others.
- Threatening to file a claim of discrimination with the EEOC.
- Refusing to carry out work instructions reasonably believed to be discriminatory.

Unreasonable opposition (which would not be protected) might include acts or threats of violence, or deliberate attempts to interfere with job performance.

An employee or applicant could win a retaliation claim, even if the underlying discrimination claim had no merit. As long as the individual has a reasonable, good-faith belief that the activity they complained about, opposed, or reported violates anti-discrimination law, the individual is protected against adverse treatment because of that activity. That means an individual could potentially lose a discrimination charge in court, but still prevail on a related retaliation claim based on how the employer responded to the complaint.

PROTECTED OPPOSITION MIGHT INCLUDE:

- COMPLAINING TO COWORKERS ABOUT ALLEGED DISCRIMINATION AGAINST ONESELF OR OTHERS.
- THREATENING TO FILE A CLAIM OF DISCRIMINATION WITH THE EEOC.
- REFUSING TO CARRY OUT WORK INSTRUCTIONS REASONABLY BELIEVED TO BE DISCRIMINATORY.

COMPLAINANTS ARE NOT UNTOUCHABLE

Because of concerns about retaliation claims, some employers believe that once an employee or applicant makes a claim of discrimination or opposes discrimination, the employee cannot be disciplined, even for unrelated issues. While you are right to be wary of creating even the perception of retaliation, you may still discipline employees for violations of work rules or performance standards.

As noted earlier, this is also the case for individuals in other protected classes. The mere fact that someone is in a protected class doesn't shelter them from discipline or other adverse action, but it should make you think twice about whether there could appear to be a relationship between the two.

For example, Billy has been arriving late to work, and has received two out of three progressive disciplinary steps outlined by the employer's policy. In conjunction with an incident unrelated to tardiness, Billy participates in an investigation with the EEOC regarding a discrimination complaint made by one of Billy's coworkers. Two days later, Billy is tardy for the third time, which would normally mean termination, but the employer is nervous that termination at this point would appear to be retaliatory for Billy's participation in the EEOC investigation.

While the employer should keep the possible perception of retaliation in mind, the company may still terminate Billy for violating an unrelated company policy. It's not that an employee can never suffer adverse action after participating in an investigation regarding discrimination; Billy just can't suffer adverse action because of that participation.

While such discipline would still be allowed if it were unrelated to Billy's participation in the EEOC investigation, the employer should be particularly careful to ensure that a thorough trail of documentation clearly shows a non-

J. J. Keller®
COMPLIANCE NETWORK

WANT EXPERT GUIDANCE FOR YOUR HR POLICIES?

COMPLIANCE NETWORK members enjoy direct access to J. J. Keller's accomplished team of HR compliance experts. **Ask questions**, **schedule one-on-one consultations**, and **submit research requests** to overcome any compliance challenge.

ASK OUR EXPERTS

retaliatory reason for the adverse action. It helps considerably if the employer has solid policies and has followed them consistently (see the next section for more on this).

If you are unsure of whether an adverse action may appear retaliatory, consult an employment law attorney for an overall assessment of risk.

4. CREATE SOLID POLICIES AND FOLLOW THEM CONSISTENTLY

Clear and specific policies are often touted as the key to well-oiled workplaces and minimal litigation. However, even the most polished policies are futile if they're not consistently applied as written. By applying policies inconsistently, you make it much harder on yourself to prove that your actions were not discriminatory or otherwise illegal. In fact, inconsistent policy enforcement can create the appearance of discrimination, even in cases where discriminatory motives weren't present.

EVEN THE MOST POLISHED POLICIES ARE USELESS IF THEY'RE NOT CONSISTENTLY APPLIED.

Take your dress code, for example. You are within your rights to create a dress code and enforce it, but if it's not enforced uniformly, and employees have a reason to allege that they were treated differently because of membership in a protected class, the otherwise acceptable dress code can be the source of a discrimination claim.

For example, an African-American employee won a case before a Pennsylvania District Court in 2013 after showing that an employer applied the company's dress code differently to non-African-American employees. The employee was

fired for refusing to remove hair braids. While the company policy prohibited cornrows showing scalp, the braids the employee wore were not of that type, and had been allowed for non-African-American employees.

A large part of consistent policy application is supervisor training. That's up next.

5. IMPLEMENT SUPERVISOR TRAINING

While your HR department is vital to your company's objective of avoiding discrimination claims, the command that your managers and supervisors have over the concept of discrimination may be even more important. Unfortunately, HR — even if it has a wealth of expertise — won't be privy to many of the conversations your managers and supervisors have with their employees. In some cases, HR may not even be involved in certain disciplinary actions.

THE BETTER YOUR MANAGERS' UNDERSTANDING OF DISCRIMINATION, THE BETTER EQUIPPED THEY ARE TO HELP YOUR COMPANY AVOID CLAIMS.

Any of these interactions between an employee or applicant and a manager or supervisor could create the foundation of a discrimination claim. And of course, untrained managers and supervisors are even more likely to misstep in this area, making comprehensive (and regular) training regarding discrimination imperative. They must understand all the different ways employees might be protected, and must be able to recognize both when actual discrimination might occur and when actions could be perceived as discriminatory.

J. J. Keller®
COMPLIANCE NETWORK

EXPAND YOUR COMPLIANCE KNOWLEDGE

Gain foundational knowledge and pursue professional development in the J. J. Keller Institute, part of **COMPLIANCE NETWORK**. Explore articles and videos on 120+ compliance subjects – including workplace discrimination – then test your understanding with practical exercises.

ENTER THE INSTITUTE

HARASSMENT

Harassment is an important concept that should be addressed either in discrimination training or as separate training. While some states require some form of harassment training, voluntary training could help you avoid liability.

Supervisors must understand that harassment is illegal when based on membership in a protected class, and that it doesn't have to result in a specific adverse employment action to create liability. Unlawful harassment often involves a hostile work environment, which is a pattern of offensive comments or behavior that affects a person's ability to perform the job.

Discrimination and harassment training should give your managers the tools to avoid taking actions that are — or might be perceived to be — discriminatory. They also must recognize their duty to stop harassment that might be occurring between employees. Training should give managers a plan to handle discrimination complaints when they do arise. More often than not, that plan includes getting your company's HR department involved.

Communication from your supervisors is especially important because every employer has a duty to stop harassment that it knows about. When a supervisor knows about harassment, the employer is assumed to have known as well.

RETALIATION

When they receive complaints of discrimination, supervisors must also be trained to refrain from retaliating against employees. In some instances, a supervisor who is offended by an employee who complains about discrimination won't even realize feeling more inclined to evaluate the employee more critically after the complaint was lodged. Training on the concept of retaliation can help remind your supervisors to be aware of even unconscious behaviors that could be construed as retaliatory.

TRAIN THEM TO FOLLOW POLICIES — MOST OF THE TIME

Your supervisors have to understand the concept of discrimination enough to realize that, most of the time, avoiding discrimination means not diverging from established company policies and practices. However, it may also mean making exceptions from time to time.

TRAINING SHOULD HELP MANAGERS AND SUPERVISORS RECOGNIZE THE RARE SITUATIONS IN WHICH POLICIES SHOULD NOT BE FOLLOWED TO THE LETTER.

For instance, if your company's policy is to terminate an employee after a certain number of absences, your managers and supervisors need to know to be alert for absences that might be protected by the Family and Medical Leave Act (FMLA), or that could be considered reasonable accommodations under the Americans with Disabilities Act (ADA). Where either of these laws comes into play, following your company policy without exception could actually create liability for you rather than avoid it.

Note that policies can also be written in such a way that gives both employees and supervisors a heads up about when exceptions could be granted.

BEYOND DISCRIMINATION TRAINING

You should consider going well beyond teaching nondiscrimination to your managers and supervisors by also helping them to understand the value of diversity in the workplace. Employees who go through diversity training are more likely to value one another's differences and less likely to see diversity as a barrier. They're also more likely to be aware of their own biases, which can help your managers and supervisors consciously avoid discriminatory actions.

FINAL THOUGHTS

The sheer number of discrimination charges filed with the EEOC each year is evidence that it is all too easy to make missteps with regard to discrimination laws. Though the laws are numerous and all are complex, a thorough understanding of the laws is absolutely necessary for companies that want to protect themselves against litigation.

J. J. Keller®
TRAINING

Looking for diversity training?

J. J. Keller offers an online Diversity, Equity, and Inclusion Training Program to help you and your employees maintain a respectful, discrimination-free workplace.

PREVIEW TRAINING

HOW CAN WE HELP?

CLICK BELOW TO WATCH A VIDEO!

GET FREE RESOURCES

J. J. Keller®
COMPLIANCE NETWORK

Join an Entire **NETWORK** of Safety & Compliance Expertise

Become a member of **COMPLIANCE NETWORK** and gain access to J. J. Keller's industry-leading safety and compliance content – custom-tailored to your exact regulatory needs.

MEMBERS ENJOY THESE VALUABLE BENEFITS:

- **PERSONALIZED REGULATORY CONTENT** for workplace safety, transportation, environment, HR, and other markets.
- **NEWS & TRENDING ISSUES** relevant to your industry, area(s) of operation, and more.
- **J. J. KELLER INSTITUTE**, an expansive collection of articles, videos, and interactive exercises spanning 120+ compliance topics.
- **UNPRECEDENTED ACCESS TO EXPERTS** through question submissions, one-on-one phone or video consultations, and in-depth research requests.
- **AND MORE**

ABOUT THE AUTHOR

JUDY KNEISZEL, EDITOR
J. J. KELLER & ASSOCIATES, INC.

Judy Kneiszel is an Editor on the Human Resources Publishing Team at J. J. Keller & Associates, Inc. She conducts research and creates content on a variety of HR-related topics and contributes to a number of Human Resource products including the Employment Law Regulatory Alert newsletter and the Essentials of Employee Relations manual. Judy specializes in issues such as background checks, discrimination, diversity and inclusion, policies and procedures, and sexual harassment prevention. She is a member of the national chapter of the Society for Human Resource Management (SHRM).

ABOUT J. J. KELLER & ASSOCIATES, INC.

Since we began as a family-owned company in 1953, our purpose at J. J. Keller & Associates, Inc. has been to protect people and the businesses they run. Today, serving 500,000+ companies across North America, our associates are making a larger impact than ever. Transportation, construction, utility, healthcare, education and industrial organizations of all sizes rely on our expert insights to help create safe, respectful work environments and simplify complex government regulations. They trust in our comprehensive portfolio of solutions, including cloud-based management tools, training, consulting, professional services, publications, forms, PPE and safety supplies.

HR professionals rely on J. J. Keller's experts, products and services to address core HR topics – including FMLA, ADA, HIPAA, FLSA, and employment law – to reduce risk, improve regulatory compliance and manage performance. Learn more at JJKeller.com, and follow us on LinkedIn, X, and Facebook.

Government regulations change frequently; therefore, J. J. Keller cannot assume responsibility or be held liable for any losses associated with omissions, errors or misprinting in this publication. This publication is designed to provide reasonably accurate information and is distributed with the understanding that J. J. Keller is not engaged in rendering legal, accounting, or other professional services. If legal or other expert advice is required, the services of a competent professional should be sought.